



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO. 91 OF 2014

REPUBLIC.....APPLICANT

VERSUS

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

INSPECTOR GENERAL OF POLICE2ND
 RESPONDENT

THE DIRECTOR CRIMINAL INVESTIGATIONS DEPARTMENT.....3RD
 RESPONDENT

AND

STEPHEN OYUGI OKERO1ST INTERESTED
 PARTY

RIGHT END PROPERTIES LIMITED2ND INTERESTED
 PARTY

MARTIN MAINA..... EX-
 PARTE

JUDGEMENT

1. The application for consideration in this judgment is the notice of motion dated 19th March, 2014 in which the ex-parte Applicant, Martin Maina prays for the following orders:

“1. **THAT** an order of Prohibition be issued by this Honourable Court directed to the Respondents from, either jointly and/or severally, commencing, sustaining or proceeding with any criminal proceedings against the Applicant in any court herein with respect to any dealing(s) relating to the property known as L.R. No. 1870/X/24 situated in Nairobi.

2. **THAT** costs of this Application be provided for.”

2. The application is supported by a verifying affidavit sworn by the Applicant on 6th March, 2014 and a statutory statement dated the same date.
3. The Office of the Director of Public Prosecutions, the Inspector General of Police and the Director of Criminal Investigations Department are the 1st, 2nd and 3rd respondents respectively. Stephen Oyugi Okero is the 1st Interested Party whereas Right End Properties Ltd is the 2nd Interested Party.
4. The Applicant's case as outlined in his pleadings is that he is an advocate of the High Court of Kenya. In June, 2005 he was retained in his professional capacity to represent an intended purchaser, one Salim Hussein Dungarwalla (hereinafter referred to as the purchaser) in a conveyancing transaction relating to a property known as L.R. No. 1870/X/24 (hereinafter referred as the suit property) situated in Nairobi. The purchaser wanted to buy the suit property from Uzima Publishing House also known as Uzima Press Limited (hereinafter simply referred to as the vendor).
5. The purchaser and the vendor entered a sale agreement on 23rd June, 2005 in which the agreed sale price for the suit property was Kshs.27,000,000/=. Kshs.2,700,000/= being 10% of the purchase price was deposited with the vendor's advocates, M/s Mugo & Co Advocates, to hold as stakeholders while the balance of the purchase price was to be paid within sixty days of the execution of the agreement. The said agreement was duly registered in the Lands Registry at Nairobi on 23rd June, 2005.
6. After the signing of the agreement, the 2nd Interested Party (Right End Properties Ltd) approached the purchaser expressing an interest to purchase the property. The purchaser agreed to assign the sale of the suit property to Right End Properties Ltd at a cost of Kshs.47,000,000/=. However, before the transaction could be completed, the 2nd Interested Party approached the vendor directly and offered Kshs.40,000,000/= as the purchase price of the property which offer the vendor accepted. The essence of the second agreement was that the vendor would breach the earlier agreement with the purchaser.
7. On discovering what had happened, the Applicant immediately lodged a caveat at the Lands Registry in respect to the suit property claiming an interest by his client, the purchaser. The purchaser also instituted **Nairobi Environment and Land Court Case No. 2315 of 2007, Salim Hussein Dungarwalla v Uzima Press Ltd, Right End Properties Ltd & another** seeking injunctive reliefs and orders of specific performance against the vendor. Interlocutory orders of injunction were granted pending the hearing and determination of the suit.
8. According to the Applicant, on 17th February, 2011 while he was attending to other matters at the Lands Office in Nairobi, he came across a Notice of Withdrawal of Caveat allegedly signed by him lodged in the file relating to the suit property. He also came across a court order purportedly issued on 16th February, 2011 lifting the injunction earlier issued in **ELC Case No. 2315 of 2007** barring transactions involving the suit property pending the determination of the matter.
9. He immediately alerted the Registrar of Titles that the signature on the Notice of Withdrawal of Caveat was not his and therefore a forgery and that he was also not aware of any court order lifting the injunction. The Registrar acting on this information cancelled all the endorsements made on the title being entries 9 to 10 and the registration of transfer. The documents had been lodged for registration by an advocate by the name Mr Stephen Oyugi Okelo of Oyugi and Co. Advocates.
10. On 18th February, 2011, the Applicant and the purchaser lodged a complaint with the Criminal Investigations Department, Nairobi against the directors of Right End Properties Ltd namely Mr Ashraf Savani and Mr Matadali Chatur for fraud related to the said transactions. The Applicant complained of forgery of the Notice of Withdrawal of Caveat and a court order lifting the caveat relating to the suit property.

