



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 49 OF 2015

**IN THE MATTER OF AN APPLICATION BY LOYFORD KABURU JOSEPH FOR LEAVE TO
COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW**

AND

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CAP 26 LAWS
OF KENYA**

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

**IN THE MATTER OF ARTICLE 20(1), (2), 21(1), 22(1), 25(C), 27(1), (2), 47(1), (2) AND 258(1)
OF THE CONSTITUTION OF KENYA 2010**

BETWEEN

LOYFORD KABURU JOSEPH.....APPLICANT

VERSUS

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

CHIEF MAGISTRATES, MAKANDARA LAW COURTS.....2ND RESPONDENT

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

THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

1. On 17th February 2015, Honourable W. Korir J granted the exparte applicant herein Mr Loyford Kaburu Joseph leave of court to apply for Judicial Review Orders of certiorari and prohibition to:

- a. Quash the decision of the 1st respondent Director of Public prosecutions to charge the applicant herein with the offence of forcible detainer contrary to Section 91 of the Penal Code,

Cap 63 Laws of Kenya in **Makadara Law Courts chief Magistrate's Court criminal case No. 5432 of 2014. Republic Vs Loyford Kaburu Joseph**;and

b. Prohibit the 3rd respondent Inspector General of police from arresting, investigating and or preferring any charges whatsoever against the applicant herein on account of the same facts in Makadara Law Courts **case No. 5432 of 2014, Republic Vs Loyford Kaburu Joseph**.

2. The Learned Judge also granted a stay for 90 days and directed that the substantive Notice of Motion together with skeletal submissions and list of authorities be filed and served with 10 days from the date of that order, and pursuant to the Exparte chamber summons dated 17th February 2015 filed in court on the same day under certificate of urgency.

3. The exparte applicant complied with the said orders and instituted Notice of Motion dated 27th February 2015 on the same day seeking for the substantive Judicial Review orders of certiorari and prohibition as per the leave to apply granted on 17th February 2015.

4. The notice of motion was supported by the verifying affidavit sworn by the exparte applicant herein **Loyford Kaburu Joseph**, the statutory statement and annexures annexed thereto as filed with the application for leave to apply dated 17th February 2015 and supporting affidavit filed with the notice of motion together with the annexures thereto.

5. In the grounds, verifying affidavit, statutory statement and the supporting affidavit which all provide the same back ground to these Judicial Review proceedings, the Exparte applicant avers and deposes that:

1. The 1st respondent has unilaterally, arbitrarily and capriciously commenced criminal proceedings in Makadara Law Courts CM'S Court Criminal case No. 5432 of 2014 Republic vs Loyford Kaburu Joseph.

2. That although the applicant is charged in Count 1 with the offence of forcible detainer contrary to Section 91 of the Penal Code and Count 2 with the offence of giving false information to a person employed in the public service contrary to Section 129(b) of the Penal Code, the said criminal proceedings against the applicant have been commenced against him with regard to the illegal and fraudulent transfer of his parcel of land by his estranged wife to another person.

3. That there exists a land litigation matter at the Chief Magistrates Court at Milimani being Civil case No. 7 of 2014 between one James Njuguna Munyui as the plaintiff herein as the defendant as shown by annexed copy of plaint in the said civil matter, which is yet to be concluded hence the issue of ownership of the plot subject matter thereof and of the criminal charges is yet to be determined.

4. Further, that one Peninah Wanjiku did on 26th March 2014 lodge a complaint at Kayole Police station that the applicant herein had forcibly detained her property contrary to Section 91 of the Penal Code.

5. That in the purported sale and transfer of the plot 622C Soweto subject of the criminal proceedings at Makadara Law Courts and the civil suit pending in Milimani Chief Magistrate's Court, the said Peninah Wanjiku is only but a witness and not purchaser or owner of the said plot.

6. Accordingly, it is deposed that the complainant in the criminal proceedings Peninah Wanjiku has no standing to press charges against the exparte applicant herein, as the only sale agreement is between James Njuguna Munyui, who is her husband and Jane Kawira the exparte applicant's estranged wife.

7. It is therefore contended that preferring criminal charges against the ex parte applicant herein is unlawful and an abuse of the court process and a waste of judicial time and that unless restrained, the respondent's actions are prejudicial to the ex parte applicant since the trumped up charges are frivolous, vexatious and oppressive to the applicant hence it is in the best interest of justice that the Judicial Review orders of certiorari and prohibition do issue.

