



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS APPLICATION NO. 34 OF 2016

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

IN THE MATTER OF AN APPLICATION BY CHARLES MBUGUA

NJUGUNA ORDERS OF PROHIBITION AND CERTIORARI

AND

IN THE MATTER OF CONSTITUTION OF KENYA 2010, ARTICLES 27 (1) (2), 47(1),(2),(3)

IN THE MATTER OF ARRAIGNMENT, CHARGE AND ONGOING PROSECUTION OF CHARLES MBUGUANJUGUNA KIKUYU PRINCIPAL MAGISTRATE COURT IN CRIMINAL CASE NO. 1171 OF 2015 ARISING FROM COMPLAINTS RELATED TO HIS ENGAGEMENT AS COUNSEL BY PARTIES WHO ARE ACTIVELY ENGAGED IN CIVIL LITIGATION IN THE HIGH COURT AND COURT OF APPEAL OF KENYA

AND

IN THE MATTER OF BLATANT INTIMIDATION AND VICTIMIZATION OF COUNSEL DULY RETAINED AND REPRESENTING A PARTY TO A CIVIL DISPUTE AND ABUSE OF POLICE PROSECUTORIAL POWERS TO DISABLE AND UNSETTLED A LEGAL PROFESSIONAL IN PROVIDING LEGAL SERVICES IN ORDER TO GRANT UNDUE ADVANTAGE TO THE COMPLAINANT, A PARTY TO ONGOING CIVIL PROCEEDINGS IN THE HIGH COURT AND COURT OF APPEAL

AND

IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW AGAINST THE CHARGING AUTHORITY (OCS) KIKUYU AND DCIOKIAMBU) AND THE COURT SEIZED OF THE CRIMINAL MATTER (KIKUYU PRINCIPAL MAGISTRATE COURT) TO SECURE PROTECTION OF THE LAW AGAINST UNREASONABLE, IRRATIONAL AND BASELESS CHARGING AND PROSECUTION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KIKUYU MAGISTRATES

COURT (CRIMINAL DIVISION.....1ST RESPONDENT

COUNTY CRIMINAL INVESTIGATIONS

OFFICER KIAMBU.....2ND RESPONDENT

OFFICER COMMANDING STATION KIKUYU.....3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....4TH RESPONDENT

AND

NICHOLAS KABUCHO MURIMI.....1ST INTERESTED PARTY

JOE GATHU KIMEMIA.....2ND INTERESTED PARTY

JOSEPH KARANJA MBUGUA3RD INTERESTED PARTY

PAUL KINUTHIA MBURU.....4TH INTERESTED PARTY

FRANCIS KAGWE MBAYA.....5TH INTERESTED PARTY

ERASTUS GATHAGE GATU.....6TH INTERESTED PARTY

DAVID MUROKI KAGWE.....7TH INTERESTED PARTY

NUNI GENERAL TRADING

CO. LIMITED.....8TH INTERESTED PARTY

ESROM N. MIRINGA.....9TH INTERESTED PARTY

DAVID NJANE RUIYI.....10TH INTERESTED PARTY

EX PARTE: CHARLES MBUGUA NJUGUNA

JUDGEMENT

Introduction

1. By a Notice of Motion dated 3rd February, 2016, the applicant herein, **Charles Mbugua Njuguna**, seeks the following orders:

1. That this honourable be pleased to grant to the ex parte applicant an order of prohibition prohibiting further prosecution of the applicant in Principal Magistrates Criminal Courts in Kikuyu in Criminal Case No. 1171 of 2015 (Republic versus Charles Mbugua Njuguna.

2. That this honourable court be pleased to grant to the ex parte applicant an order of certiorari to bring to the High Court to decision of the County Criminal Investigations

Officer Kiambu and OCS Kikuyu to charge the applicant herein as per the charge sheet presented in Kikuyu Criminal Case No. 1171 of 2015 (Republic versus Charles Mbugua Njuguna) and to quash the charges therein.

3. That costs of application be provided for.

Ex Parte Applicant's Case

2. According to the ex parte applicant, on 13th March, 2015 his firm was instructed to represent Muguga Investment Company Limited (hereinafter referred to as "the Company") by **Esrom Ngugi Miringa, Henry Mungau Thongote** and **David Njane Ruiyi** who informed him that they were directors of the company and gave him documents in support thereof. They further instructed him to institute court proceedings in the name of the company against the former directors and **Nuni General Trading Company Limited**.

3. According to the applicant, prior to filing the suit he sought to verify the directorship of his instructing clients and wrote to the Registrar of Companies to confirm the directors of the company via letter dated 17th March, 2015 delivered and paid for on same day. Thereafter, his clients followed up the CR12 which they delivered in his office on 18th March, 2015 and he was advised by them to contact one **Eddy Kimemia** who personally collected the CR12 from the Registrar of Companies office and delivered it to his office.

4. Pursuant to his instructions, the applicant instituted on behalf of Muguga Investment Company Ltd High Court Civil Suit No. 126 of 2015 to which the defendants filed their responses where they alleged the CR12 was not genuine. It was averred that in the course of the hearing it became clear that there was a dispute as to who were the genuine directors of Muguga Investment Company Limited. The matter was canvassed before **Honourable Justice Gikonyo** where the Judge summoned the Registrar of Companies one **Consolata Maweu** who personally attended court and was examined on oath by the court and produced a copy of the company file for courts perusal. The Judge further summoned the DCIO Kikuyu who caused a document examiner's report on the said CR12 to be filed in court and after the hearing the learned judge reserved the ruling to be delivered on 7th October, 2015.