11. An advocate by the name Benson Ngugi Njeri who is a partner in the firm of Igeria & Ngugi Advocates who was the purchaser's advocate in **ELC Case No. 2315 of 2007** also recorded a statement with the police.

12. It is the Applicant's case that there was inordinate delay in the investigation of the matter and he kept writing to the Director of Public Prosecutions (DPP) to inquire into the progress of the matter. There being no progress in the matter he decided to institute private prosecution proceedings against the directors of Right End Properties Ltd. However, upon the application of the directors of the company, the private prosecution was terminated by the High Court on the ground that he had no *locus standi*.

13. After the long wait, the DPP eventually wrote to the Applicant on 6th February, 2014 informing him that his office had by a letter dated 25th July, 2013 directed the police to charge a number of individuals including him with fraud related offences. The same letter further informed the Applicant that the file related to the matter had been recalled for independent review by a different counsel and the decision thereon would be made only on facts, evidence and the law. It is the Applicant's case that he has never been informed by the DPP about the outcome of the review.

14. The Applicant subsequently became aware that on 4th March, 2014 the 1st Interested Party had been charged in **Nairobi Chief Magistrate Criminal Case No. 338 of 2014** for alleged fraud concerning the suit property. He also learned from press reports that the police were looking for him with a view to having him charged for offences committed in transactions related to the property.

15. On 6th March, 2014 the Applicant moved this Court and obtained leave to commence these proceedings. The leave was directed to operate as stay of further action by the respondents. According to statutory statement, the Applicant seeks relief on three grounds namely breach of legitimate expectation, unreasonableness/ irrationality and wrongful exercise of discretion.

16. It is the Applicant's assertion that failure by the DPP to notify him of the outcome of the independent review is a breach of his legitimate expectation that the DPP would inform him of the outcome of the independent review before taking any further action. Further, that the decision by the respondents to arrest and charge him in relation to the suit property is in breach of his legitimate expectation that he would be afforded fair administrative action by the respondents in the discharge of their respective constitutional and statutory duties.

17. The Applicant contends that the actions of the respondents are irrational and unreasonable and amounts to abuse of the court process. He contends that the effect of the decision to arrest and charge him is that the complainant has now been turned into a suspect without any justification while on the other hand the persons against whom complaints have been made by the Applicant are not being charged.

18. The Applicant postulates that the DPP has improperly used his discretion by electing to prosecute him and failing to prosecute the persons against whom complaints were made. Further, that the DPP wrongfully exercised his discretion by electing to prosecute him for the achievement of a collateral purpose which is to coerce and compel him to abandon **ELC Case No. 2315 of 2007**.

19. In support of his case, the Applicant cites various authorities. Referring to the decision in **Republic v Chief Magistrate's Court at Mombasa ex-parte Ganijee & another [2002] KLR 703**, he asserts that a criminal investigation or trial meant to help an individual frustrate the civil case of the opponent is an abuse of the process of the court and such a prosecution should not be allowed to stand. He argues that no one should be 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. It is his case that allowing his arrest and prosecution by the respondents would amount to allowing the defendants in the civil matter to oppress him into acceding to the demands by brandishing the

sword of punishment under the criminal law.

20. Citing the decision in **George Joshua Okungu & another v Chief Magistrate's Court Anti-Corruption Court at Nairobi & another** [2014] eKLR he submits that although the mandate to prosecute criminal offences belongs to the DPP, the court has jurisdiction to stop such prosecution where an applicant demonstrates that the intended or ongoing criminal proceedings constitute an abuse of process and are being carried out in breach or threatened breach of the applicant's constitutional rights.