6. In a detailed rejoinder to the ex parte applicant's notice of motion, the 1st and 3rd respondents filed a replying affidavit sworn by No. 55117 Corporal David Kibet who is the investigating officer in the impugned criminal case stationed at CID Kayole Branch, Nairobi and is conversant with all the matters, facts and circumstances concerning and relating to the subject matter of the proceedings herein.

7. In his 20 paragraph affidavit, CPL David Kibet deposed that on 13th October 2014 a complaint was made at Kayole police station by the applicant between that his plot No. 662C situated in Soweto had been sold by his wife. That James Njuguna and Penina Wanjiku also complained to the police that the applicant herein had refused to vacate from a land that they had legitimately bought from Jane Wawira Nyaga, the applicant's wife. That following those two different complaints, the deponent investigated and established that the suit plot was originally allotted to the applicant herein who transferred it to his wife Jane Wawira Nyaga voluntarily. That after the couple separated, Jane Wawira Nyaga sold the plot to James Njuguna through his wife Peninah Wanjiku at a sum of shs 818,000.

8. That it was after acquiring the suit plot that James Njuguna wrote to the applicant herein through his advocate giving the applicant a notice to vacate but that the applicant refused saying that the plot belonged to him. That when the police carried out forensic examination of signatures and handwriting on the transfer documents and letters as compared to the ex parte applicant's known handwriting and signature, they established that it was him who had signed transfer and written the letter passing ownership of the suit plot to his wife Jane Wawira Nyaga. And that it was then that the police preferred the impugned charges against the applicant.

9. It was further deposed that the Director of Public Prosecutions is empowered under Article 157(6) of the Constitution to institute, undertake, take over and continue or terminate criminal proceedings hence the respondent is discharging its duties and functions in the public interest and administration of justice among other constitutional functions. That the respondent had not abused or exceeded its powers or failed to comply with any legal or constitutional provisions in charging the applicant with a criminal offence.

10. It was further deposed that the applicant is seeking to curtail powers and mandate of the criminal justice system as enshrined in the Constitution. The deponent also denied that the criminal charges were framed or trumped up against ex parte the applicant. It was further deposed that the applicant has failed to demonstrate that the prosecution had not acted independently or had acted capriciously, in bad faith or had abused legal process to trigger this court's intervention. Further, that the respondents had not acted in excess of or without jurisdiction and neither had they breached the rules of natural justice in directing that the ex parte applicant be charged with criminal offences, having reviewed the evidence and witness statements before making the decision to charge the ex parte applicant, and urged the court to dismiss the Judicial Review proceedings.

11. Both parties filed written submissions.

12. In the applicant's submissions dated 11th July 2016, it was contended that the charges framed against him are arbitrary, and capricious because they relate to a dispute where his wife's illegal and fraudulent transfer of his Plot 622C Soweto to another person and that there is a civil suit CMCC Milimani 7/2014 pending between James Njuguna Munyui as plaintiff and the applicant herein with a hearing date fixed for 16th April 2015, which matter relates to ownership of the suit plot and which is yet to be concluded. Further, that in any case, in the impugned charge sheet, Peninah Wanjiku who is the complaint therein is but only a witness in the sale agreement hence not the owner of the land

therefore she has no legal standing to lodge criminal proceedings against the ex parte applicant herein and that a witness to a sale agreement cannot turn out to be the purchaser thereof complaining of being deprived of possession of the land by the ex parte applicant.

13. Further, that even in the purported complainant's statement to the police, she states that it is her husband who purportedly purchased the suit plot from the applicant's estranged wife. Consequently, it was submitted that the preferring of criminal charges against the applicant was unlawful, illegal, irregular and couched in procedural impropriety which the court should not condone. The ex parte applicant urged the court to grant the Judicial Review orders of certiorari and prohibition. He relied on the case of **Pastoli Vs Kabale Local Government Council and Others [2008] 2 EA 300** where the court held that:

“ In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.....illegality is when the decision making authority commits an error of law in the process of taking or making that act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.....”

