REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CAUSE NO. 237 OF 2015

IN THE MATTER OF AN APPLICATION BY GERALD CHEGE GAITHO AND AGNES WANJIRU GAITHO FOR AN ORDER OF PROHIBITION

AND

IN THE MATTER OF THE PENAL CODE (CAP. 75) LAWS OF KENYA

AND

IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT AT THIKA LAW COURTS CRIMINAL CASE NO. 1694 OF 2013

REPUBLIC…….....…….....……...……APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS..... 1ST RESPONDENT

THE CHIEF MAGISTRATE'S COURT,

THIKA LAW COURTS…….....…….. 2ND RESPONDENT

AND

KENCAIR HOLDINGS LIMITED…….....……..INTERESTED PARTY

1. GERALD CHEGE GAITHO

2. AGNES WANJIRU GAITHO.....EX PARTE

JUDGEMENT

Introduction

1. By a Notice of Motion dated 23rd July, 2015, , the *ex parte* applicants herein, **Gerald Chege Gaitho** and **Agnes Wanjiru Gaitho**, son and mother respectively seek the following orders:

1. **<u>THAT</u> this Honourable Court be pleased to issue AN ORDER OF PROHIBITION directed at the Respondents to prohibit, forbid and to act as a restraint to any trial or any further Proceedings as now pending before the Thika Law Courts Chief Magistrate's Court in Criminal Case Number 1694 of 2013, where the Ex Parte Applicants are the 1st and 2nd Accused persons respectively.**
2. **<u>THAT</u> this Honourable Court be pleased to grant any other and/or further relief under the terms that it may find fair and just in the circumstances.**
3. **<u>THAT</u> costs of this Application be provided for.**

<u>Applicants' Case</u>

2. The ex parte applicants' case was that the 1st Applicant is the registered proprietor of **Land Reference Number Thika Municipality Block 15/866** measuring approximately Ten (10) acres (hereinafter referred to as "the suit land"). It was averred that the suit land, then known as **Unsurveyed Residential Plot – Thika Municipality**, was allocated to the 1st Applicant by the Government vide a Letter of Allotment dated 28th June, 1996, and he was issued with a Certificate of Lease on or about the 18th March, 2013. Thereafter, he had the premises formally surveyed, paid the sums demanded by the Ministry of Lands and after execution of the Lease, the Certificate of Title was issued. The 1st applicant then took possession of the suit land and with the assistance of his mother, the 2nd Applicant, subdivided the same and disposed of portions of it to third parties who are in lawful occupation till now.
3. According to the applicants, the Interested Party, a complete stranger to the Applicants and the suit land, has without any legal justification laid a claim on the suit land and is the Complainant in Criminal Case Number 1694 of 2013 (hereinafter referred to as "the criminal case"), where the Applicants are charged with Obtaining Registration of Land by False Pretences contrary to Section 320 of the ***Penal Code***. To the applicants, the decision to bring the said charges against them was made maliciously and in a blatant abuse of the 1st Respondent's powers to institute criminal proceedings under Article 157 of the Constitution since no investigations were conducted before the decision was made, and if any, fell short of the standards required of them of impartiality.
4. It was disclosed that the substance of the offence the Applicants are charged with is related to land, and the only body that could determine whether the Applicants had indeed obtained the suit land by false pretences is the National Land Commission, who have confirmed through a letter dated 24th June, 2015 that they are still investigating the land dispute between the 1st Applicant and the Interested Party. The applicants' case was therefore that it is shocking that the 1st Respondent made the decision to institute and undertake criminal proceedings against them in 2013 when, two years later, the matter is still being investigated by the National Land Commission. In their view, the decision the 1st Respondent's decision to institute and undertake criminal proceedings against them was therefore unconstitutional, illegal and offended public policy, and should be declared null and void.
5. Despite the foregoing, the 1st Respondent has been completely unable to prosecute the said criminal case, which case has failed to take off for the last two years because no prosecution witnesses have been called more than two years later for a clear lack of evidence despite the applicants being desirous of exonerating themselves therein.
6. It was therefore contended that said the Criminal Case amounts to an abuse of the criminal justice system to settle civil disputes, and any further prosecution continues to heavily prejudice the Applicants.

<u>1st Respondents' Case</u>

7. In response to the application, the 1st respondents contended that the issues raised in the application are similar to those raised in ELC Petition no. 460 of 2008 dated 17th June 2013 by the

ex-parte applicants herein (hereinafter referred to as "the Petition").