21. The Applicant referred the Court to paragraph 58 of the judgment in the cited case where it was stated that:

“It is therefore clear that whereas the discretion 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. Similarly where the commencement or continuation of the criminal prosecution will result in abrogation of the Petitioner's rights and freedoms enshrined in the Constitution, the Court is under a duty to bring such proceedings to a halt. In so doing, it must be emphasised that the Court is not concerned about the innocence or otherwise of the Petitioner. The Court's duty is only to ensure that the Petitioner's rights and freedoms as enshrined in the Constitution are protected and upheld. As was held Wendoh, J in *Koinange vs. Attorney General and Others* [2007] 2 EA 256, the jurisdiction of the Court in Constitutional matters is limited to inquiring into the allegations of violation of fundamental rights as alleged by the applicant and what remedies, if any, the court can grant.”

22. As to his assertion that the respondents breached his legitimate expectation to a fair administrative process, the Applicant cited the case of **Geothermal Development Limited v Attorney General & 3 others** [2013] eKLR where the Court opined at paragraph 28 that:

“As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (See *O'Donoghue v South Eastern Health Board* [2005] 4 IR 217). Hilary Delany in his book, *Judicial Review of Administrative Action*, Thomson Reuters 2nd edition, at page 272, notes that, “Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision.””

23. As to the ingredients of the doctrine of legitimate expectation, the Applicant urged this Court to look at the decision in **Diana Kethi Kilonzo & another v Independent Electoral Commission & 10 others** [2013] eKLR in which the doctrine was discussed at length.

24. Other cases cited to show under what circumstances prohibitory orders may issue against criminal proceeding are: **Kuria & 3 others v Attorney General** [2003] 2 KLR 69; **Isaac Gathungu Wanjohi & another v Director of City Planning, City Council of Nairobi and another** [2014] eKLR, Nairobi High court Petition No. 47 of 2013; **Josephine Anyango Akoth v the Director of Public Prosecutions & others**; and **Rosemary Wanja Mwagiru & 2 others v Attorney General & 3 others** [2013] eKLR.

25. The Applicant wraps up his case by submitting that there is a caveat placed on the exercise of prosecutorial powers by the DPP by Article 157(11) of the Constitution which provides that:

“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.”

26. The Applicant therefore urges this Court to allow his application and quash the decision of the DPP to charge him.

27. The respondents oppose the application through the replying affidavit of Police Constable Isaac Ogotu sworn on 9th April, 2014. The officer avers that he is the investigating officer in the criminal case.

28. The investigating officer deposes that investigations into the matter, the subject of the application herein, commenced on the 17th February, 2011 following a complaint from the Applicant. He avers that upon receipt of the complaint he visited the Lands Office and obtained the original Notice of Withdrawal of Caveat; the original court order dated 16th February, 2011; the original title for the suit property; and two applications for registration dated 10th February, 2011 and 16th February, 2011 which showed that the documents were filed by Oyugi and Company Advocates.

29. Further investigations established that the Registrar of Titles had cancelled the entries made on the title document transferring the suit property to the 2nd Interested Party. In the course of investigations, the Applicant was interviewed and he denied signing the Notice of Withdrawal of Caveat which was purportedly signed by him. As a consequence of the said denial, the specimen signatures of the Applicant were taken for forensic examination and comparison with the signatures on the Notice of Withdrawal of Caveat. The forensic document examiner in his report dated 22nd March, 2013 confirmed that the signature on the Notice of Withdrawal of Caveat was not that of the Applicant.

30. The specimen handwriting of the 1st Interested Party was also taken for the purpose of comparing it with the handwriting on the applications for registration. The document examiner in his report dated 22nd March, 2013 confirmed that the handwriting in the applications for registration belonged to the 1st Interested Party.

31. In furtherance of the investigations, the court order dated 16th February, 2011 was presented to the Deputy Registrar of the High Court, Nairobi who confirmed that the same did not originate from the High Court.

32. According to the investigating officer, having ascertained that a criminal offence may have been disclosed in the case under investigation, the advice of the DPP was sought in his capacity as the prosecuting authority under Article 157 of the Constitution. The DPP having perused the file and the evidence gathered directed that further investigations be carried out into the alleged forgery reported by the directors of Uzima Publishing House.