14. The applicant maintained that the decision to charge the ex parte applicant by the respondents is an abuse of the court process, illegal, irrational and clouded in procedural impropriety and that the continued trial of the ex parte applicant by the Chief Magistrate's court will result in manifest injustice hence, the orders sought should be granted to stop the said injustice being done to the applicant.

15. In the view of the ex parte applicant, the criminal proceedings and civil proceedings going on at the same time will embarrass him.

16. The respondent filed submissions dated 18th July 2016 reiterating the depositions in the replying affidavit of No. 55117 Corporal David Kibet whose contents I have reproduced in this judgment with emphasis that the charges preferred against the applicant in criminal case No 5432/2014 are properly before the court and disclose offences recognized under the laws of Kenya and that the respondents' decisions were proper and within the law and in execution of their constitutional mandates.

17. Further, it was contended that in any event, existence of a civil suit does not preclude the bringing of criminal charges against the applicant even if the issues in question are the same, as stipulated in Section 193A of the Criminal Procedure Code.

18. It was the respondents' submissions that the application herein seeks to curtail the mandate of the criminal justice system actors as stipulated in the Constitution.

19. Further, that there is no evidence that the ex parte applicant will in any way be prejudiced by his continued prosecution in the criminal proceedings against him nor that there is an abuse of court process. That the accuracy or correctness of the evidence will be assessed by the trial court which is best placed to deal with the quality and sufficiency of evidence gathered and properly adduced before the trial court.

20. That the Director of Public Prosecutions is an independent office which does not operate under directions of any person as stipulated in Article 249(2) of the Constitution hence the Judicial Review proceedings hereto are misconceived, unfounded, unmeritorious and baseless since there is no demonstration that the respondents failed to act independently or that they acted capriciously or in bad faith or even abused legal process in a manner as to invite the court's intervention in this matter.

21. Further, that it had not been demonstrated that the respondents lacked jurisdiction, acted in excess of jurisdiction or departed from the rules of natural justice in directing that the applicants be charged with criminal offences.

22. It was further submitted that the applicant had not established the existence of conditions precedent for grant of orders of prohibition as there is no evidence of misuse of power or contravention of the rules of natural justice as alleged by the applicant. Reliance was placed on the decision in **Kenya National Examination Council Vs Republic Exparte Geoffrey Gathenji Njoroge & Others CA 266/1996** wherein it was stated that an order of prohibition is not intended to correct the cause, practice or procedure of an inferior tribunal therefore, that the respondents ought not to be interfered with in the running of their affairs. The respondents urged the court to dismiss the application herein with costs since it is an abuse of the court process.

Determination.

23. I have carefully considered the Judicial Review motion herein instituted by the exparte applicant against the respondent's seeking to quash the decision by the respondents to charge the exparte applicant with criminal offences; and to prohibit the continuance of the prosecution which is pending before the Makadara Chief Magistrate's Court on account that there is a similar case or proceedings going on before Milimani Chief Magistrates court touching on the same subject matter hence the criminal charges are orchestrated by bad faith.

24. I have given equal consideration to the replying affidavit sworn by the investigating officer No. 55117 Cpl David Kibet and the parties rival written submissions and authorities, and constitutional as well as statutory law relied on by counsels on record.

25. Article 165(1), (6) of the Constitution clothes this court with jurisdiction to supervise subordinate courts, bodies or authorities or any person exercising a judicial or quasi judicial function. That jurisdiction is intended to be exercised to curb abuse of power or process. In **Mohamed Gulam Hussein Farzal Karmah & Another V CM's Court Nairobi [2006] e KLR** Nyamu J observed that:

“ whilst the power of the High Court to intervene to stop a criminal prosecution must be exercised sparingly, the High Court always be ready to intervene to prevent any prosecution which is vexatious, oppressive malafides, frivolous or taken up for other proper purpose such as undue harassment of a party or abuse of the process of the court.”

26. From the above persuasive decision, it is clear that no judicial or quasi judicial power or function should be exercised unreasonably, irrationally or in excess of jurisdiction or without jurisdiction or in bad faith or in breach of the rules of natural justice and where such occurs, then the High Court is empowered to intervene to correct the abuse or misuse of the criminal justice system as well as abuse of court process.

