



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MISC. JUDICIAL REVIEW APPLICATION NO. 162 OF 2015

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

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

THE DIRECTOR CRIMINAL INVESTIGATIONS DEPARTMENT...2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

EX PARTE: RAFIQUE EBRAHIM

AND

WILSON GACHANJA.....INTERESTED PARTY

JUDGEMENT

Introduction

1. By a Notice of Motion dated 29th May, 2015, the *ex parte* applicant herein, **Rafique Ebrahim**, seeks the following orders:

a. That orders of Prohibition to issue directed at the Respondents particularly the 1st, 2nd and 3rd Respondent herein whether by themselves, their agents, servants and/or juniors or any other person acting on their behalf, instructions and authority prohibiting each one of them from conducting further inquiries, investigations and/or from harassing, intimidating and vexing the applicant herein and from acting on the complaints of the interested party in respect of all those parcel of land known as Land Reference Numbers 21078/2, 21078/3, 21078/4, 21078/5 and 21078/6.

b. That orders of Prohibition to issue directed at the respondents and more particularly the 2nd and 3rd respondents restraining them either by themselves, their agents, servants, juniors

and other designated officers acting on their instructions prohibiting them from arresting and preferring criminal charges against the Applicant herewith based on the criminal complaints lodged by the interested party touching on his acquisition and subsequent disposal of all those parcels of land known as Land Reference Numbers 21078/2, 21078/3, 21078/4, 21078/5 and 21078/6

c. That orders of Prohibition to issue directed at the 1st Respondent whether by himself, servants, agents or designated officer from commencing criminal proceedings acting on the basis of criminal complaints lodged by the interested party in respect of the applicant's acquisition and subsequent disposition of all those parcels of land known as Land Reference Number 21078/2, 21078/3, 21078/4, 21078/5 and 21078/6.

d. That the cost of this application be provided for.

Applicants' Case

2. The facts of the case, according to the Applicant, who described himself as a businessman based in Nairobi and a real estate business investor within the Republic of Kenya among other business ventures within the Republic of Kenya, were that sometime in the year 2011, the Applicant acquired certain properties from different parties during the normal course of business as a real estate investor. According to him, on the 24th day of August 2011, the Applicant purchased a property known as Land Reference Number 21078/2 situated in Loresho, Nairobi county within the Republic of Kenya from its predecessors in ownership, **David Kipkemboi** and **Dominick Buttuk** vide a sale agreement dated the same day after conducting all the necessary due diligence in respect of the said property prior to such acquisition and having being satisfied that the same was free and available for acquisition.

3. The Applicant averred that he lawfully paid all the outstanding rates and rent due and owing to the relevant agencies of government in satisfaction of the requirements of the **Ratings Act** among other provisions of the law and met the stamp duty payable on the transfer upon assessment of the same by the Chief Land Valuer and paid the same to the Collector of Stamp Duty in fulfilment of the obligations imposed under the provisions of the **Stamp Duty Act** Cap 480, Laws of Kenya. The Applicant further contended that the duly executed transfer in respect of the said transaction was subsequently registered at the lands office on the 31st day of October 2011 under entry Number IR. 130574/2 and he was subsequently issued with a document of title in respect of the suit land and upon such issuance the was confirmed as the absolute proprietor of the said parcel of land with all the rights appurtenant thereto subject to the conditions being and imposed on the title document. As a result, the Applicant has resorted to exercise his rights over the aforesaid property including the right to dispose of the said parcel of land and has indeed offered the same for sale to a third party by the name **Haniff Popat**, which transaction is pending conclusion and which is above board and in accordance with the law.

4. The Applicant disclosed that he further purchased another property being Land reference number **21078/3** and **21078/4** situated in Loresho, Nairobi County within the Republic of Kenya from one **George Kaiza Kautela** for valuable consideration vide an Agreement for Sale dated the 24th of August 2011 through similar procedures. He averred that he subsequently transferred all his interest in the said properties for valuable consideration to **Zamco Developers Limited** and thereby relinquished all the ownership rights over the said property to the said company, who are the new proprietors thereof.

5. Further to the foregoing, the Applicant acquired all that property referred to as Land Reference Number 21078/5 situated in Loresho, Nairobi County within the Republic of Kenya, from its previous owner, one **Barnabas Tembulio**, for valuable consideration pursuant to an Agreement for Sale dated the 24th of August 2011 through the very same procedure. Subsequently, the Applicant transferred all his interest in the aforesaid property to an entity named **Endebess Development Company Limited** for valuable consideration rendering the aforesaid company the current registered proprietor to the suit land. Following the same procedure, the Applicant averred that it acquired Land reference Number 21078/6, situated in the same area from one **PheobeNyangweso** vide an Agreement for Sale dated the 24th of

August 2011 which he subsequently transferred to one **Adil Nazf Daud**, the current registered proprietor thereof.

