REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 347 OF 2016

IN THE MATTER OF AN APPLICATION BY REN LIANGQUAN, LAN BEI, WANG JIAN ZHONG, LIU JIAN, WANG XIAO PING, & SICHUAN HUASHI ENTERPRISES CORPORATION EAST AFRICA LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARIAND DECLARATION

AND

IN THE MATTER OF THE LABOUR INSTITUTIONS ACT 2007 LAWS OF KENYA

AND

IN THE MATTER OF THE CIVIL PROCEDURE RULES 2010 ORDER 53

REPUBLIC…….....…….... APPLICANT

VERSUS

COUNTY LABOUR COMMISSIONER NAIROBI..... 1ST RESPONDENT

MINISTRY OF LABOUR, SOCIAL SECURITY AND SERVICES.....… 2ND RESPONDENT

CHIEF MAGISTRATES COURT, MILIMANI.....3RD RESPONDENT

THE ATTORNEY GENERAL…….....……... 4TH RESPONDENT

***EX-PARTE* SICHUAN HUASHI ENTERPRISES CORPORATION EAST AFRICA LIMITED**

JUDGEMENT

Introduction

1. By a Notice of Motion dated 8th August, 2016, the *ex parte* applicant herein, **Sichuan Huashi Enterprises Corporation East Africa Limited**, seeks the following orders:

> **1. CERTIORARI removing to this Honourable Court for the purposes of quashing the Charge Sheets, Warrants of Arrest and all proceedings in Criminal Case No. 1111 of 2016 Republic v Ren Lianquan, Lan Bei, Wang Jian Zhong, Liu Jian, Wang Xiao Ping, and Sichuan Huashi Enterprises Corporation East Africa Limited.**

2. CERTIORARI removing to this Honourable Court for the purposes of quashing the decision by the 1st and 2nd Respondents made on 15th February 2016 to institute and/or commence criminal proceedings against the Applicant.

3. DECLARATION that Criminal Case No. 1111 of 2016 is a violation of the Applicant's right to Fair Administrative Action contrary to Article 47 of the Constitution of Kenya, 2010 as read with Section 4 of the Fair Administrative Action Act, 2015 as the same are an abuse of process, arbitrary, capricious and brought mala fides by the Respondent in abuse of due process of the court, and have occasioned the subject great prejudice.

4. Costs be in the cause.

Ex Parte Applicants' Case

2. According to the applicant, on 8th December 2015, the 1st Respondent wrote to the Applicant about complaints made by 8 alleged former employees of the Applicant who claimed that they had not been paid salary in lieu of 7 days' notice upon termination and cash in lieu of leave days earned but not taken, which letter the Applicant has no recollection of receiving nor are they aware of the contents thereof. Pursuant thereto, on 16thDecember 2015, the 1st Respondent summoned the Applicant for a meeting at its offices discuss the claims by the alleged employees.

3. In response to the said complaints on 23rd December 2015, the Applicant's site manager, **Mr. Cao Zheng** responded that the complainant employees were not employed by the Applicant and do not appear in its register of casual workers for the site in question, which site is at Adams Arcade, Ngong Road, Nairobi and that the work of steel-fixing was sub-contracted to one **Mr. John Andiedie** who was the employer of the complainants.

4. It was averred that on 25th January 2016, the 1st Respondent wrote to the Applicant summoning it to attend a joint meeting at its offices, Nyayo House 16th Floor Room 3, on 29th January 2016 and requiring it to produce the employment records for the complainant employees covering the period served as required under Labour Laws for ease of reference. Despite the applicant reiterating its position as here above, on 1st February 2016, the 1st Respondent issued a Demand Notice for the terminal dues of the eight complainants in the total sum of Kshs 152,400.00 be paid within 14 days from the date of the letter and not later than 10thFebruary 2016. Despite protests from the applicant, *o*n 15th February 2016, the 1st Respondent issued a Final Demand Notice cum Notice of Intended Prosecution and on or about 25th July 2016, the Applicant and its five directors were served with Summons and asked to appear in Court on 2nd August 2016 to take plea on the two separate counts which counts were brought under section 61 of the ***Labour Institutions Act***, 2007 which attracts a maximum fine of Kshs 50,000 or 3 months' imprisonment per count, which in turn exposes the Applicant to a maximum fine of Kshs 600,000 and/or imprisonment of its directors for a term of not more than 6 months each. It was averred that the applicant's advocate at the mention of Criminal Case No. 1111 of 2016 - *Republic v Ren Liangquan & 5 Others*, made an oral application that the plea taking be deferred to allow a preliminary objection on the duplex and defective charge sheets to be heard and determined in the first instance, but the application was declined by the Court which proceeded to issue warrants of arrest against the directors of the Applicant and further ordered that the case be mentioned on the 16th August 2016 for plea taking. To the applicant it has an excellent case as the charge sheets are duplex and defective and the 1st and 2nd Respondents in preferring charges against the Applicant and its directors have ignored clear evidence in their possession that the complainants were not employees of the Applicant contrary to the provisions of Article 47 of the Constitution as read with section 4(1) of the ***Fair Administrative Action Act*** which provide a right to expeditious, efficient, lawful, reasonable, and procedurally fair administrative action.