27. Nonetheless, the Director of Public Prosecutions is empowered by Article 157(1) of the Constitution to direct the prosecution of any person suspected of committing a criminal offence. On the other hand, the Inspector General of Police is empowered under the National Police Service Act to investigate any allegation of criminal conduct through the Department of the Directorate of Criminal Investigation Department and recommend to the Director of Public Prosecutions for possible prosecution.

28. The Director of Public Prosecutions has the mandate under Article 157(1) of the Constitution to direct the National Police Service to investigate any allegation or complaint of criminal conduct. He is also empowered under section 5 of Office of the Director of Public Prosecutions Act, 2013 to direct the Inspector-General to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction. The office of Director of Public Prosecution Act No 2 of 2013 also mandates the Director of Public Prosecution to initiate and undertake criminal prosecution against any person.

29. The power of the Director of Public prosecution, however, is not absolute. It is subject to checks imposed by Article 157(1) of the Constitution which stipulates that in the exercise of that power he must have regard to public interest in the administration of justice and the need to prevent and avoid abuse of legal process. In other words, if the Director of Public Prosecution acts contrary to the

established constitutional and statutory norms, the court is mandated to intervene. It is not the mandate of this court in these proceedings to determine the merits or demerits of the pending criminal case against the ex parte applicant as it is not the trial court. It is neither the duty of this court to determine the sufficiency or otherwise of the evidence that the prosecution in the pending criminal case intends to call to prove the criminal charges framed against the ex parte applicant herein.

30. The only question is whether as averred and seriously contended by the ex parte applicant, there are civil proceedings pending between him and other parties over the same subject matter which is over land or property known as plot No, 622C situate in Soweto village, Kayole within Nairobi City County and whether by initiating the separate and parallel criminal proceedings against the ex parte applicant, the respondents are abusing their power and acting irrationally, and in bad faith. Annexure KLJI is the charge sheet in criminal 5432/2014 wherein the accused person is Loyford Kaburu Joseph, the ex parte applicant herein. The charges were drawn after his arrest on 12th November 2014. The charge/offences is (are) Forcible detainer contrary to Section 91 of the Penal Code; giving false information to a person employed in the public service contrary to Section 129(b) of the Penal Code.

31. In the particulars of the charges thereon, it is alleged that on 24th August 2013 at Soweto in Embakasi District within Nairobi County, being in possession of plot No. 622C of Peninah Wanjiku without colour of right, held possession of the said land in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, against Peninah Wanjiku who is entitled by law to the possession of the said land.

32. In count 2 of giving false information to a person employed in the public service, the particulars are that on 10th April 2014 at Kayole Police Station in Embakasi District within Nairobi County, informed No.55117 Corporal David Kibet, employed in the public service as a police officer that your wife Jane Wawira Nyaga forged documents of plot No. 622C information you knew or believed to be false, intending thereby causing the said David Kibet to use his lawful power to the said Jane Wawira Nyaga. The witnesses named in the charge sheet are Peninah Wanjiku who is also the complainant in the charge sheet, Mrs Jane Wawira (the applicant/accused person's wife), Justus Mutua and Job Kirundui. According to the ex parte applicant, the above charges are illegal, irregular and laced with procedural impropriety and should be quashed because they emanate from a civil dispute pitting him, his wife Jane Wawira Nyaga and one James Njuguna Munyui who is the complainant and Peninah Wanjiku's husband, which matter is pending before the Chief Magistrate's court at Milimani Commercial court vide CMCC No. 7/2014.

33. Further, the ex parte applicant asserts that the complainant in the criminal case is merely a witness in the sale agreement for disposal of the plot 622C Soweto village, Kayole and not the purchaser thereof. He further claims that in any case, the civil suit pending is what will determine ownership of the subject land hence the police or Director of Public Prosecutions cannot purport to charge him with forcible detainer before ownership thereof is established by the civil court. The ex parte applicant laments that the police are being used by his estranged wife to frustrate him hence they must be prohibited and the decision to charge him quashed as it is an abuse of court process.

34. On the other hand, the respondent contend that the court herein is being called upon to interfere with the criminal process which is a legitimate process since forensic evidence gathered by the police following a complaint by the 'owner' of the land in issue showed that the ex parte applicant herein executed transfer of land documents in favour of his wife Jane Wawira Nyaga and who in turn sold the suit plot to Mr James Njuguna Munyui but that he later turned around to disown his actions of transferring the plot to his wife voluntarily and reported to the police that the transfer documents had been forged by his said wife Jane Wawira Nyaga. That after forensic investigations, the deponent investigator found that the ex parte applicant herein was found to have executed the disputed documents hence the charge of giving false investigation to a person employed in the public service. Further, that the ex parte applicant forcibly remained in possession of the suit land/plot hence the first count of forcible detainer.