5. It was averred that prior to delivery of the ruling, and at the behest of defendants in HCCC 126 of 205 the applicant's clients' directors **Esrom Miringa** and **David Njane Ruiji** were charged at Kikuyu Criminal Case No. 594 of 2015 allegedly for making the said CR12 without authority, a matter in which the applicant was retained to defend them and he successfully applied to defer the plea pending the ruling in HCC 126 of 2016 which was delivered by **Kariuki, J** on 7th October, 2015 on behalf of **Gikonyo, J**. By that decision, the Court among other orders restrained the defendants from acting as directors of the company or otherwise interfering with the smooth running and management of the company and in the said ruling paragraph 50 the judge addressed the issue of the Directorship and the impugned CR12 and held as a fact that the issue of who are the lawful directors ought to be determined at trial as there was a *prima facie* case that the defendants were removed as directors of the company.

6. The applicant averred that on 12th November, 2015 after representing his clients in Kikuyu Criminal Case No. 594 of 2015 he was accosted by CID officers from Kikuyu and arrested and taken to the station where he was advised that they had received orders from CCIO Kiambu to arrest and charge him for forgery of the CR 12 dated 17th March, 2015 and he was thereafter released on cash bail of Kshs 25,000.00 and requested to write his statement explaining how he got possession of the said CR12 which statement he delivered on 16th November, 2015 together with statement of his clerk **Daniel Mutura** who applied for the CR12 and statement of **Eddy Kimemia** who delivered the same to his office. The applicant disclosed that he simultaneously wrote to the County Criminal Investigation Officer Kiambu raising the issues via letter dated 16th November, 2016 and was advised to report on 18th November, 2015 for further progress. On the material date he was advised that they have firm instructions to have him charged and the same day he was arraigned in Kikuyu Principal Magistrate's court in Criminal Case No. 1171 of 2015 for the following offences

a. Count1: Forgery Contrary to Section 349 of the **Penal Code** Particulars: On 17/3/2015 with intent to deceive forged a certain signature on CR 12C 12621 purporting to be genuinely signed by Colleta Maweu assistant registrar of Companies a fact known to be false.

b. Count2: Making a document without Authority Contrary to Section 357(a) of the Penal Code. Particulars: On 17th day of March 2015 without lawful authority made a certain document namely CR12 C12621 dated 17/3/2015 in the names of Muguga Investments Company Limited purporting to have been prepared and issued from the registrar of companies,

c. Count3: Uttering a false document contrary to Section 353 of the Penal Code Particulars: On the 18/3/2015 at the Commercial Division Milimani High Court Nairobi within Nairobi Count knowingly and fraudulently uttered a certain document namely CR12 C 12621 dated 17/3/2015 in the names of Muguga Investments Company Limited purporting to have been prepared and issued from the Registrar of Companies.

7. To the said charges, the applicant pleaded not guilty and released on a cash bail and hearing scheduled for 11th February, 2016. According to the applicant his follow up of the matter with the police revealed that:

a. That **Nicholas Murimi, David Kagwe** and **Joseph Mbugua** who were defendants in HCC No. 126 of 2015 immediately after the ruling delivered on 7th October, 2015 – wrote a letter to various offices including Director of Criminal Investigations Department. In the letter they complained against the applicant allegedly for having knowingly submitted forged and faked documents and misled the court in determining the outcome of the case. They further demanded that the applicant be charged.

b. That by a letter dated 29th October, 2015 the County Criminal Investigations Officer- Kiambu directed that action be taken against the applicant immediately.

c. Though the complainant was alleged to be **Colleta Maweu** no formal statement had been recorded by her nor had she raised any complaints against the applicant.

d. That the registrar companies had confirmed receipt of the letter requesting for the CR12 and issued a receipt for the same.

e. That despite the statements given by **Eddy Kimemia** and **Daniel Mutura** the instructions were to have the applicant charged in order to embarrass him and to frustrate his ability to represent his clients in the Civil and the Criminal proceedings

f. That there was no prima facie evidence warranting me to be arraigned in court.

8. The applicant reiterated that the sole reason he was being charged was because of the complaint by the defendants in the HCC No. 126 of 2015 since the issue of the said CR12 was extensively canvassed before **Justice Gikonyo** and the Judge in page 44 of the ruling extensively made comments in respect thereof. It was averred that the CID did not carry out independent investigations and the decision to charge him in court was made without due process. Additionally, in light of the statements of **Eddy Kimemia** and **Daniel Mutura** and the supporting documents, the decision to charge him was irrational and not one which a right thinking person who applied his mind on the facts would make.

9. It was emphasised that the sole reason the defendant wanted him charged was to frustrate his capacity as an advocate to represent his clients hence they were abusing the criminal process to achieve their end. Towards this the said complainants wrote to the Law Society of Kenya and demanded he withdraws from representing his clients in the various matters allegedly because he had been charged. This, it was averred shows clearly the goal for pursuing the said criminal charges is to intimidate him as an advocate and frustrate his ability to represent his clients and to carry out the duties of an advocate. The sole reason is to

unlawfully obtain an advantage over his clients in the civil cases pending in the High Court and Court of Appeal. It was disclosed that the High Court declined an application for stay by the defendants after which the defendants moved to the Court of Appeal which stayed some of the orders granted by the High Court pending hearing of the appeal on merits.

10. In the applicant's view, the charges were brought to achieve ulterior motives and in blatant disregard of cardinal duty of fairness since even the document examiner report by DCIO Kikuyu did not incriminate him at all. He therefore asserted that the decision and charges are irrational and unreasonable and ought to be quashed.

9th and 10th Interested Parties' Case

11. The 9th and 10th interested parties, on their part supported the application.

12. According to them, the arrest and subsequent indictment/arraignment in court of the *ex parte* applicant was carried out in extreme bad faith, with ulterior motives, without any justifiable cause or basis and constitutes an unabashed blatant abuse of office by the 2nd and 3rd respondents as well as contumacious abuse of prosecutorial discretion on the part of 4th respondents which this court ought not countenance. According to them, the decision to arrest and indict the *ex parte* applicant is capricious, based on irrelevant considerations, spurious, illegal, irrational and is a classic case of "Wednesbury's unreasonableness" and this court ought to rise to its cardinal duty and remove the said charges before the 1st respondent and quash the same to vindicate the law on review of administrative actions.