6. According to the Applicant, he transferred all his interests in the aforesaid properties to the respective persons and entities as stipulated above who currently hold the title deeds in respect of the said and he has no further interests therein. However sometimes in March 2014 he received a call from **Adil Daud** and **Fred Gumo**, the directors of a Endeless Development Company Limited, persons of whom he had sold some of the said parcels as indicated above, informing him that there were persons who had encroached on the said land after which he advised them to report the matter to the police.

7. The Applicant averred that upon acquisition and disposal of the aforesaid property as per the foregoing averments, sometime in March 2014, he received a call from persons who identified themselves as CID officers who surprisingly summoned the Applicant to shed more light about his involvement in the said property and the manner in which he acquired the same. In response thereto, the Applicant proceeded and recorded his statement and set forth a full account of the manner in which he acquired and disposed off the said property and furnished the said officers with all the requisite documents in respect of his involvement in the said transaction with a view to assist in the investigations and the inquiries being conducted by the said officers.

8. However, to his shock and consternation, he has since established that the said inquiries were being undertaken pursuant to a complaint lodged by the interested party who is the former Commissioner of Lands who claimed to have been an allottee to the said parcel of land though the extent and nature of his claim towards the said parcel of land has never been brought to the attention of the applicant. The Applicant averred that to date, he has never been informed about the full particulars and nature of the complaint against him as lodged by the interested party and the extent of his alleged criminal culpability.

9. It was contended that during the course of the investigations an inquiry was conducted by one of the investigating officers, one **Wilson Njogu**, who sifted through the inquiry file and the statements recorded at the station and thereafter concluded and recommended vide a memo dated the 11th of March 2015, that the nature of the dispute related to ownership of the aforesaid parcels of land for which the Ministry of Lands were responsible for issuance of titles and the allotment letters and further recommended that the dispute be referred to the civil court to ascertain who is in possession of the lawful title document. The Applicant further contended that the officer in Charge of the 2nd Land Fraud Investigations Department of the 2nd Respondent one **Mr. Etyyang** made further inquiries into the matter and recommended vide a memo dated the 31st of March 2015 addressed to the Director Criminal Investigations (DCI) making similar findings in respect of the investigations and recommended that the matter be addressed in a civil court.

10. Despite the aforesaid findings and recommendations, other junior CID officers within the 2nd Respondent's docket have purported to harass and intimidate the Applicant herein over the said parcels of land imputing fraudulent conduct on the part of the Applicant without any plausible and or reasonable explanations and/or justifiable cause in that regard despite the fact that the applicant has recorded his entire statement with the 2nd and 3rd Respondent's officers on the matter. The Applicant disclosed that he has received numerous and disturbing phone calls from one CID officer **Mr. Kitale**, who has persisted with further inquiries into the matter while threatening criminal action against him in respect of the transactions in respect of the said parcels of land.

11. The Applicant asserted that he was a *bona fide* purchaser for value without notice of any defect in title, if at all there is any, as implied by the ongoing unlawful and irregular inquiries as he purchased the aforesaid properties from the initial registered owners and lawfully acquired and disposed off the aforesaid properties as demonstrated above save for Land Reference Number 21078/2 which is still registered in his name.

12. To the Applicant, he was a stranger to the allegations and complaints being made by the interested party, as he was a *bona fide* purchaser for value without notice of any defect in title when he acquired the

said parcel of land as demonstrated by the raft of documents attached as evidence which clearly demonstrated true ownership in respect of the said land. He was therefore of the view that he was being unfairly and unjustifiably targeted by the said CID officers purportedly acting on the complaints made by the interested party. To him, in view of the said recommendations by the said officers of the 2nd Respondent, it is apparent that the said complaints are misplaced and tailored to achieve objectives other than those of the criminal justice.

13. The Applicant asserted that in light of the foregoing, he was convinced that the lodging of criminal complaints and the subsequent inquiries and the blatant harassment targeted against him at the instance and instigation of the interested party is a ploy solely meant to actuate malice and settle other scores against him contrary to the objects of the criminal justice system. He added that the intended prosecution as evidenced by the consistent threats have been precipitated by ill intention and malice on the part of the interested party and that the continued investigations and intended prosecution of this matter will amount to nothing but an abuse of the court criminal process and the criminal justice system. To him, if at all the interested party has any claims against him or any other party, then the said claims can only be pursued through filing of civil proceedings in a civil court or forum to recover that which he purports he owns and not through the criminal proceedings as he has constantly purported to do.