8. It was averred that on or about 22nd January 2012 the 1st respondent received a complaint at Thika CID Office regarding the ownership of the suit land and that the conflicting interest to the property was one **Joseph Kamotho** on behalf of Kencair Holdings Ltd. on one hand and elders from Visions in Christ Church on the other hand. A similar complaint was lodged sometime in 2011 at the CID Headquarters Nairobi by the complainants in the Criminal Case against a parallel company known as Kencair Limited.
9. It was averred that the 1st Respondent substantively responded to the issues raised in the said petition through an affidavit dated 18th October 2013 which petition was subsequently dismissed on the 24th October 2014. The above notwithstanding further investigations revealed that the 2nd ex-parte Applicant fraudulent appended her signature on a sale agreement as the purchaser purporting to be that of the 1st ex-parte Applicant and that the certificate of lease in favour of the 1st ex-parte Applicant was acquired fraudulently through false misrepresentation as stated by the Commissioner of Lands in that the file used to process the said lease file no. 225048 belongs to land belonging to the Kenya Police Staff, Savings Credit Co-Operative in Kajiado District.
10. According to the 1st Respondent:

a. Section 193A of the ***Criminal Procedure Code*** provides that notwithstanding the provisions of any other written law, the subsistence of a related civil proceedings shall not be a ground of any stay, prohibition or delay of the criminal proceedings.
b. The application have not demonstrated any actual or threatened contravention of their constitutional rights by the Respondents instituting criminal proceeding against them.
c. The Applicants have been charged with offences known to law and the prosecution has sufficient evidence to sustain the respective charges. The issues meant to vindicate the Applicants charges. The issues meant to vindicate the Applicants should be canvassed in the criminal court and fairly determined; and not in the Judicial review court.
d. That the application is frivolous and an abuse of the court process and meant to circumvent the criminal justice system.

11. It was averred on behalf of the 1st Respondent that contrary to what the Applicants averred in the application that the suit property was allocated to the 1st ex-parte applicant by the Government vide a letter of allotment dated 28th June 1996 investigations established that the 2nd Applicant who is associated with **Awali Developers Company** stated that the said Company bought the suit property from one **John Kamau Mwangi** who is still at large. However, the sale agreement was drawn between the said **John Kamau Mwangi** and the 1st applicant. The police were however unable to record a statement from the said **John Kamau Mwangi** to clarify the issues raised with regard to the suit property and the police are still trying to trace him.
12. It was contended that the criminal case did not commence because the High Court in the said petition had issued conservatory orders staying the criminal case pending the hearing and determination of the same petition, which petition was subsequently dismissed.
13. It was averred that the Applicants were found in actual occupancy of the suit property with no colour of right, and continued to hold possession of it in a manner likely to cause a breach of peace; with their presence thereupon aimed at thwarting the efforts of the registered owners to access and take physical possession of the property.
14. According to the 1st Respondent, the police did not act illegally or contravene any code of regulation; and neither did they act under the control or direction of any party; but were independently discharging their duties after conducting thorough investigations as mandated by Article 244 of the Constitution of Kenya, 2010 and the ***National Police Service Act***, section 24 and 35, *inter-alia* mandates the police with the investigations of crimes and apprehension of offenders. It was therefore the 1st Respondent's case that this application is based on deliberate concealment, distortion and non-disclosure of material facts made with the latent intent to mislead the honourable court as to the true facts leading to the subject criminal complaint, investigations and charges.
15. To it, the Respondents acted within their respective mandates under the relevant establishing

legislation and in the circumstances, it cannot be said that he actions of the Respondents were in breach of the mandate vested upon them hence the Court was urged to dismiss the same with cost as the same lacks merit remit the matter to the trial court which is equipped to deal with the quality and sufficiency of evidence gathered in support of the charges preferred against the Applicants.

Determinations

16. I have considered the parties' respective cases, as contained in their affidavits as well as submissions on record.
17. Before dealing with the substance of this matter it is noteworthy that the verifying affidavit filed herein comprised of some 5 paragraphs whose substance was limited to confirming the correctness of the facts stated in the statement. In **Commissioner General, Kenya Revenue Authority Through Republic vs. Silvano Anema Owaki T/A Marenga Filing Station Civil Appeal No. 45 of 2000,** the Court of Appeal held:

> **"We would observe that it is the verifying affidavit not the Statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1(2) of Order LIII. This position is confirmed by the following passage from the *Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7*: 'The application for leave "By a statement" – The facts relied on should be stated in the affidavit (see *R v. Wandsworth JJ. ex p. Read [1942] 1 KB 281*). "The statement" should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit.' At page 283 of the report of the case of *R v. Wandsworth* Justices, Viscount Caldecote CJ said: 'The Court has listened to argument on the proper procedure or remedy in the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction.'** [Underlining mine].