13. The said interested parties confirmed that they represented to the *ex parte* applicant that they were directors of Muguga Investment Company Limited and gave him instructions to file HCCC NO. 126 of 2015 where they have sued the 1st to 8 interested parties, inter alia, on the grounds that the 1st to 7th interested parties had illegally held themselves out as directors of the said company and purported to grant a lease to the 8th interested party without any authority from the said company or its shareholders. They confirmed that the *ex parte* applicant did conduct a search at the Registrar of Companies to confirm their directorship status and based on information received from one **Eddy Kimemia**, their representative, he collected the said search (CR 12) from the company's registry and delivered to the *ex parte* applicant's offices.

14. The said interested parties disclosed that HCCC No. 126 of 2015 was filed on 18th March 2015 and in their response to the application for temporary injunctions which was filed contemporaneously with the suit, the 1st to 7th interested parties filed a replying affidavit on 24th March 2015 where they claimed that the interested parties had attached an altered document (letter dated 17th March 2015 (CR 12) to their application and prayed that it be disregarded. During the hearing of the said application, an issue arose as to who were the genuine directors of the said company whereupon the judge summoned the Assistant Registrar of Companies, one **Colleta Maweu**, who had apparently signed the said CR 12 and who then personally attended court and was examined by the court. She also produced a copy of the said company's file for the Court's perusal and the Judge further summoned the DCIO Kikuyu who caused a document examiners report on the said CR12 to be filed in court which was apparently done pursuant to a complaint lodged with the police by the 1st interested party accusing the 9th and 10th interested parties of having forged several documents (amongst them the said CR 12) and using the said documents in the said suit. It was disclosed that nowhere in that exhibit memo form was the *ex parte* applicant named as a forgery suspect despite the fact that the impugned CR 12 was part of the case that he had filed.

15. However two months later on 1st July 2016, the said interested parties were arraigned before the Kikuyu Magistrate Court in Criminal case number 594 of 2015 as per the copy of charge sheet attached to the *ex parte* applicant's affidavit though the *ex parte* applicant was not charged with them despite the fact that the interested parties and the 2nd, 3rd and 4th respondents had all the facts and were fully aware that he had filed the impugned CR 12 in the said HCCC No. 126 of 2015. It is then that they instructed the *ex parte* applicant to represent them in the criminal proceedings and defer the plea to await the outcome of

the ruling on the application for temporary injunction in the said case and the court allowed the application for deferral of the plea.

16. It was averred that three months later on 7th October 2015, the judge delivered his ruling in the said HCCC No. 126 of 2015 in the said interested parties' favour granting *inter alia* orders of injunction against the 1st to 7th interested parties chief among them an injunction restraining them from leasing the assets of the said company or representing themselves as directors or agents of the said company. The court further enjoined them from interfering with the smooth running and management of the said company. It was averred that at paragraph 50 of the said ruling, the Judge addressed the issue of directorship and the impugned CR12 and held as a fact that the issue as to who are the lawful directors ought to be determined at the trial as there was a prima facie case that the defendants had been removed as directors of the company.

17. It was contended that the 1st, 3rd and 7th interested parties were not in the least amused and even before the judges ink had dried, they wrote a letter of complaint to various offices among them the Directorate of Criminal Investigations and the 4th respondent purporting that the *ex parte* applicant had knowingly submitted forged and faked documents and misled the court in determining the outcome of the said HCCC No. 126 of 2015. It was however emphasised that this letter did not in any way impute that the *ex parte* applicant had forged or faked any document listed therein but only relayed a complaint of him having "knowingly submitted forged and faked documents and misled the court in determining the outcome of the" said HCCC No. 126 of 2015. It was the said interested parties' case that since the said letter of complaint by the 1st, 3rd and 7th interested parties did not impute any forgery or uttering or making a false document on the part of the *ex parte* applicant, there was no nexus between the complaint in that letter and the decision to charge the *ex parte* applicant with the said offences. Consequently, the charges had no foundation and are an obvious illegality.

18. To the said interested parties, contrary to the impression created by the 4th respondent in his affidavit sworn by one Ken Mwenge on 2nd March 2016 that it was the Assistant Registrar of companies, one **Colleta Maweu** (whose signature is alleged to have been forged) who made a complaint leading to the indictment of the *ex parte* applicant, it was in fact this letter of complaint by the 1st, 3rd and 7th interested parties that prompted the 2nd, 3rd and 4th respondent to initiate action against the *ex parte* applicant as confirmed by the letter dated 29th October 2015 from the 2nd respondent in which the 2nd respondent made reference to the said letter of complaint by the 1st, 3rd and 7th interested parties dated 7th October 2015 and directed that the said Ken Mwenge do take immediate action against the *ex parte* applicant. The said letter by the 2nd respondent however made no reference to a complaint lodged by the said Assistant Registrar of companies at all. In any event, according to the said affidavit of the 4th respondent, the alleged complaint by the said Assistant Registrar of companies was allegedly made on 4th November 2015, five days after the 2nd respondent had directed that action be taken against the *ex parte* applicant.