14. Based on legal advice the Applicant averred that the continued investigations and the contemplated threat of prosecution over the complaints of the interested party by the said CID officers amount to abuse of power on the part of the 1st and 2nd Respondents and its agents, the same is unreasonable and violate his rights to legitimate expectation, tainted with extraneous considerations and are an abuse of the criminal justice system.

15. The Applicant was however apprehensive that the officers of the 2nd and 3rd Respondent's may make good the threat and proceed to carry out further inquiries while at the same time continue summoning the Applicant over the irregular investigations. To him, he no longer feels secure and has justifiable fears about his security and general well-being and has been forced to adjust his lifestyle owing to the aforesaid incessant threats and intimidation by the said officers. To him, the said further inquiries are actuated by malice and ulterior motive by the said officers of the 2nd and 3rd Respondent.

16. He was therefore convinced that the lodging of criminal complaints and the subsequent investigations and the inquiries directed against him by the 1st and 2nd respondent at the instance and instigation of the interested party is a ploy solely tailored to scandalize him and his reputation.

17. In a rejoinder to the replying affidavits, the Applicant contended that the interested party had not shown any interest in the suit property and therefore had no locus to lodge complaint in respect thereof.

Respondents' Case

18. The Respondents opposed the application vide a replying affidavit sworn by **Sgt. Gilbert Kitalia**, an officer employed by the National Police Service and based at the Directorate of Criminal Investigations, Serious Crimes Unit.

19. According to him, on the 29th day of April, 2015 he was instructed by his immediate officer in charge Serious Crime Unit, to take over investigations of an inquiry file No. 16/2015 from the Officer in charge Land Fraud Investigations Unit, **Mr. Etyang**, as directed by the Director of Criminal investigations. He immediately perused the file and commenced investigations as directed and noted that **Wilson Gachanja**, the interested party who is also the complainant, had earlier on lodged a complaint to the effect that his parcel of land reference number **21078** had illegally and fraudulently been transferred by unknown persons without his consent. According to the deponent, the interested party had initially lodged the said complaint at the Nairobi County Criminal investigations Officer where he had recorded his statement before the matter was taken over by the Land Fraud Investigation Unit and finally by the Serious Crime Unit.

20. It was averred that the information disclosed by the complainant/interested party was to the effect that the parcel of land reference number 21078 located in Loresho had been allocated to him through his Company M/S Kerilaik Holdings Limited in the year 1995 and he subsequently retained the services of a private surveyor by name **James Kamwere** who surveyed the land for him and drew a deed plan that was eventually approved by the Director of Survey for issuance of title by the Commissioner of Lands. The interested party then submitted the said deed plan to the Commissioner of Lands for processing of his title and applied to the Commissioner of Lands to subdivide the said parcel of land number 21078 before issuance of the title which application was accepted. In the year 1997, the interested party again retained the services of the same private surveyor who subdivided the parcel of land 21078 into six parcels of land that is land reference nos. 21078/1 which was reserved as road reserve, 21078/2, 21078/3, 21078/4, 21078/5 and 21078/6 and the private surveyor then submitted the deed plan to the Director of Survey which was approved for onward transmission to the Commissioner of Lands for Issuance of titles.

21. According to the complainant, while the deeds plans were at the Commissioner of Land awaiting preparation of title deeds, two of the deed plans went missing being deed plans for land reference numbers **21078/2** and **21078/6**. The interested party then decided to withhold the preparation of title deeds for the three remaining deed plans to avoid misuse of the two that were missing that is deed plans for land reference numbers 21078/3, 21078/4 and 21078/5 based on the promises from the lands officials at the Lands Ministry that the missing deed plans were being traced. According to the Complainant, the lost deed plans were deed plan under 246097 and 246093 for Land Reference numbers 21078/2 and 21078/6. However, the interested party still holds in his possession the other three deed plans which he withheld from the lands office being deed plan numbers 266094, 246095, 246096 and 246092 meant for a road reserve which are deed plans are for land reference numbers 21078/3, 21078/4, 21078/5 and 21078/1 respectively.

22. It was deposed that subsequently the interested party got to learn that his land L.R No. 21078 had been fenced off by unknown people and it was at this point that the interested party then reported the matter to the Nairobi County criminal investigations offices for action and recorded his statement at Nairobi county Criminal Investigations Office where he presented all his documents as pertains his acquisition of the said plot L.R No. 21078 and subsequent subdivision of the same to five parcels that is land reference numbers 21078/1 reserved as road reserve 21078/2, 21078/3, 21078/4, 21078/5 and 21078/6.