35. From the above rival positions, and in the midst of all the accusations counter accusations is plot No.

622C Soweto village in Kayole. In the plaint filed on 6th January 2014 by James Njuguna Munyui against Loyford Kaburu Joseph, filed at Milimani Commercial CMs Court, the plaintiff therein James Njuguna Munyui claims that he is the proprietor and or lawful owner of all that property known as plot No. 622C Soweto/Kayole within Nairobi County, having purchased it from Jane Wawira Nyaga, the defendant (exparte) applicant's wife on 15th October 2013 and that the seller and her family including the exparte applicant herein agreed to vacate the same on 1st December 2013 and thereafter the plaintiff would collect total monthly rental income of shs 15,000/-. The purchase price/consideration was shs 900,000 according to the agreement dated 15th October 2013 annexed and marked (LKJ2). The sale agreement was witnessed by Peninah Wanjiku. In the said plaint, the plaintiff seeks the following prayers:

- a) A declaration that the defendant's continued occupation and or possession over plot 622C situated in Soweto village is illegal and is inimical to the plaintiff's rights to property.
- b) A permanent injunction restraining the defendant whether by himself or his agents, servants or employees from interfering, selling, disposing off, entering into, accessing, alienating, trespassing, and/or accessing the plaintiff's property whether by himself his agents and further restraining the defendant whether by himself or his agents, servants or employees from collecting and or/deriving rental income from the semi permanent rooms erected on plot 622C situate in Soweto village.
- c) A mandatory injunction evicting the defendant from plot No. 622C situated in Soweto village.
- d) Mesne profits for trespassing,
- e) Costs of the suit and interest at court's rate.
- f) Any other relief that the Honourable court may deem just and fit.

36. In short, what the plaintiff is saying in the above civil suit which was instituted against the exparte applicant herein is that the latter has without colour of right encroached /trespassed onto plot No. 622C Soweto village belonging to the plaintiff and refused to vacate therefore the exparte applicant should vacate or be evicted since his occupation of the suit plot is unlawful. Further, that the plaintiff is entitled to compensation in mesne profits due to the exparte applicant's continued unlawful occupation of the suit plot.

37. From the above undisputed facts, I have no doubt in my mind that in the civil suit which is still pending hearing and determination in the lower court, the plaintiff's claim against the exparte applicant herein who is the defendant therein is a case of trespass to land and that is why he is seeking reliefs of eviction and mesne profits to compensate him for non use of his land.

38. However, the striking feature about the charge sheet in the impugned criminal case is that it alleges that the exparte applicant has forcibly detained or occupied the same suit plot 622C Soweto/Kayole in Nairobi County, and this time round, the property is now owned by Peninah Wanjiku who is the complainant and who is not a party in CMCC 7/2014.

39. On the basis of the above assessment, I am persuaded that the dispute between the parties hereto is purely of civil nature and that the police and Director of Public Prosecutions were being dragged into the matter improperly. There is an established civil legal process for resolving disputes relating to ownership, title to and trespass to land as stipulated in Article 162(2) (b) of the Constitution, noting that even the notice to vacate the land dated 4th November 2013 alleges that the applicant is the tenant. The plaintiff in CMCC 7/2014 has initiated that process.

40. From annexure LKJ4, this court gets the clearest impression that when the plaintiff in CMCC 7/2014 filed that suit and contemporaneous with the plaint, sought for mandatory interlocutory

injunction restraining the ex parte applicant and or compelling him to vacate the suit land and to deliver vacant possession of the suit land/plot to the plaintiff and upon his application for mandatory interlocutory injunction being dismissed on 7th March 2014 by Honourable Lorot H.R. with costs to the ex parte applicant herein, that is when the plaintiff in that suit, who is the husband to the complainant in the impugned criminal case resorted to the criminal justice system by using his wife Peninah Wanjiku to initiate criminal proceedings of forcible detainer vide criminal 5432/2014.