19. It was however contended that the letter from the Assistant Registrar of Companies dated 4th November 2015 is a response to the letter from the 2nd respondent of the same day where the latter had attached the said CR 12 and receipt for verification meaning that the complaint had already been made. To this extent, the feeble and impotent attempt by the 2nd, 3rd and 4th respondents through the said **Ken Mwenge** to create the impression that the *ex parte* applicant was charged pursuant to a complaint by the said Assistant Registrar of Companies is a tragic demonstration of the debauchery and devious schemes on the part of the 4th respondent to by all means sustain the trump up charges levelled against *ex parte* applicant. The Court was urged to note that the decision to take action against the *ex parte* applicant as conveyed by the 2nd respondent was made even before the said Assistant Registrar of Companies recorded her statement with the police. So that by the time it was made, the apparent author of the CR12 had not yet disowned the same before the 2nd or 3rd respondents. To these interested parties, it is obvious that the arrest and subsequent arraignment of the *ex parte* applicant in court which was executed pursuant to the directive by the 2nd respondent was wholly irrational, capricious, hasty, premature, fickle and without any basis. Moreover, the forensic documents examiners report merely concluded that the CR 12

was not authored by the Assistant Registrar of Companies but did not claim or in the least impute that the same was forged by the *ex parte* applicant and no attempt was made to conduct any comparisons between the *ex parte* applicants handwriting with the signature on the CR 12 before the *ex parte* applicant was arraigned in court.

20. It was averred that the said letter of complaint by the 1st, 3rd and 7th interested parties was written just after the judge had delivered his ruling against the 1st to 8th respondents which was after a duration of six months since the said HCCC No. 126 of 2016 (where the *ex parte* applicant is accused of having “knowingly submitted forged and faked documents and misled the court in determining the outcome of”) was filed by the *ex parte* applicant. The timing of the complaint which was just after the *ex parte* applicant had secured an adverse ruling against the 1st to 8th interested parties, it was contended, was suspect and a clear demonstration of irresponsibly irked and disgruntled complainants. To them, while the 1st, 3rd and 7th interested parties had all the time since the case was filed by the *ex parte* applicant to complain that the latter had “knowingly submitted forged and faked documents”, at no point even in the civil process did they point a finger at the *ex parte* applicant. Having failed in the civil process courtesy of the *ex parte* applicant, it was contended the 1st, 3rd and 7th interested parties could not stand the intrepid *ex parte* applicant and decided to now focus on the *ex parte* applicant to intimidate and pressure him to recuse himself from representing the said interested parties further.

21. The 9th and 10th interested parties asserted that while indeed nothing prohibits the criminal process running concurrently with the civil process, it is apparent that the criminal process herein has been commenced with ulterior motives solely to settle scores by intimidating the *ex parte* applicant for having bravely represented them and secured adverse orders against the 1st to 8th interested parties. It was disclosed that on 16th November 2015, the *ex parte* applicant provided his statement to the police accompanied by that of his clerk, one **Daniel Mutura** and another statement by the said **Eddy Kimemia** and in those statements, the *ex parte* applicant’s said clerk indicated that he is the one who lodged the application for the said CR 12 and paid for it while the said **Eddy Kimemia** indicated that he is the one who collected the CR 12 from the company’s registry and delivered it to the *ex parte* applicant. However, despite the evidence on record demonstrating that the *ex parte* applicant had no contact with the said CR 12 until it was delivered to his office, the 4th respondent still proceeded to charge the *ex parte* applicant.

22. It was contended that having regard to the evidence that was before the 4th respondent, the decision to charge the applicant is one that totally defies logic and acceptable moral standards and one that no tribunal properly directing itself on the facts would take. It is wholly irrational, an abuse of prosecutorial discretion and the court’s process, actuated by malice and other irrelevant considerations. While appreciating that judicial review is not concerned with the merits of a decision and that the *ex parte* applicant does not question the merits of the decision to charge him, it was revealed that he questions the rationality of and/or the logic behind that decision in the face of the evidence that was before the 4th respondent prior to his arraignment in court.

23. It was the said interested parties’ case that the decision to arrest and charge *ex parte* applicant falls squarely within the four corners of judicial review jurisdiction and this court ought to protect the *ex parte* applicant from the clear abuse of prosecutorial discretion by the 4th respondent.

2nd, 3rd and 4th Respondents’ Case

24. According to the 2nd, 3rd and 4th Respondents, on 4th November, 2015 one Ms. **Colleta Maweu**, Senior State Counsel based at the Registrar of Companies, made a complain to CID Kikuyu that she had received a letter ref CID/C/CRI/6/7/VOL.XI/25 dated 4th November, 2015 from DCIO Kikuyu attached with a receipt S/No. C 0588097 and CR 12 C 12621 dated 17th March, 2015 for verification and that initial request for CR 12 for Muguga Investments Company Limited to the Registrar of Companies was made by firm of Njuguna & Partners on the same date and were issued with a receipt for the same.

25. Upon verification she stated that the said receipt was issued by her office but the CR 12 C 12621 was

forged document which had purportedly been issued and signed by her and that the CR 12 did not have the reference number of the applicant which is quoted by the applicant. She therefore needed the matter to be investigated. The assistant registrar further confirmed that they did not act on the request and that therefore the CR 12 C 12621 dated 17th March, 2015 did not originate from her office.

26. It was averred that the Forensic Document Examiner, in the investigation confirmed that the signature on the said CR 12 C 12621 Form was forged.

27. Accordingly criminal charges were preferred against **Charles Mbugua Njuguna** before the Principal Magistrate Court at Kikuyu vide Criminal Case No. 1171 of 2015.

28. To the said Respondents, the ex parte applicant has not demonstrated that in executing their constitutional mandate, the respondents acted without or in excess of the powers conferred by law or acted maliciously, infringed, violated, contravened or in any manner failed to comply with or respect and observe the foregoing provisions of the constitution or any relief thereof. Further, the ex parte applicant has failed to demonstrate that the respondents have not acted independently or have acted capriciously, in bad faith or abused the legal process in a manner to trigger the High Court's intervention.