23. It was deposed that sometimes in the month of June, 2014, the 2nd respondent directed that the matter be taken over by one of the units under the Directorate of Criminal Investigations Headquarters being the Land Fraud Investigations Unit and in March 2015 the Land Fraud Unit under **Etyang** forwarded the file to the 2nd respondent recommending that the matter was civil in nature. The 2nd respondent upon discovering that the matter as at that time had not been thoroughly and/or properly investigated then re-directed the same to the Serious Crimes Unit for further investigations and the deponent, together with his colleague **Sgt John Wahome**, were assigned to urgently investigate the matter on 29th April, 2015 and to take appropriate action as per the findings.

24. According to the deponent, their investigations did indeed confirm the facts earlier on given by the interested party in his complaint as stated hereinabove. In the course of their investigations it was discovered that five parcels of land subdivided by the interested party had subsequently been allocated to other different people using forged deed plans plus the two deed plans belonging to the interested party that had gone missing while at the lands offices. Based on the statements of several witnesses, the deponent averred that it was discovered that the new allottees were allocated the said parcels of land L.R No. 21078/2, 21078/3, 21078/4, 21078/5 and 21078/6 in the year 1999 way after the interested party had begun the process of applying for title deeds for his parcels of land. Further investigations revealed that three of the deed plans that were used to prepare the title deeds for the new allottees that is L.R no. 21078/3, 21078/4 and 21078/5 were forged deed plans and that the interested party is still in possession of his three original deed plans for the same plots. In addition, investigations revealed that two of the subsequent allottees namely **Timothy Okemba Adeny** was then aged 17 years while **George Kaiza Kautela** who cannot be traced are purportedly the allottees for L.R. No. 21078/4 and 21078/3 respectively. To the deponent, one **Phoebe Nyangweso** the purported allottee for land reference number

21078/6 had since distanced herself from the said allotment as she was then resident outside the country and had recorded a statement to that effect.

25. It was disclosed that the records of the Land rent payment receipts and stamp duty discloses that deposits for all the five parcels of land that is L.R Nos. 21078/2, 21078/3, 21078/4 21078/5 and 21078/6 were paid at National Bank of Kenya by one **David Kipkembo Imundui** of telephone number **0722-438247 who also made all the sale transactions in respect** of the said parcels of land reference numbers 21078/2, 21078/3, 21078/4, 21078/5 and 21078/6 by which the same were purportedly transferred to the ex-parte applicant, **Rafique Ebrahim**. To deponent disclosed that the transactions of the said parcels of land from **Rafique Ebrahim** the ex-parte applicant was also done by the said **David Kipkemboi Imundui** to the current owners.

26. It was deposed that the law firm of **Robson Harris & Co. Advocates** said to have been involved in the first sale transactions between the purported first allottees and the applicant **Rafique Ibrahim** had distanced itself from any such transaction and denied knowledge of the said transactions and some of the advocates in the firm namely **Benson Mwaura Nyenjeri** and **Paul Kimotho Njoki** recorded statements stating that their law firm official stamp and their signatures were forged.

27. To the deponent, the transfer documents by the applicant **Rafique Ebrahim** to **Adilnazaf Daud**, the current owner of land reference number 21078/6 was confirmed to be forged as the said lawyer, **Benson Mwaura Nyenjeri**, from Robson Harris & Co. Advocates confirmed that he has never dealt with neither **Rafique Ebrahim** nor **Adilnazaf Daud** in sale transaction of land reference number 21078/6. It was disclosed that the advocates from **Robson Harris & Co. Advocates** had since recorded their statements confirming that all the transactions in the sale of the above parcels of land reference numbers 21078/2, 21078/3, 21078/4, 21078/5 and 21078/6 purportedly by their law firm are forgeries.

28. The deponent added that investigations were then extended to the Director of Survey where they obtained the maps and deed plans for the initial land parcel land reference number 21087 and the subsequent divisions which were done by **James Kamwere Muriuki**. Further investigations disclosed that deed plans used to obtain title for L.R No. 21078/3, 21078/4 and 21078/5 were forgeries as the deed plans used for L.R. No. 21078/2 and 21078/6 are the ones that were stolen while at the Lands offices after they were presented there by the interested party.

29. Having established the above, and upon briefing the deponent's officer-in-charge serious crime unit they decided to contact the ex-parte applicant **Rafique Ebrahim** through his mobile phone number to avail himself at our offices to clarify on the above findings. The Applicant promised to avail himself after he was done with investors he claimed were in the country from South Africa but he failed to keep his promise. To the deponent, the telephone conversations between him and the applicant were only limited to the purpose disclosed above and at no time was the ex-parte applicant intimidated or threatened in any manner with criminal prosecution as claimed. According to him, he had contacted more witnesses in this inquiry file who came up and clarified issues that arose in the course of his investigations.