41. In my humble view that is a clear manifestation of being mischievous, frivolous, vexatious and an abuse of the court and legal process leave alone malafides. If the plaintiff in the civil suit who is the husband to Peninah Wanjiku the complaint in the criminal case was dissatisfied with the decision of the magistrate dismissing his application for mandatory injunction, he should have appealed against that order/ruling or in the alternative, fast tracked the hearing of his suit against the ex parte applicant, and not to reincarnate through his wife to initiate criminal proceedings against the ex parte applicant.

42. On the basis of the above facts which are undisputed, I find that the ex parte applicant has a legitimate complaint against the respondents who are no doubt being used to abuse the legal and judicial process.

43. As correctly submitted by the ex parte applicant's counsel, the pending civil suit is raising questions of ownership of plot No. 622 C Soweto village, Kayole which has not been resolved. If the police did assist the plaintiff in that case to carry out forensic investigations to determine whether the ex parte applicant did execute transfer documents in favour of his wife, then that forensic evidence should be adduced in the civil suit to prove ownership of the plot, and not to press criminal charges against the ex parte applicant while the civil suit which was instituted earlier is still pending before a court of competent jurisdiction.

44. In the **National Assembly V Honourable James Njenga Karume CA 92/1992 Nairobi** the Court of Appeal stated that:

“ In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rule cannot oust clear constitutional and statutory provisions.”

45. In my humble view, the civil suit No. 7/2014 should first be heard and determined on its merits and since the plaintiff therein and the complainant in the criminal case are no doubt claiming under the same title, if they are successful, they will enforce the evictions and mandatory injunctive orders as prayed therein, as well as execute for the recovery of mesne profits for unlawful use of their land, since the plaintiff is seeking declaratory orders that the suit plot belongs to him and the situation has not changed and it has not been demonstrated that such position has changed, as shown by the affidavit sworn by No. 55117 Corporal David Kibet.

46. Indeed, if the police and Director of Public Prosecutions are relying on the same sale agreement between Jane Wawira Nyaga and James Njuguna to press forcible detainer charges against the ex parte applicant, which is the same agreement that the plaintiff in the civil suit is relying on to claim ownership of plot 622C Soweto then it is irrational to claim that the complainant in the forcible detainer charges is Peninah Wanjiku. It is immaterial that the money was transferred by Peninah Wanjiku, since she is not privy to the sale agreement in question and neither does that sale agreement indicate that she was the beneficiary of the transaction, going by Annexure DIC 2 dated 15th October 2013.

47. In my humble view, Section 193A of the Criminal Procedure Code would only come to the aid of the respondents if they had not acted in bad faith as is apparent in this case that they are using the criminal process to enforce a pending civil claim which is not determined and after the plaintiff in the civil suit miserably failing to obtain a mandatory injunction which was to be used to evict the

exparte applicant from the disputed plot 622C Soweto/Kayole before the main suit is heard and determined.

48. As earlier stated, this court will intervene in criminal proceedings, where it is apparent that the respondents are clearly abusing the powers and functions entrusted upon them in the execution of their statutory or even constitutional mandate.

49. The remedy of Judicial Review is concerned with the decision making process and not the merits of the decision or with private rights of individuals. It is meant to ensure that individuals are given fair treatment by the body to which they are subjected to as was held in the case of **Republic Vs Secretary of State for Education and Science Exparte Avon County Council [1991] 1 ALL ER 282.**

50. Judicial Review orders of certiorari lies to quash the decision of a body, person or authority exercising judicial or quasi judicial jurisdiction, which is made without jurisdiction or in excess of jurisdiction or where the body has failed to apply the rules of natural justice or fair administrative action, where the decision is illegal or unreasonable (see **CA 266/1999 KNEC V Republic Exparte Godfrey Githinji.**

51. In applying the principles set out in numerous case law cited, and considering the judicial review orders sought in these proceedings, I find that the decision by the 1st and 3rd respondents to invoke the criminal justice system to prefer criminal charges against the exparte applicant in a matter which is purely civil in nature was not only unreasonable but also irrational and irregular. I am fortified by the decision in **Associated Provincial Picture House V Wednesbury Corporation (1948) 1 KB 233**, where Lord Green MR Pronounced himself that:

“ Decisions of persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by appropriate order of Judicial Review proceedings where the court concludes that the decision is such that no person or body properly directing itself on the relevant law and acting reasonably could have reached that decisions.”