1st to 7th Interested Parties' Case

29. According to the 1st to 7th interested parties, they are the duly elected members of the Board of Directors of Muguga Investments Company Limited and that **David Njane Ruiyi, Henry Mungai Thongote** and **Esrom N. Miringa** did not have any authority to issue instructions to the ex-parte Applicant to institute any suit on behalf of the said company. It was averred that the ex-parte applicant purportedly on the instructions of **David Njane Ruiyi, Henry Mungai Thongote** and **Esrom N. Miringa** filed HCCC No. 126 of 2015 contemporaneously with an Application for injunction and that upon perusing the suit papers, it became evident that some of the documents compiled and filed by the ex-parte Applicant including a CR12 dated 17th March 2015 were either false or blatant forgeries.

30. According to the said interested parties, the Board of Directors of Muguga Investments Company Limited in an attempt to verify the legality and source of the aforementioned CR 12 instructed its advocates on record at the time, M/S C.W. Kinuthia & Co. Advocates to write to the companies registry to verify the authenticity of the said document to which the Assistant registrar of companies responded confirming that the said CR12 which was applied for by the ex-parte Applicant did not originate from their offices.

31. It was averred that it is clear that the ex-parte Applicant applied for the CR12 which was later revealed to be a forgery and upon discovering this, the board of Directors of Muguga Investments Company Limited reported the same to the relevant authorities to investigate and determine the culpable parties. To the interested parties, the latter dated 7th October 2015 addressed to the law society of Kenya, the Chief Justice, office of the Director of Public Prosecution, director of Criminal Investigation Department, Advocates Complaints Committee and the Office of the Ombudsman was a request for the ex-parte applicant to be investigated for the crimes committed and was in no way an attempt to intimidate the ex-parte applicant and was entirely intended to seek justice for what was believed to be a criminal act committed against the company.

32. It was averred that the ruling delivered by **Hon. Justice Kariuki** on behalf of **Hon. Justice Gikonyo** in HCCC No.126 of 2015 is the subject of an Appeal and the orders issued by the superior court which adversely affect the 1st -7th interested parties have been stayed pending determination of the same. There is therefore no basis for ill will or malice from the 1st-7th interested party herein who have every faith that the judicial process will vindicate them and their only concern is to see that justice is achieved. To them, the decision to charge the ex-parte applicant was in the hands of the investigative bodies who are not the 1st-7th interested Parties herein which bodies evidently established that the ex-parte applicant had committed an offence, hence the institution of criminal proceedings as against him. It was further contended that it is also apparent that the investigations and subsequent commencement of criminal

Proceedings against the ex-parte applicant were based on a complaint made by **Ms. Colleta Maweu** and therefore the notion that the criminal charges were preferred in order to achieve ulterior motives is therefore untenable.

33. According to them, the Office of the Director of Public Prosecution is an independent constitutional office and as a general principle, once the Office of the Director of Public Prosecution has in exercise its constitutional prerogative, directed that a prosecution be commenced against a person, absent dishonesty, bad faith, or some exceptional Circumstance, the decision of the ODPP to prosecute should not be amenable to judicial review.

34. In their view, the ex-parte Applicant owed a duty to the court to be candid and inform the court of any fraudulent document in his care/possession, a duty to not produce fraudulent documents in court to try and mislead the Court and that his actions as an officer of the court are then a matter of public interest and should therefore be subjected to the proper legal process. To the said interested parties, section 193A of the **Criminal Procedure Code** Cap 75 Laws of Kenya provides for concurrent civil and criminal proceedings and therefore the mere fact that the learned judge made preliminary observations on some of the forged documents does not preclude the institution of criminal proceedings against any parties found culpable after independent investigations have been conducted by the relevant bodies neither is it a group for any stay, prohibition or delay of the same. Furthermore the substratum of the issues that were being investigated by the relevant authorities were criminal in nature and consequently the criminal courts have the inherent jurisdiction and are best placed to deal with and make conclusive findings on those issues.

35. They contended that the mere assertion that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not a ground for halting criminal proceedings by way of judicial review, since judicial review proceedings are not concerned with the merit by with the decision making process. In their view, judicial review can only be applied for an limited grounds, which include illegality, procedural unfairness and unreasonableness. The ex-parte applicant has not pleaded and /or proved any ground know to judicial review in support of his applicant and all that he is doing is pre-arguing his defence in this court which is not the proper forum. The said interested parties asserted that requiring the ex-parte applicant herein to subject himself to the normal criminal prosecution mandate by law where he has the safeguards guaranteed by the Constitution does not in any way amount to an attack on his human dignity in violation of his constitutional rights and that his assertion that the criminal charges have been brought to intimidate him and to obtain an advantage in the civil proceedings is obscene and diversionary as the only relevant factor in instituting criminal proceedings is whether a party has committed an offense known in law. It was therefore the said interested parties' case that the applicant has failed to meet the legal test and threshold required for the grant of the judicial Review orders sought hence in the interests of justice and fairness that instant application ought to be dismissed with costs.

8th Interested Party's Case

36. According to the 8th interested party, judicial review process is not concerned with the merits or demerits of a decision to charge an individual with a criminal offence but whether the process through which the relevant authorities conducted their mandate was proper. However, the applicant is questioning the merits and demerits of the decision to charge him with the criminal case and the strengths and weakness of his case which queries cannot be entertained in an application for judicial review but can only be heard and determined in the Magistrate's Court at the 1st respondent under section 6 of the **Magistrate's Court Act** is vested with jurisdiction to exercise such jurisdiction and powers in proceedings of a criminal nature as may be conferred on it by the **Criminal Procedure Code**, Cap 75 and any other written law.