18. It is therefore clear that it is the affidavit verifying the facts that ought to contain all the facts and the annextures ought to be exhibited thereto.
19. The circumstances under which the Court will grant stay of a criminal process in these kinds of proceedings is now well settled. The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim.
20. However as was held in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**:

> **"Although the state's interest and indeed the constitutional and statutory powers to**

prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and

ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds."

21. In **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170,** the Court of Appeal held:

"It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings... Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court."

22. In **Meixner & Another vs. Attorney General [2005] 2 KLR 189,** the same Court expressed itself as hereunder:

"The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion is acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution... Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it; it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or

excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct. The other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the prosecution is sufficient to support the charge. The criminal trial process is regulated by statutes, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court, which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court."

23.In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69,** the High Court held:

"The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer...In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute. It is further alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The fact that it has not been argued before however does not mean that the law stops dead at its tracks. An order of prohibition looks to the future and not to the past; it is concerned with the happenings of future events and little, if any, of past events. Where a decision has been made, there is little that the court can do by an order of prohibition to actually stop the decision from being made, because simply that which is sought to stop has already been done. However in such circumstances, the power of judicial review is not limited to the other orders of judicial review other than prohibition. With respect to civil proceedings prohibition lies not only for the excess of jurisdiction but also from a departure of the rules of natural justice...So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under

the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another. However, it does not mean that a civil suit and a criminal case cannot co-exist at any one particular time. This is because the section envisages the re-prosecution of a criminal case substantially dealt with either in fact or law, a case in which issues have been laid to rest. There is no mention in the section that the simultaneous existence of a civil and criminal case is constituting double jeopardy. The courts have, however stated that the power to issue an order of prohibition to stop a criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related facts, or to say that a person should never be prosecuted in criminal proceedings when he has a civil suit against him relating to matters in the criminal proceedings...The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution....”

24. In **Republic vs. Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703**, it was held:

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the

interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth... When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in... In this case it is asked to step in to grant an order of prohibition. Prohibition looks into the future and can only stop what has not been done. It is certiorari that would be efficacious in quashing that which has been done but it is not prayed for in this matter. There was no order granted for stay of further proceedings when leave was granted and it is possible that the private prosecution has proceeded either to its conclusion or to some extent. In the former event an order of prohibition has no efficacy and the court would be acting in vain to grant one. What is done will have been done. If there is anything that remains to be done in those proceedings, however, the order of prohibition will issue to stop further proceedings."

25. In this case the ex pate applicants' case is that the 1st Respondent did not carry out any investigations and that if any such investigations were carried out they fell short of the standards of impartiality. The Respondents have however explained their version of the circumstances that gave rise to the said criminal proceedings. In **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] Eklr**, it was held:

"the police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court...As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene".

26. Proceedings of this nature, ordinarily, do not deal with the merits of the case but only with the process. In other words these proceedings determine, *inter alia*, whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made, whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters, whether the decision to commence the criminal charges go contrary to the applicant's legitimate expectation, whether the respondents' decision to charge the applicant is irrational. It follows that where an applicant brings such proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction to determine such a matter and will leave the parties to resort to the usual forums where such matters ought to be resolved. In other words, such proceedings are not the proper forum in which the innocence or otherwise of the applicants is to be determined and a party ought not to institute such proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in these kinds of proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and whether such proceedings amount to a violation of his rights and fundamental freedoms and once the Court is satisfied that that is not the case, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by

determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.

27. Whereas the applicants may well be correct that there are several factors which go to show their innocence, these are not the proper proceedings in which the correctness of the evidence or the truthfulness of the witnesses is to be gauged. That task is solely reserved for the trial Court which is constitutionally bound to determine the proceedings in accordance with the law. Accordingly, the mere fact that the applicants view the evidence to be presented against them as patently false, concocted and/or misleading does not warrant this Court in interfering with the criminal process since that is an allegation which goes to the sufficiency and veracity of the evidence and the innocence of the Applicants, matters which are not within the province of this Court.