30. He however denied that he was carrying out investigations in this matter on his own making but the same were necessitated by the failure of the first investigating team to carry out thorough investigations and thus the 2nd respondent procedurally as per his mandate directed further investigations in the interest of justice. He therefore contended that recommendations as per the memos dated 11th March and 31st March 2015 relied upon by the ex-parte applicant were not conclusive in terms of investigations but were prepared and forwarded for directions by the 2nd respondent who disagreed with the findings of the makers and directed further investigations into the matter. In his view, the correspondence referenced above is internal communication within the office of the 2nd respondent and were never addressed to the ex parte applicant and it is questionable how the same were obtained. To him, the said correspondence cannot be used to bar the 2nd respondent from conducting conclusive investigations if there is need to gather more evidence such as in the present case.

31. The deponent clarified that whereas the recommendations of the initial investigators were not ignored,

they were found to have been inconclusive and the said recommendations have been overtaken by events as there are issues of forgeries, making of false documents, obtaining money by false pretences, obtaining false registrations which have now been disclosed upon more comprehensive investigations as outlined above. In any case, he averred that internal correspondence referenced above cannot be used to bar the 1st respondent from discharging its Constitutional mandate as the same is done independently and in the interest of justice. The deponent asserted that all subsequent investigations into this matter have been done within the mandate of the 2nd respondent to carry out investigations of a report made by any complainant and the same has not been influenced by any third party but has been done lawfully without any favour or malice.

32. The deponent contended that issues of forgery, obtaining money by false pretences, making false documents, obtaining false registrations of land which have so far been established in the course of my investigations, can only be best dealt by a trial court which is well equipped and mandated by law to handle the same. To him, investigations in to this matter have since disclosed that initial title in this matter was obtained unlawfully using forged documents hence the need to investigate all parties involved in the transactions including the ex-parte applicant among others. Further, investigations into this matter have been independent and impartial and have not been influenced in any way by the interested party, who lodged a genuine complaint that his parcel of land have been grabbed by the applicant and his accomplices and thus any allegation to the contrary is in itself malicious, misplaced and farfetched.

33. To the deponent, the ex-parte applicant herein is seeking to dictate the function of Constitutional bodies which are merely discharging their mandate in a lawful manner and issues now disclosed upon proper scrutiny demonstrate that the matter is not of civil nature but is criminal in character. To him therefore, it is in the wider interest of justice that the investigations herein be concluded and that once finalized the right course of justice should ensue since the 2nd respondent had not finalized its investigations neither had a decision been made by the 1st respondent. According to him, justice will not only be done but will be seen to have been done if investigations herein are allowed to proceed to the logistical conclusion and appropriate action taken where necessary in this inquiry file no. 16/2015 as there are weighty matters touching on forgery of land documents, obtaining false registration of land, obtaining money by false pretences, making false documents among other issues which can only be articulated well through Criminal Court process.

34. The deponent averred that in the course of conducting investigations herein there has been no abuse of power from any member of the investigating team as the same was conducted within the mandate as prescribed under the *National Police Service Act, 2011* that includes, protection of life and property, detection of crime, apprehension of offenders, maintenance of law and order, preservation of peace and enforcement of all laws and regulations. He averred that the issue of investigations properly initiated as in this case and taking action against offenders generally cannot amount to abuse of criminal justice system as alleged by the applicant.

Interested Party's Case

35. The interested party, **Wilson Gachanja**, on his part filed the following grounds of opposition:

- 1. That the motion is misconceived, frivolous, scandalous, vexatious and an abuse of this court's process.**
- 2. That no letter of allotment could be generated on a parcel of land which had already been alienated more than 15 years later therefore, the letters of offer issued between the period of June and July 2011 were fraudulently issued, unlawful, irregular and invalid**
- 3. That this honourable court has no jurisdiction to bar the respondents from exercising their constitutional and statutory mandate for to do so would be usurping their powers.**
- 4. That on the aforementioned grounds, the Interested Party shall seek for dismissal *in limine* of the applicant's notice of motion dated 29/5/2015 with costs.**

36. Apart from the said grounds, the interested party averred that he is the chairman and founder of **Kerilaik Holdings Limited** and that he served in the office of the Commissioner of Lands from January 1989 to November 1999, during which period his said company, **Kerilaik Holdings Limited**, applied for and was allocated parcel L.R. No. 21078 Loresho area of Nairobi measuring 2.5 acres or thereabout. He averred that on 10th July 1997, he paid the entire requisite stand premium being Kenya Shillings Three Hundred and Sixteen Thousand, Nine Hundred and Thirty Seven (Kshs 316,937/-). On 22nd July 1997, the Government of the Republic of Kenya through the office of the Commissioner of Lands accepted the offer formally and plot file number 92817 was created to that effect.