37. To the 8th interested party, the 2nd and 3rd respondents are mandated under section 24 of the **National Police Act** to amongst other duties, investigate crimes, apprehend offenders or suspects and perform any other duties that may be prescribed by the Inspect General under the **National Police Act** or any other written law from time to time while Article 157 of the Constitution empowers the 4th respondent to direct the Inspector General of National Police Service to investigate any information or allegation of criminal

conduct and the Inspector General shall comply with such direction. The constitution also mandates the 4th respondent to institute and undertake criminal proceedings against any person in respect of any offence alleged to have been committed upon conclusion of investigations by the Director of Criminal Investigations. The power of the Director of Public Prosecutions is exercised independently having regard to public interest the interest of the administration of justice and need to prevent and avoid abuse of the legal process.

38. It was averred that the applicant has failed to demonstrate that the respondents lacked the requisite authority, acted in excess of jurisdiction or departed from the rules of natural justice in directing that the ex parte applicant be charged with the offences disclosed by the evidence gathered. Further the applicant in this petition has not shown the court that the respondent have not acted independently or have acted capriciously, in bad faith or has abused the process in a manner to trigger the High Court's intervention. In addition, 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 manipulation of the court process so as to seriously deprecate the likelihood that the applicant might not get a fair trial as provided for under the constitution to warrant the High Court to interfere with the criminal process before the subordinate court.

39. The 8th interested party averred that it was aware and it was been admitted by the applicant in his application, that vide a letter dated 7th October, 2015, a complaint was made to the County Criminal Investigation Officer as against the applicant herein for forging and faking documents in relation to High Court Civil Case No. 126 of 2015. More specifically, the applicant was accused of having forged a signature of one **Colleta Maweu** (Assistant Registrar of Companies) on a CR 12 C 12621 in respect of Muguna Investment Company and pursuant to the investigations commenced by the 2nd and 3rd respondents it was established that:

- a. The Assistant Registrar of Companies had twice disowned the authenticity of the CR 12 in question.
- b. A document examiner had confirmed that the signature on the CR 12 in question had been forged.
- c. The Assistant Registrar of Companies one **Colleta Maweu** who was claimed to be the holder of the signature had admitted before court that she is stranger to the signature on the CR 12 in question.
- d. The 2nd and 3rd applicant noted that the applicant has never disputed the fact that the CR 12 in question had been forged but sought to shift the liability to one **Daniel Mutura** (his employee/clerk) and one **Eddy Kimemia** who was one of his client. The two individuals' statements could not be taken by face value as they were in effect compromised due to their stand with the applicant herein and the matter in general.

40. The 8th interested party further erred that in addition to the facts and findings, the 2nd, 3rd and 4th respondents discovered several other facts led them to the conclusion that there was sufficient evidence to mount a prosecution as against the applicant hence the decision to charge the applicant was informed by the sufficiency of evidence on record and the public interest and not any other considerations. It was contended that civil matters are distinct and independent from criminal matters and the fact therefore 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 as 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 recognized aim.

41. It was therefore contended that the applicant cannot seek to escape criminal culpability just because the High Court civil case No.126 of 2015 has been instituted. Both Kikuyu Criminal Case No.590 of 2015

and High Court civil case No.126 of 2015 are allowed by law to run concurrently. The accuracy and correctness of the evidence or facts gathered in the investigation can only be assessed and test by Kikuyu Criminal Case No.590 of 2015 which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support of the charges.

42. To the interested party, the applicant's allegations that the charges were instituted with the sole aim of targeting, victimizing, intimidating and coercing to abandon his clients representation is at best severely misconceived, paranoid, dramatic, alarming and made of bad taste.

43. It was averred that the letter alluded by the applicants addressed to the applicant and copied to the Chief justice, the CID Director, the Director of Public Prosecution, the Chairperson LSK and the AG's office seeking to have the applicant recuse himself from the conduct of High Court Civil case No.126 of 2015 was purely premised on the applicant's professional obligation as an advocate of the High Court of Kenya who had severely breached the provisions of the *Advocates' Act* Cap 16 and the *Law Society Act* No. 12 of 2014 on the code of conduct of and Advocate of the High Court of Kenya. It was contended that it is incumbent upon an Advocate who is aware that he is a potential witness in the matter that he is representing his client to recuse himself from handing he matter and this is because of the existence of a conflict of interest. The 8th interested party averred that even there was some truth in such claims of wanting to sever the applicant's services to his client, then still no such advantage can accrue to the 8th interested party as a party in the High Court civil case No.126 of 2015 since the applicant's client is able to procure the services of several other equally qualified non-suspect Advocates to continue with the conduct of their matter in High Court case.

44. It was therefore contended that the applicant failed to prove violation of his fundamental freedoms and rights he has also failed to prove any violation and/or infringement of any law or regulation of abuse of discretion and breach of rules of Natural Justice and the Application should therefore be dismissed with costs.

Determination

45. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions made herein.

46. It is trite that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. It was accordingly held by **Mumbi Ngugi, J** in **Kipoki Oreu Tasur vs. Inspector General of Police & 5 Ors (2014) eKLR** that the fundamental principle of criminal law is to ensure that the guilty should be convicted as charged after due process. In that case, the learned Judge expressed herself as follows:

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

47. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly

be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. 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.

48. However caution ought to be exercised and as was held by the Court of Appeal in **Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013]eKLR:**

“While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court. This is case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations”

49. Therefore, in the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration. See **R vs. Monopolies and Mergers Commission Ex Parte Argyll Group Plc [1986] 1 WLR 763** and **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK).**

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

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

51. 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 if 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.”

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

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform.....A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society’s senses of fair play and decency and/or where the proceedings are oppressive or vexatious... The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court’s) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer... In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute. It is further alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law... In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no

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

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

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth...When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in...”

54. I also agree with the decision in R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001 that:

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.

55. As was aptly put in Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR:

“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 3rd respondent to prosecute criminal offences 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 such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt.