5. The applicant accused the 1st and 2nd Respondents of having acted contrary to section 39(1) of the ***Labour Institutions Act*** as well as the principle in **Salomon vs. Salomon & Co Ltd [1896] UKHL 1** that a director and its company are separate legal entities, by charging the directors of the Applicant in their

personal capacity as opposed to simply summoning them to take plea on behalf of the Applicant.

6. It was submitted on behalf of the applicant that.

2nd, 3rd and 4th Respondents' Case

7. In opposition to the application, the 2nd, 3rd and 4th Respondents (hereinafter referred to as the Respondents) averred that on 8th December 2015, labour inspector, **Mrs Mukanga**, received a labour complaint by some 8 persons who claimed to be former employees of the applicant company herein and consequently issued a letter to the applicant notifying it of the same. On account of the aforementioned letter eliciting no response, another letter dated 16th December 2015 was sent out to the director of the applicant company herein inviting them to a joint conciliation meeting scheduled for 18th December 2015. But the applicant failed to attend the said conciliation meeting, prompting the issuance of seeking a joint meeting on 29th January 2016. Instead of the applicant attending the said meeting, it wrote a letter dated 28th January 2016 stating that they were not the employers of the 8 complainants.

8. It was therefore averred that the applicant having failed to attend any of the meetings as invited, a Demand Notice dated 1st February 2016 was issued to the Director of the applicant company herein requiring that the sum of Kshs 152,400.00 be deposited with the County Labour Office and on 15th February 2016, a Notice of Intended Prosecution was issued to the said Director. According to the Respondents, instead of attending the said meetings, the applicant's directors chose to speak to other officers.

9. It was the Respondent's case that though the applicant alleges that the work of steel fixing was sub-contracted to one **Mr. John Andiedie** who was the employer of the complainants, there is no reliable evidence to that effect, and further the alleged sub-contractor, is not registered with the Ministry of Public Works to perform construction works and therefore has no capacity to employ labour as a contractor.

10. It was therefore asserted that the applicant's directors having failed to respond to the Notice of Intended Prosecution dated 15th February 2016, the matter was referred to a court of law for determination vide Criminal Case No. 1111 of 2016 wherein the directors of the applicant company were availed an opportunity to be heard but they ignored the same and this court's discretion should therefore not be exercised in their favour.

11. It was contended that the decision to charge the directors of the *ex parte* applicant was as a result of thorough and extensive investigations and which decision was made within the provisions of the law as provided for in the ***Labour Institutions Act*** hence the *ex parte* applicant had not made out a case for judicial review proceedings as all the evidence is subject to the trial court for examination and determination and not the judicial review court. The Respondent averred that there is no proof of an element of bad faith, unreasonableness, excess of jurisdiction and irrationality by the Respondents hence the criminal proceedings are proper and the applicant will have its day in court where it can raise its contentions and that the trial Court is in a better position to scrutinize the evidence presented before it in determining whether such evidence proves the applicant's guilt or innocence.

Determinations

12. I have considered the application, the affidavits both in support of and in opposition to the application, the submissions made and the authorities cited.

13. Before dealing with these issues, it is important to fresh our memories on the law relating to circumstances in which criminal proceedings may be halted.

14. The Court ought not to usurp the mandate of the Prosecution agencies to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or

ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.

15. However as was held in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**:

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

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

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

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

> **"The Attorney General has charged the appellants with the offence of murder in the exercise**

of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion is acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution...Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it; it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct. The other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the prosecution is sufficient to support the charge. The criminal trial process is regulated by statutes, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court, which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court."

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

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

prohibit...The fact that it has not been argued before however does not mean that the law stops dead at its tracks. An order of prohibition looks to the future and not to the past; it is concerned with the happenings of future events and little, if any, of past events. Where a decision has been made, there is little that the court can do by an order of prohibition to actually stop the decision from being made, because simply that which is sought to stop has already been done. However in such circumstances, the power of judicial review is not limited to the other orders of judicial review other than prohibition. With respect to civil proceedings prohibition lies not only for the excess of jurisdiction but also from a departure of the rules of natural justice...So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another. However, it does not mean that a civil suit and a criminal case cannot co-exist at any one particular time. This is because the section envisages the re-prosecution of a criminal case substantially dealt with either in fact or law, a case in which issues have been laid to rest. There is no mention in the section that the simultaneous existence of a civil and criminal 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....”