37. He disclosed that he then applied to the Ministry of Lands for consent to subdivide the above named parcel of land which request was acceded to and Messrs Kamwere & Associates, licensed land surveyors to conduct the subdivision process and as a result parcels L.R. No. 21078/2, 21078/3, 21078/4, 21078/5 and 21078/6 were formed. Parcel L.R. No. 21078/1 was a road reserve. He added that the above deed plans were forwarded to the director of surveyor for approval and the same were released to the surveyor, **Mr. Kamwere** on the 28th February, 2003 duly approved, for onward transmission to the commissioner of lands for preparation of the respective grants. He then paid Kenya Shillings One Million and Forty Thousand (Kshs 1,040,000/-) towards the preparation of titles. However he was informed that the Titles for the above named parcels of land could not be processed due to existence of two deed plans to wit 21078/2 and 21078/6 which had mysteriously disappeared from the lands office ten (10) years earlier and his efforts to trace the same have been futile. Thereafter, the office of the Commissioner of Lands changed hands and the new Commissioner of Lands, **Mr. Zablon Mabea**, promised to issue him with titles based on the deed plans in his possession. With the view of fast-tracking the process, the interested party surrendered all the deed plans to the Commissioner of Lands and in the year 2003 did an informal transfer of the parcels from **Kerilaik Holdings Limited** to **Abercon Villas Limited**, a holding company for **Kerilaik Holdings Limited**. On 27th September 2010, upon receipt of all the relevant documents, the Commissioner of Lands issued instructions that grants be issued in favour of **Abercon Villas Limited**.

38. The interested party however averred that on routine checks in the lands office, he discovered with respect to the above plots that Plot No. 21078/2 – a letter of offer dated 23rd July 2011 was allegedly issued to one **Mr. Kipkemboi** and **Dominic Buttuk** based on the deed plan that had been reported stolen in the Commissioner of Land's office and the title was processed on the stolen deed plan and transferred to the Applicant herein who allegedly sold the same to **Popat**. With respect to Plot No. 21078/3 – letter of allotment was allegedly issued to **George Kaisa Kautela** on 24th June, 2011, and the Title was processed and transferred to the applicant herein who is in the process of selling the same to **Zamco Developers Agencies Limited**. With respect to Plot No. 21078/4 – letter of allotment was issued to one **Timothy Okwemba** on 24th June 2011 and transferred to the applicant herein who is currently in the process of selling the same to **Zamco Developers Agencies Limited**. As regards Plot No. 21078/5 – registered to **Banaba Tembulio** on 23rd June 2011 and subsequently transferred to the applicant herein on 24th June, 2011 who is currently in the process of selling the same to **Zamco Developers Agencies Limited**. Plot No. 21078/6, on the other hand was transferred to the applicant herein who sold the same to **Endebes Developers Limited**.

39. The interested party averred that upon further inquiries, he discovered that plot file number 92817 is still in the Commissioner of Lands' office unsigned and has been there since 2010 the year he deposited the deed plans.

40. Aggrieved by the above findings, the interested party instructed his advocates to lodge a complaint with the Directorate of Criminal Investigations for further probe and scrutiny of the above conveyancing transactions, which complaint was lodged vide a letter date 18th June 2014. However, to frustrate the said investigations, the present proceedings were instituted with the sole aim of insulating the applicant from a lawful process.

41. To the interested party, the application before this honourable court is misconceived, frivolous, vexatious, scandalous and an abuse of this court's process; that no letter of allotment could be generated on a parcel of land which had already been alienated more so 15 years later and therefore the purported

letters of offer issued to the above named persons were a forgery perpetrated by the then Commissioner of Lands in cahoots with other officers in that office and cannot by any stretch of imagination be a basis for a good title; the applicant herein is notorious in fraudulent conveyancing transactions and had in similar circumstances, obtained a fake title to wit parcel No. 21074 belonging to Kigwor Limited and upon investigations by the 2nd Respondent, surrendered the said title to 2nd Respondent herein to avoid prosecution for fraud; that all the deed plans he surrendered to the commissioner of lands for issuance of titles were fraudulently used to generate the above fraudulent titles and for this honourable court to be asked to stay or prohibit any investigations on a patently criminal and fraudulent transaction is tantamount to asking this court to sanction illegalities or fraud; that all the titles processed with the stolen deed plans and fraudulent illegal and a nullity in law and offends section 26(1)(j) of the **Land Registration Act**; that from the foregoing, it is clear that the applicant herein has committed a criminal offence, this honourable court therefore, cannot bar and/or prevent the 2nd respondent from exercising its mandate as stipulated in law, to carry out investigations on any person believed to be a party to criminal activities and/or dealings by usurping the process of a criminal court and determining the viability or otherwise of the criminality of the applicant; and that in view of the aforesaid chronology of events the allegations contained in the affidavit of the Applicant purportedly in support of the Motion herein are false, misleading, oppressive, scandalous and *mala fides* and should be struck out.