28. In **Thuita Mwangi & Anor vs. The Ethics and Anti-Corruption Commission & 3 Others Petition No. 153 & 369 of 2013**, it was held:

" … I am afraid that the High Court at this point is not the right forum to tender justifications concerning the subject transaction let alone test the nature and veracity of these allegations. In… the Court held that "It is the trial Court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court". Similarly…Lenaola J., captured this balance as follows; "(22). The point being made above is that the DPP though not subject to control in exercise of his powers to prosecute criminal offences, must exercise that power on reasonable grounds. Reasonable grounds, it must be noted, cannot amount to the DPP being asked to prove the charge against an accused person at the commencement of the trial but merely show a prima facie case before mounting a prosecution. The proof of the charge is made at trial."

29. As was held by **Mumbi Ngugi, J** in **Kipoki Oreu Tasur vs. Inspector General of Police & 5 Ors (2014) eKLR:**

"The criminal justice system is a critical pillar of our society. It is underpinned by the Constitution, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated".

30. In this case the applicants' contention amount to an allegation that there is no sufficient evidence to sustain the charge against them in light of the circumstances of this case. Those circumstances, it is my view amount to a defence which the applicants ought to pursue before the trial Court. As was held by **Lenaola, J** in the case of **Daniel Ndungu vs. Director of Public Prosecutions & Another (2013) eKLR**:

"In conclusion, the Petitioner ought to face his accusers, prove his innocence or otherwise and submit to the consequences of the Law should he be found culpable".

31. The other issue that was raised was that the complaint is still being investigated by the National Land Commission. It is however clear that the 1st Respondent's powers of under Article 157 of the Constitution are exercised independently without direction from any other authority hence it is not a condition precedent that it must await the investigations of the Commission before it can proceed to carry out its mandate. In any case, the Commission has no prosecutorial powers and as section 193A of the ***Criminal Procedure Code*** Chapter 75 Laws of Kenya provides:

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings

shall not be a ground for any stay, prohibition or delay of the criminal proceedings.

32. However as was appreciated in **Kuria & 3 Others vs. Attorney General** (supra):

"It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the applicants might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial..."

33. The applicants have also complained against the delay in prosecuting the said criminal case. However, according to the 1st Respondent, this delay was occasioned by the fact that the High Court in the said petition stayed the prosecution of the criminal case. If that is the position and it has not been controverted, then the applicants cannot be heard to complain when the delay has been occasioned by their own actions. In any case as was held in As was held in **Jago vs. District Court (NSW) 106**:

"An abuse of process occurs when the process of the court is put in motion for a purpose which, in the eye of the law, it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve. The purpose of criminal proceedings, generally speaking is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and, on that account, is deserving of punishment. When criminal process is used only for that purpose and is capable of serving that purpose, there is no abuse of process...When process is abused, the unfairness against which a litigant is entitled to protection is his subjection to process which is not intended to serve or which is not capable of serving its true purpose. But it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court's control unless it be said that an accused person's liability to conviction is discharged by such unfairness. This is a lofty aspiration but it is not the law."

34. It must always be remembered that the decision whether or not to grant judicial review is an exercise of judicial discretion and like all discretion must be exercised judicially based on material and not capriciously or whimsically. This position was emphasised by **Richardson, J** in **Martin vs. Tauranga District Court [1995] 2 LRC 788 at 799** where he held:

"...where the delay has not affected the fairness of any ensuring trial though; for example unavailability of witnesses or the dimming of memories of witnesses so as to attract consideration...it is arguable that the vindication of the appellant's rights does not require the abandonment of trial process; that the trial should be expedited rather than aborted and the breach of Section 25(b) should be met by an award of monetary compensation. That would also respect victims' rights and the public interest in the prosecution to trial of alleged offenders."

35. In the same case, **Hardie Boys, J** aptly put it as follows:

"The right is to trial without undue delay, it is not a right not to be tried after undue delay. Further, to set at large a person who may be, perhaps patently, guilty of a serious crime, is no light matter. It should only be done where the vindication of the personal right can be achieved in no other satisfactory way. An alternative remedy may be an award of damages."