57. Whereas Article 157(10) of the Constitution provides that the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority, Article 157(11) provides:

In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

58. Apart from that, section 4 of the *Office of Public Prosecutions Act*, No. 2 of 2013 provides:

In fulfilling its mandate, the Office shall be guided by the Constitution and the following fundamental principles—

(a) the diversity of the people of Kenya;

(b) impartiality and gender equity;

(c) the rules of natural justice;

(d) promotion of public confidence in the integrity of the Office;

(e) the need to discharge the functions of the Office on behalf of the people of Kenya;

(f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;

(g) protection of the sovereignty of the people;

(h) secure the observance of democratic values and principles; and

(i) promotion of constitutionalism.

59. It is therefore clear that the terrain under the current prosecutorial regime has changed and that the discretion given to the DPP is not absolute but must be exercised within certain laid down standards provided under the Constitution and the *Office of the Director of Public Prosecutions Act*. Where it is alleged that these standards have not been adhered to, it behoves this Court to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the Constitution itself. I associate myself with the sentiments expressed in **Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565** to the effect that :

“the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system...In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of

***Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003* is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: “The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time..... In our role as “sentinels” of fundamental rights and freedoms of the citizen which are founded on laissez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent “sentinels” of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right.”**

60. Whereas this is not the forum to determine the applicant’s innocence or culpability, the DPP owes this Court a duty of placing before this Court material upon which this Court can feel that he is justified in mounting the prosecution. Where therefore it is clear that the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognised under the Constitution and the ***Office of the Director of Public Prosecutions Act***, that would, in my view, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion. As was held by **Wendoh, J** in **Koinange vs. Attorney General and Others [2007] 2 EA 256**:

“Under section 26 of the Constitution the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney Generals inherent powers to investigate and prosecute may be exercised through other offices in accordance with the Constitution or any other law. But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of the Constitution and in considering what constitutes an abuse of the court process the following principles are relevant: (i) Whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed; (ii) Whether the person against whom the criminal proceedings are commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of the constitution; (iii) Whether the prosecution is against public policy.”

61. It is now clear that even in the exercise of what may appear to be *prima facie* absolute discretion conferred on the executive the Court may interfere. The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323**.

62. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute ought to be interfered with. It is clear that in exercising their discretion to charge a person both the police and the DPP’s office must take into account and must exercise the discretion on the evidence of sound legal principles. As was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**:

“...policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek

recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes".

63. Therefore the police are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered is not necessarily fatal to the prosecution. However, where, as it is alleged in this case, exculpatory evidence is presented to the police in the course of investigation and for some reasons unknown to them they deliberately decide to ignore the same one can only conclude that the police are driven by collateral considerations other than genuine vindication of the criminal judicial process. Neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of malice and hence abuse of discretion and power.

64. In my view, the correct prosecution policy is the one expounded in *Code for Prosecutors of the Crown Prosecution Service of the United Kingdom* ("the Code") as reflected in our own prosecution policy, *The National Prosecution Policy*, revised in 2015. The *Code*, provides, *inter alia* that:

4.4 Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.

4.5 The finding that there is a realistic prospect of conviction is based on the prosecutor's objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which he or she might rely. It means that an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a different test from the one that the criminal courts themselves must apply. A court may only convict if it is sure that the defendant is guilty."

65. *The National Prosecution Policy*, revised in 2015 on the other hand provides at page 5 that:-

2. Public Prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, Public Prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available?"...

66. In ***Githunguri vs. Republic [1986] KLR 1*** at page 18 and 19 a three Judge bench High Court constituted of Ag. Chief Justice Madan and Justices Aganyanya and Gicheru expressed themselves as follows:

"But from early times... the Court had inherent power and the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and

harassing – the Court had the right to protect itself against such an abuse...The power seemed to be inherent in the jurisdiction of every Court of Justice to protect itself from the abuse of its own procedure...every Court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the Court...Mr Chunga argued that to grant the application would be tantamount to curtailing or interfering with the powers of the Attorney-General under section 26 of the Constitution. This argument of his compels us to say that he kept freewheeling for a long time before us because perhaps he did not understand the real purport of the application. No one has made any challenge to the powers of the Attorney-General, nor would any one succeed if he were to say that the Attorney-General's powers under section 26 can be interfered with. What this application is questioning is the mode (emphasis ours) of exercising those powers...No one will succeed in convincing us that the Court does not have inherent powers to exercise supervisory jurisdiction over tribunals and individuals acting in administrative or quasi-judicial capacity...A prosecution is not to be made good by what it turns up. It is good or bad when it starts. The long and short of it is that in our opinion it is not right to prosecute the applicant as proposed.”

67. Similarly, in Mohammed Gulam Hussein Fazal Karmali & Another vs. Chief Magistrate's Court Nairobi & Another [2006] eKLR where Nyamu, J examined the policy considerations for halting criminal proceedings, noting that the court has two fundamental policy considerations to take into account which were enunciated in the case of M. Devao vs. Department of Labour (190) in sur 464 at 481 as:

“The first is that the public interests in the administration of justice require that the court protects its ability to function as a court of law, by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court processes may lend themselves to oppression and injustice...the court grants a permanent stay in order to prevent the criminal process from being used for purposes alien to the administration of criminal justice under the law. It may intervene in this way if it concludes that the court processes are being employed for ulterior purposes or in such a way as to cause improper vexation and oppression.”

68. I also associate myself with the decision in R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001 that:

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.