Determination

42. I have considered the application, the affidavits, both in support of and in opposition to the application and the respective submissions made by the parties herein.

43. The applicant herein substantially seeks orders prohibiting the institution of criminal proceedings against the applicant by the Respondents.

44. The Applicant's case seems to be that he followed the law in the acquisition of the suit properties and that the complaints lodged by the interested party had been investigated by the police who earlier on recommended that the matter be dealt with as a civil matter.

45. The Respondents on their part contend that according to their investigations, there is sufficient evidence to sustain the intended charges against the applicant. They contend that the documents relied upon by the applicant were forged and that the firm of advocates who allegedly conducted the transaction has disowned the authenticity of the documents alleged prepared by them.

46. On the basis of the material placed before this Court there seems to have been some element of impropriety. As to who did engineer the same is not for this Court to determine.

47. Section 24 of the **National Police Service Act No 11 A of 2011** sets out functions of the Kenya Police Service as being the—

(a) Provision of assistance to the public when in need;

(b) Maintenance of law and order;

(c) Preservation of peace;

(d) Protection of life and property;

(e) Investigation of crimes;

(f) Collection of criminal intelligence;

(g) Prevention and detection of crime;

(h) Apprehension of offenders;

(i) Enforcement of all laws and regulations with which it is charged; and

(j) Performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

48. The word “investigate” is defined in the *Black’s Law Dictionary 9th Edition* as: “*To inquire into a matter systematically; to make an official inquiry.*”

49. In Republic vs. Chief Magistrate Milimani & Another Ex-parte Tusker Mattresses Ltd & 3 Others [2013] eKLR this Court expressed itself as follows:

“The Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial. That this Court has power to quash impugned warrants cannot be doubted. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the police to investigate allegations of commission of a criminal offence ought to be interfered with. It is not enough to simply inform the Court that the intended trial is bound to fail or that the complaints constitute both criminal offence as well civil liability. The High Court ought not to interfere with the investigative powers conferred upon the police or the Director of Public Prosecution unless cogent reasons are given for doing so... The warrants were issued to enable the allegations be investigated. Whether or not the investigations will unearth material which will be a basis upon which a decision will be made to commence prosecution of the ex parte applicants or any of them is a matter which is premature at this stage to dwell on.”

50. It is trite that the Court ought not to usurp the Constitutional mandate of the Respondents to investigate any matter that, in the Respondents’ view raise suspicion of the occurrence or imminent occurrence of a crime. The mere fact that the allegations made are likely to be found worthless, is not a ground for halting investigations into the complaints or even prosecutions made or brought to the attention of the Respondents since the purpose of a criminal investigations and prosecutions conducted *bona fide* is to consider both incriminating and exculpatory material and not just to collect evidence on the basis of which a criminal charge may be laid.

51. It must always be noted that judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence to the complaint 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 to bring to the attention of the investigators in the course of the conduct of the investigations.

52. However, if the applicant demonstrates that the investigations and prosecutions that the Respondents intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to the same since they must be carried out independently and must be carried out in good faith without malice or for the purpose of achieving some collateral goal divorced from the purpose for which the investigatory or prosecutorial powers are given to the Respondents.

53. 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...”

54. 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.”

55. The duty and mandate of the police was appreciated in Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR where 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. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. 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”.

56. It is therefore clear that whereas the discretion given to the respondents to investigate criminal offences and prosecute the same is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence, the Court will not hesitate to bring such proceedings to a halt. However, since judicial review applications do not deal with the merits of the case but only with the process, the Court in such proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are *bona fides* and that the same are being conducted in a fair manner, the High Court ought not to usurp the powers of the police by halting otherwise proper complaints made before them.

57. In this case, in light of the material placed before this Court, the Court cannot state with certainty that no fraud has been committed by any of the parties to these proceedings. Whereas it is true that the issues forming the subject of these proceedings may well give rise to civil proceedings, that does not, without

more, warrant the grant of the prohibitory orders sought herein. As was appreciated by this in Republic vs. Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR:

“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. Section 193A of the Criminal Procedure Code on this issue 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.”

58. It is therefore clear that the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers *inter alia* to take statements. The Respondents have enumerated the facts which led them to undertake the investigations in question. It is not the mandate of this Court in these proceedings to make a finding as to the merit of the decision.