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

20. In this case the ex parte applicant’s case is that the complainants in the criminal case were not its employees and therefore he does not owe them any dues. On the other hand the Respondents contend that a complaint was made by the said complainants and that despite inviting the applicant to attend meetings on the issue the applicant instead resorted to meeting some of its officers outside the said meetings. Although this is denied by the applicant, the Court cannot in these proceedings determine whether the alleged subcontract between the applicant and one **Mr. John Andiedie,** is valid since, if not for anything else the said person is not a party before this Court. In any case the validity or otherwise of a contract or agreement is not a matter for determination by a judicial review Court, much less a criminal court. If therefore there is an issue as to the validity of the subcontract that is a matter that may be placed before the criminal court, not for the determination of its validity but to show that the criminal process is not the best forum to determine the issues. However, for this Court to deal with the same would amount to depriving both the criminal Court and the civil Court of the powers to deal therewith thereby usurping the jurisdiction of the two Courts.

21. Since the issue whether or not the applicant appeared before the Labour Officers is contested, it is not possible for this Court, based on the conflicting unresolved versions, to find that the version presented by the applicant was not considered by the Respondents since if the applicant did not present its case, there was nothing to consider. What the applicant however is asking this Court to do is to consider its version and make a finding that based thereon, the criminal proceedings ought not to have been commenced

against it. That, however, is not the duty of this Court exercising its judicial review jurisdiction.

22. It was also contended that based on the principle in **Salomon vs. Salomon** the applicant ought not to have been prosecuted. However section 23 of the ***Penal Code*** provides that:

> ***Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.***

23. Apart from the said section 39(1) of the ***Labour Institutions Act*** which states:

> ***"Where an offence under this Act is committed by a company, association or body of persons, corporate or incorporate or by a public body, and the offence is proved to have been committed with the consent or connivance, or to have been facilitated by any neglect on the part of any director, chairman, manager, secretary or other officer employed by such company or association or body of persons or public body, that director, chairman, manager, secretary or other officer shall be deemed to have committed an offence."***

24. It therefore follows both the corporate body and its management may be parties to a criminal offence but the management may not be culpable unless they prove that through no act on their part, they were not aware that the offence was being or was intended or about to be committed or that they took all reasonable steps to prevent its commission.

25. Apart from the foregoing, the complainants have not been joined to these proceedings. Order 53 rule 3(2) of the ***Civil Procedure Rules*** provides that:

> ***The notice shall be served on all persons directly affected, and***
>
> ***where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.***

26. The rationale for this rule is to avoid a situation where the orders sought are likely to adversely affect third parties without them having been afforded an opportunity of being heard. In that event the Court would have, under the guise of protecting the applicant's interests, violated the rights of third parties. In this case, to grant the orders sought herein would obviously affect the rights and interests of the said complainants who, according to the record, were never notified of these proceedings.

27. Judicial review orders being discretionary, the Court would decline to grant the same where third parties' interests would be adversely affect thereby.

28. The Respondents contended that this Court has no jurisdiction in the exercise of its judicial review jurisdiction to grant declaratory orders. That positon may have been true before the enactment of the ***Fair Administrative Action Act, 2015***. However section 11(1)(a) of the ***Fair Administrative Action Act, 2015*** now empowers the Court in the exercise of its judicial review jurisdiction to grant such a relief where appropriate and deserved. Accordingly, decisions which were delivered on the issue prior to the enactment of the said statute may nolonger be good law to that extent.

29. However in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69,** it was held:

> **"A prerogative order is an order of serious nature and cannot and should not be granted**

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

30. It must be remembered that justice must be done to both the complainant and the accused and where there is evidence upon which the prosecution can reasonably mount a prosecution, it is not for the High Court in a judicial review proceeding to inquire into the sufficiency or otherwise of such evidence since the High Court ought not to usurp the role of the trial court in determining the merits of the criminal case. This position was appreciated in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** where it was held:

"the police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court...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".

31. In this case, I associate myself with the position adopted in **Kuria & 3 Others vs. Attorney General** (supra) that:

"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."

32. It was contended that the applicant made an oral application that the plea taking be deferred to allow a preliminary objection on the duplex and defective charge sheets to be heard and determined in the first instance, but the application was declined by the Court which, proceeded to issue warrants of arrest against the directors of the Applicant. To the applicant it has an excellent case as the charge sheets are duplex and defective. In my view the issue of duplicity of the charge sheet can still be raised even after the plea is taken as the taking of a plea does not render an otherwise defective charge sheet valid. In other words there is an alternative remedy for dealing with the issue of duplicity of the charge sheet other than judicial review and judicial review being a remedy of last resort ought not to be invoked in those circumstances.

33. Having considered the foregoing, it is my view that the applicant's application does not meet the threshold for the issuance of judicial review orders in the manner sought herein. In the premises I find no merit in this application.

Order

34. Accordingly, the order that commends itself to me, and which I hereby grant is that the Notice of Motion dated 8th August, 2016 fails and is hereby dismissed with costs to the Respondents.

Dated at Nairobi this 2nd day of December, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mweke for Mr Gichuhi for the applicant

Mr Munene for Miss Maina for the Respondent

CA Mwangi