33. Following the directive of the DPP the investigating officer obtained a statement from Isaac Onyango Aloo of Isaac Onyango Aloo & Company Advocates who is purported to have witnessed the forged sale agreement which indicated the sale price was Kshs. 37, 000, 000/=. Mr Isaac Onyango Aloo stated that he was a stranger to the said sale agreement and the signatures and stamp impressions thereon were forgeries. A director of Uzima Publishing House, Phoebe Mugo also confirmed that the signatures on the said sale agreement purportedly appended by her were a forgery. The other director, Reverend Canon John Kamau Theuri also confirmed that the signature purportedly appended by him on the sale agreement was forged.

34. Further, that the sale agreement in question was subjected to examination by a forensic document examiner and in a report dated 15th May, 2012, the signatures of the directors of Uzima Publishing House and that of Isaac Onyango Aloo Advocate were confirmed to be forgeries.

35. After the completion of investigation as directed by the DPP and having ascertained that a criminal offence had been committed by the Applicant and Salim Hussein Dungarwalla, the investigators sought the advice from the DPP once again. The DPP subsequently directed that charges be preferred against Mr. Stephen Oyugi Okelo and the Applicant herein. Following those directions, criminal charges were preferred against Stephen Oyugi Okelo vide **Milimani Criminal Case No. 338 of 2014** wherein the Applicant is the complainant.

36. It is the investigating officer's case that the respondents intend to prefer criminal charges against the Applicant wherein Uzima Publishing House is the complainant.

37. The respondents therefore assert that the two cases are different and the offences were committed at different times, dates and places. The respondents contend that the application herein has been filed in bad faith, is misconceived, an abuse of the court process and is meant to defeat the cause of justice.

38. The respondents argue that they were all executing their constitutional and statutory mandates in this matter. They assert that the Applicant has not demonstrated that in undertaking investigations into the complaint lodged with the National Police Service and in making the decision to prefer criminal charges against him, either the DPP or any member of staff of the Office of the DPP or the National Police Service acted without or in excess of the powers conferred upon them by the law or have infringed violated, contravened or in any other manner failed to comply with or respect and observe the provisions of the Constitution of Kenya or any other provisions of the law.

39. They aver that the DPP independently reviewed and analysed the evidence contained in the investigations file, which was compiled by the 3rd Respondent, including the witness statements, documentary exhibits and statements of the Applicant as required by law and it was on that basis that he directed the prosecution of the Applicant. Further, that the decision to charge the Applicant was informed by the sufficiency of evidence on record and the public interest and not any other considerations.

40. According to the respondents, the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support of the charges.

41. The respondents submit that the contention by the Applicant that the action by the Office of the DPP to order his arrest and prosecution is improper, has no basis for the reasons that: state powers of prosecution are exercised by the DPP personally or by persons under his control and direction; in the exercise of prosecutorial powers the DPP is subject only to the Constitution and the law, does not require the consent of any person or authority, is independent and not subject to the direction or control of any person or authority, and the High Court would be crossing into the line of the independence of DPP to descend into the arena of finding whether there is a prima facie case against the Applicant; the Applicant has not demonstrated that the DPP has not acted independently or has acted capriciously, in bad faith or has abused the process in a manner to trigger the High Court's intervention; the Applicant has failed to demonstrate that the DPP lacked the requisite authority, acted in excess of jurisdiction or departed from the rules of natural justice in directing that he be charged with the offences disclosed by the evidence gathered; and 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 demonstrate 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.

42. Other arguments by the respondents in opposition to the case are: the Applicant has not met the requirements for the grant of the orders of judicial review; the matters raised by the Applicant form the basis of his defences before the trial court which should be raised before the trial court and not before a judicial review court; no sufficient grounds have been advanced to warrant the grant of the orders sought; the Applicant is guilty of material non-disclosure which disentitles him to the orders sought; an order of prohibition cannot issue against an action or decision which has already been taken or made before such an order is made; the High Court has no jurisdiction to decide whether or not the Applicant has a prima facie case or whether there is sufficient evidence against him; the Applicant shall have the opportunity, as guaranteed in the Criminal Procedure Code Cap 75 and the Evidence Act Cap 80, before the subordinate court to tender evidence to controvert, refute and challenge the prosecution's case and evidence; the High Court cannot play the role of the trial court in the manner pleaded herein; and the application is misconceived, frivolous, vexatious, incompetent, improperly before court and an open abuse of the court process.