59. In order for the applicant to succeed it must show that not only are the investigations which were being done by the police are being carried out with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. Although it was alleged that the criminal investigations have been commenced with a view to achieving collateral and extraneous purposes I am not satisfied based on the evidence on the record that this is so. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the *predominant* purpose is to further some other ulterior purpose and 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.

60. Dealing with the burden and standard in judicial review applications, it was held in Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69 that:

“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. 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...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.”

61. The other matter that has to be taken into account is that there is no evidence presented before me that the 1st Respondent, the Director of Public Prosecution, has made a decision to prefer charges against the applicant. To prohibit the charges against the applicant when no decision has been arrived at by the 1st Respondent may well be premature at this stage.

62. The power to commence criminal prosecutions is given to the 1st Respondent by Article 157(4) of the Constitution. This position was appreciated in by the High Court of Uganda in the case of **Uganda vs. Jackline Uwera Nsenga Criminal Session Case No. 0312 of 2013**, as follows:

“...the DPP is mandated by the Constitution (See Art. 120(3)(a)) to direct the police to investigate any information of a criminal nature and report to him or her expeditiously... Only the DPP, and nobody else, enjoys the powers to decide what the charges in each file forwarded to him or her should be. Although the police may advise on the possible charges while forwarding the file to DPP...such opinion is merely advisory and not binding on the DPP (See Article 120(6) Constitution). Unless invited as witness or amicus curiae (friend of Court), the role of the police generally ends at the point the file is forwarded to the DPP.”

63. The position was similarly appreciated in **Charles Okello Mwanda vs. Ethics and Anti-Corruption Commission & 3 Others (2014) eKLR** in which Mumbi Ngugi, J held that:

“I would also agree with the 4th Respondent (DPP) that the Constitutional mandate under 2010 Constitution with respect to prosecution lies with the 4th Respondent, and that the 1st Respondent has no power to ‘absolve’ a party and thereby stop the 4th Respondent from carrying out his constitutional mandate. Article 157(10) is clear...However, in my view, taking into account the clear constitutional provisions with regard to the exercise of prosecution powers by the 4th Respondent set out in Article 157(10) set out above, the 1st respondent (EACC) has no authority to ‘absolve’ a person from criminal liability...so long as there is sufficient evidence on the basis of which criminal prosecution can proceed against a person, the final word with regard to the prosecution lies with the 4th Respondent (DPP) ...”.

64. It is therefore my view that the discretion to be exercised by the Director of Public Prosecution is not tied to recommendations made by the investigative bodies. Therefore, the mere fact that the DPP’s decision differs from the opinion formed by the investigators is not a reason for interfering with the constitutional and statutory mandate of the DPP as long as he/she believes that he/she has in his/her possession evidence on the basis of which a prosecutable case may be mounted and as long as he takes into account the provisions of Article 157(11) of the Constitution as read with section 4 of the ***Office of Public Prosecutions Act***, No. 2 of 2013. One of the matters to be considered would be whether it is in the public interest that the prosecution be mounted. See ***The International and Comparative Law Quarterly*** Vol. 22 (1973).

65. Conversely, the mere fact that the investigators believe that there is a prosecutable case does not necessarily bind the DPP. As is rightly recognised by Sir Elwyn Jones in ***Cambridge Law Journal*** – April 1969 at page 49:

“The decision when to prosecute, as you may imagine is not an easy one. It is by no means in

every case where a law officer considers that a conviction might be obtained that it is desirable to prosecute. Sometimes there are reasons of public policy which make it undesirable to prosecute the case. Perhaps the wrongdoer has already suffered enough. Perhaps the prosecution would enable him present himself as a martyr. Or perhaps he is too ill to stand trial without great risk to his health or even to his life. All these factors enter into consideration.”

66. However, it is upon the DPP to consider those factors and not upon this Court to determine for him/her when such factors militate against the institution of criminal proceedings.

67. In my view, since the DPP is entitled to rely on any lawful sources to determine whether or not to commence criminal proceedings, the mere fact that the person making a complaint does not stand to suffer any injury does not disentitle the respondents from investigating the matter and taking any such lawful action as may be appropriate.

68. Accordingly, unless and until a decision to charge a person is made by the 1st Respondent, it is only in exceptional circumstances where the Court would prohibit, a decision being taken either way by the 1st Respondent.

69. Having considered the issues raised herein and the stage at which the proceedings are, I am of the view and I do hold that the threshold for granting the orders sought herein has not been met.

70. Consequently the Notice of Motion dated 29th day of May, 2015 fails and the same is dismissed with costs to the Respondents and the interested party.

71. Orders accordingly.

Dated at Nairobi this 6th day of June, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Macharia for the Applicant

Mr Odundo for Mr Kinga for the Respondent

Cc Mutisya