36. In my view the mere fact that the prosecution is dragging its feet in carrying out its prosecutorial functions, even if true, cannot be a ground for quashing the proceedings. Such action can properly be dealt with by the trial Court.
37. It is upon the applicants to satisfy the Court that the discretion given to the DPP to investigate and prosecute is being abused and ought to be interfered with and this burden and standard was expounded in **Kuria & 3 Others vs. Attorney General** (supra) where it was held:

"A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution...In the instant case there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under section 77 of the Constitution.."

38. In similar vein, the status of the criminal case sought to be quashed ought to be considered. Whereas there is nothing that can bar the Court from terminating pending criminal proceedings at any stage of those proceedings, it must always be remembered that judicial review remedies are discretionary in nature and one of the factors which would militate against the grant thereof is delay in seeking relief. As was held by **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728 and Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707: "***Speed and promptness are the hallmarks of judicial review.***"** Judicial review, it has therefore been held**,** acknowledges the need for speedy certainty as to the legitimacy of the target activities and requires the applicants for judicial review to act promptly. See **Mutemi Kithome vs. The District Land Adjudication & Settlement Officer Mwingi District & Others Nairobi HCMA No. 1108 of 2004 [2006] 1 EA 116.**
39. Therefore whereas under the ***Law Reform Act*** there is no limitation as to when to apply for orders of prohibition the Court in determining whether or not to grant the relief sought will take into account the delay in making the application and the import and impact of such delay in the administration of justice.
40. This position was similarly appreciated in *Judicial Review Misc. Civil Appl. No. 139 of 2014 between* ***Vania Investments Pool Limited and Capital Markets Authority & Others*** where the learned Judge pronounced himself as hereunder:

"The issue of failure to invoke alternative remedies is intricately linked with the issue of delay. Applications seeking leave to commence judicial review proceedings must be made promptly as soon as grounds giving rise to the need for judicial review become known. Undue and inordinate delay in applying for judicial review is a major factor for consideration. Lord Hope of Craighead in Regina v London Borough of Hammersmith and

Fulham (Respondents) and Other Exparte Burkett &

Another (FC) (Appellants) [2002] UKHL 23 noted the need for the applicant to move the court promptly when he observed that,

"[64] On the other hand it has repeatedly been acknowledged that applications in such cases should be brought as speedily as possible. Ample support for this approach is to be found in the well-known observations of Lord Diplock in O'Reilly v Mackman [1983] 2 AC 237, 280-281 to the effect that the public interest in good administration requires that public authorities and third parties should not be kept in suspense for any longer period than is absolutely necessary in fairness to the person affected by the decision… But decisions as to whether a petition should be dismissed on the ground of delay are made in the light of the circumstances in which time was allowed to pass. As Lord President Rodger put it in Swan v Secretary of State for Scotland 1998 SC 479, 487:"It is, of course, the case that judicial review proceedings ought normally to be raised promptly and it is also undeniable that the petitioners let some months pass without starting these proceedings. None the less, in considering whether the delay was such that the petitioners should not be allowed to proceed, we take into account the situation in which time was allowed to pass."

41. Apart from that it is stated in ***Halsbury's Laws of England*** **4th Edn. Vol. 1(1) para 12 page 270:**

"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders."

42. It this case, the criminal proceedings sought to be quashed were instituted in the year 2013 and the Respondents have explained that the delay in determining the same was due to an order given by this Court. In deciding whether or not to grant orders of judicial review, the Court must consider whether or not the orders sought by the applicant are the most efficacious remedies in the circumstances. As stated in ***Halsbury's Laws of England 4th Edition Vol. 1(1) paragraph 122***, the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles. Sound legal principles, in my view would dictate that where the applicant has delayed in coming to Court to seek remedies or that he/she has taken certain steps which militate against the expeditious disposal of his/her case, he/she cannot expect favourable exercise of the Court's discretion. As was expressed in **Kuria & 3 Others vs. Attorney General** (supra):

"In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names."

43. In the premises I am not satisfied that this is a proper case in which the court ought to bring the

criminal proceedings to a halt. The applicants will be afforded an opportunity to defend themselves, cross-examine witnesses and adduce evidence in support of their case and that in my view is the proper course to take in the circumstances of this case.

Order

44. Accordingly, the order that commends itself to me and which I hereby grant is that the Notice of Motion dated 23rd July, 2015 be and is hereby dismissed with costs to the 1st Respondent.
45. Orders accordingly.

Dated at Nairobi this day 1st day of February, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Wachira for Mr Gachie for the Applicant

Miss Spira for the Respondent

Cc Patricia