52. In the instant case, the decision by the police and the Director of Public Prosecution to charge the exparte applicant with forcible detainer of plot 622C purportedly belonging to Peninah Wanjiku when there is a pending civil suit vide CMCC 7/2014 between Peninah Wanjiku’s husband James Njuguna Munyui who claims to have bought it from the exparte applicant’s estranged wife at a consideration, and which civil suit seeks to determine not only the ownership of the suit plot but also the lawfulness of the exparte applicant’s continued occupation of the same, was to say the least, unreasonable, unconscionable, arbitrary and oppressive.

53. In addition, as the matters in dispute can effectively be resolved through civil litigation, shifting of claimants in the same dispute or matter to achieve a conviction against the exparte applicant by all means is not only abuse of power but also amounts to abuse of the court process and malafides and more so, unlawful on the part of the Director of Public prosecutions who ought to seriously peruse files to determine what is criminal and what is not, as was stated in **Peter George Anthony D’costa V Attorney General & Another Petition 83/2010** where the court was emphatic that:

“ The process of the court must be used properly and in good faith and must not be abused. This means that the court will summarily prevent its machinery from being used as a means of vexatious and oppressive in the process of litigation. It follows that where there is an abuse of the court process, it is the duty of the court to stop such an abuse of the court process.”

54. In **Republic V Commissioner of Police and Another Exparte Michael Monari [2012] e KLR** the court defined abuse of court process as :

“ proceedings taken in bad faith or circumstances yielding an inference that they were up to no good. Criminal law is not to be used oppressively to punish acts which in truth might be technically a breach of criminal law but which contains no real vice and which can only be best handled under a process other than the criminal process namely any of the different systems of civil remedies. See Floriculture International Ltd HCC 144/1997.”

55. In my view, the civil litigation process also exists to provide effective remedies to disputants especially on issues of ownership of land and where such process has been initiated by the private persons themselves, the police and the Director of Public Prosecutions have no business to interfere and purport to press criminal charges against the offending parties. Such conduct is what subjects the public tax payers to unwarranted costs of paying for damages in malicious prosecution claims and which can be avoided.

56. Accordingly, I find that the exparte applicant has made out a case for Judicial Review Order of certiorari to remove into this court and quash the decision of the police and the Director of Public Prosecution to prefer criminal charges against the exparte applicant in the attendant criminal proceedings pending before the **Chief Magistrate in Criminal 5432/2014. Republic Vs Loyford Kaburu Joseph** which decision and charge are hereby removed into the High Court and quashed.

57. On the prayer for Judicial Review order of prohibition, the purpose of Judicial Review remedy of prohibition is to prohibit the body charged with the decision making, from making or taking any further or contemplated steps without jurisdiction or in breach of the rules of natural justice as was held in the case of KNEC (supra) that:

“ What does an order of prohibition do and when will it issue? It 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 for 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.”

58. In the instant case, I have already pronounced that the decision to charge the exparte applicant with the offences as per the charge sheet namely forcible detainer and the entire criminal proceedings pending in Makadara Chief Magistrate’s Court criminal 5432/2014 are hereby quashed by an order of certiorari. That being the case, there remains nothing capable of being prohibited. Accordingly, I decline to issue Judicial Review order of prohibition as prayed and proceed to dismiss it.

59. In the end, I allow the exparte applicants Notice of Motion dated 27th February 2015 in terms of prayer No. 1 in the following terms:

a. That a Judicial Review Order of certiorari be and is hereby issued removing into this court and quashing the criminal proceedings and or charges against the exparte applicant herein Loyford Kaburu Joseph as initiated by the 1st and 3rd respondents and pending before the 2nd respondent vide Makadara Chief Magistrate’s Court criminal case No. 5432 of 2014 between Republic vs Loyford Kaburu Joseph.

b. Each party to bear their own costs of these Judicial Review proceedings including for application for leave to apply.

Dated, signed and delivered in open court at Nairobi this 13th day of September 2016.

R.E. ABURILI

JUDGE

In the presence of (judgment t date was given in court in the presence of all parties' advocates)

No appearance for Exparte applicant

No appearance for the respondent

Court Assistant Adline