69. Based on the decision of Musinga, J (as he then was) in Paul Stuart Imison Another vs. The Attorney General & 2 Others Petition No. 57 of 2009, it was submitted that the circumstances which the Court should take into consideration in grant of stay were laid out in the following manner:

“The instances in which a court can declare a prosecution to be improper were well considered in *Macharia & Another –vs- Attorney General & Another (2001) KLR 448*. A prosecution is improper if:

- (a) It is for a purpose other than upholding the criminal law;
- (b) It is meant to bring pressure to bear upon the applicant/accused to settle a civil dispute;
- (c) It is an abuse of the criminal process of the court;

(d) It amounts to harassment and is contrary to public policy;

(e) It is in contravention of the applicant's constitutional right to freedom.

70. Based on *Bennett vs. Horseferry Magistrates' Court (1993) 3 All E.R. 138, 151, HL*, it was submitted that an abuse of process justifying the stay of a prosecution could arise in the following circumstances:

a) where it would be impossible to give the accused a fair trial; or

b) Where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.

71. Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review 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 jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.

72. Therefore the determination of this case must be seen in light of the foregoing decisions. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute ought to be interfered with.

73. In this case, the applicant's position is that he was simply an advocate who was instructed in the transaction the subject of the criminal case. Where the prosecution's only case against an advocate is that the advocate acted in a transaction the subject of criminal complaint, the Court may well be entitled to halt such proceedings. In this case, it is alleged by the Respondents that the document which the applicant relied on in prosecuting the case for his clients, **Muguga Investment Company Limited** as instructed by **Esrom Ngugi Miringa, Henry Mungau Thongote** and **David Njane Ruiji** was availed to him by **Eddy Kimemia** It is averred that this **Eddy Kimemia** did record his statement to the effect that he collected the said document from the Registrar of Societies' office and delivered the same to the ex parte applicant.

74. In their responses, both the respondents and the complainants are silent on the role played by the said **Eddy Kimemia**. In fact there is no response at all on the allegation by the said **Eddy Kimemia** that he is the one who collected the said exhibit from the Registrar. The respondents simply urged this Court not to believe the statement of the said **Eddy Kimemia** on the basis that he was the ex parte applicant's client and that his statement must have been compromised due to his relationship to the applicant herein and the matter in general. It is also noteworthy that this **Eddy Kimemia** who admitted that he was the one who collected and delivered the documents to the applicant was not charged. Instead it is the applicants' instructing clients, **Esrom Miringa** and **David Njane Ruiji** that were charged at Kikuyu Criminal Case No. 594 of 2015 allegedly for making the said CR12 without authority and only after they were arraigned

in Court and represented by the ex parte applicant was the applicant also charged on 18th November, 2015 in Kikuyu Principal Magistrate's Court in Criminal Case No. 1171 of 2015 with the offences of Forgery Contrary to Section 349 of the **Penal Code**, Making a document without Authority Contrary to Section 357(a) of the **Penal Code** and Uttering a false document contrary to Section 353 of the **Penal Code**.

196. According to the applicant exculpatory evidence was placed before the police and the police decided to arbitrarily ignore the same. The police have not denied that they had the statement by **Eddy Kimemia**. Their basis for ignoring the same, that **Eddy Kimemia** was a client of the applicant is clearly spurious and unreasonable. Whereas they could consider the same and ignore it, the failure to consider such exculpatory evidence without any justification can only be explained on the basis of irrationality. According to **De Smith's Judicial Review** (sixth edition) at Page 559:

“Although the terms irrationality and unreasonableness are these days used interchangeably, irrationality is only one facet of unreasonableness. A decision is irrational in the strict sense of that term if it is unreasoned; if it is lacking ostensible logic or comprehensible justification. Instances of irrational decisions include those made in an arbitrary fashion perhaps by spinning a coin or consulting an astrologer or where the decision simply fails to add up-in which in other words there is an error of reasoning which robs the decision of logic...Less extreme examples of the irrational decision include those in which there is an absence of logical connection between the evidence and the ostensible reasons for the decision, where the reasons display no adequate justification for the decisions or where there is absence of evidence in support of the decision.”

197. **Sedley, J's in R vs. Parliamentary Commissioner for Administration, ex parte Balchin and Another [1998] 1 PLR 1**, stated at page 11 that:

“What the not very apposite term “irrationality” generally means in this branch of the law is a decision which does not add up-in which, in other words, there is an error of reasoning which robs the decision of logic.”

198. In order to determine whether the criminal proceedings have been commenced with a view to achieving collateral purposes, a holistic approach must be adopted by considering all the circumstances of the case. In this case, the police have without any reason failed to consider **Eddy Kimemia's** statement whose contents had the effect of exonerating the ex parte applicant. Apart from that the charges against the applicant were only levied after he represented his clients in the criminal proceedings. These circumstances coupled with the contents of the letter written by the complainants addressed *inter alia* to the Chief Justice who ordinarily has nothing to do with either the discipline of advocates or the prosecution can only lead to the conclusion that the prosecution of the applicant was meant to remove him from the criminal proceedings hence were instituted for the achievement of a collateral purpose.

Order

75. In the result the Notice of Motion dated 3rd February, 2016, succeeds and I grant the following orders:

1. An order of prohibition prohibiting further prosecution of the applicant in Principal Magistrates Criminal Courts in Kikuyu in Criminal Case No. 1171 of 2015 (Republic versus Charles Mbugua Njuguna).

2. An order of certiorari bringing into the this Court for the purposes of being quashed decision of the County Criminal Investigations Officer Kiambu and OCS Kikuyu to charge the applicant herein as per the charge sheet presented in Kikuyu Criminal Case No. 1171 of 2015 (Republic versus Charles Mbugua Njuguna) which decision is hereby quashed.

3. The applicant will have the costs of these proceedings to be borne by the 2nd, 3rd and 4th Respondents.

Dated at Nairobi this 6th day of December, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Njagi for the applicant

Mr Busaidy for Mr Mude for the 1st to 7th interested parties

CA Mwangi