43. Counsel for the respondents cited various decisions to buttress their submissions. **Nairobi High Court Petition No. 369 of 2013, Thuita Mwangi & 2 others v the Ethics & Anti-Corruption & 3 others** was cited in support of the contention that only a trial court can competently make a finding whether or not a criminal offence was committed after hearing the evidence. This argument was strengthened by reference to the decision in **William S.K. Ruto & another v Attorney General & another, Nairobi High Court Civil Suit No. 1192 of 2004** in which it was held that analysis of evidence should be left to the trial court.

44. As for the submission that the police have a duty to investigate complaints, the case of **Cape Holdings Limited v Attorney General & 2 others, High Court Misc. Application No. 240 of 2011** was cited. In that case it was held that a complainant cannot be blamed for reporting a complaint to the police as it is within the mandate of the police to investigate such a complaint in order to determine whether a criminal offence has been committed.

45. The 1st Interested Party instructed an advocate who informed the Court on 1st October, 2014 that the 1st Interested Party did not wish to participate in these proceedings. For record purposes, the 1st Interested Party, Stephen Oyugi Okero is the ex-parte Applicant in **JR Miscellaneous Application No. 114 of 2014** where he seeks to quash his prosecution in **Nairobi Chief Magistrate Court Criminal Case No. 338 of 2014** in which he is charged with offences allegedly committed in connection with the suit property.

46. The 2nd Interested Party opposed the application through the replying affidavit sworn by one of its directors Madatali Chatur on 17th June, 2014. In the said affidavit Chatur avers that sometime in April, 2007, the 2nd Interested Party was approached by one Salim Hussein Dungarwalla with information about a prime property for sale in Westlands, Nairobi. Salim Hussein Dungarwalla who is now deceased informed Chatur that he was in the process of purchasing L.R. No. 1870/X/24 from Uzima Publishing House Limited for Kshs.37,000,000/= and that he intended to assign all his rights to the property for consideration in the sum of Kshs.10,000,000/= as he could not afford to pay the balance of the purchase price.

47. The 2nd Interested Party's directors visited the suit premises accompanied by the late Dungarwalla and after assessment found the property to be a worthy investment and requested for copies of all the documents pertaining to the suit property to enable them conduct a search on the suit property. Among the documents released by the deceased was a copy of an agreement of sale dated 23rd June, 2005 purportedly drawn by R.M. Mugo Company Advocates.

48. Consequently, the 2nd Interested Party instructed the firm of Kipkenda, Lilan & Koech to act on its behalf in the transaction. They were to liaise with Maina & Maina Advocates who acted for the deceased. Later on, the firm of Maina & Maina Advocates forwarded a deed of assignment for

execution by the 2nd Interested Party. The said deed provided for the absolute transfer of the deceased's beneficial interest in the suit property for a consideration of Kshs.47,000,000/=.

49. By a letter dated 8th May, 2007 the 2nd Interested Party's then advocates advised that they preferred to deal directly with the registered proprietor of the suit property without compromising the interest of the deceased, proposing a rescission of the agreement between the vendor and the 2nd Interested Party and the sum of Kshs.10,000,000/= be held in an escrow account.

50. On 18th May, 2007 the 2nd Interested Party's advocates forwarded to the 2nd Interested Party correspondence between the vendor (Uzima Publishing House), the advocates for the vendor and the firm of Maina & Maina Advocates rescinding the initial agreement, disclosing that the suit property was to be sold for Kshs. 27,000,000/= not Kshs.37,000,000/= and that the agreement in the 2nd Interested Party's possession was not genuine.

51. Upon scrutiny of the two agreements it was clear to the 2nd Interested Party that page 2 of the agreement which provided the purchase price had been altered. As a result, the 2nd Interested Party opted not to proceed with the assignment transaction between it and the deceased purchaser. It is the 2nd Interested Party's case that the vendor later indicated that it was willing to sell the suit property for a consideration of Kshs.40,000,000/= leading to the execution of an agreement dated 15th June, 2007 between the 2nd Interested Party and the vendor.

52. On 27th November, 2007 the deceased filed **ELC No. 2315 of 2007** seeking specific performance of the sale agreement dated 23rd June, 2005 and injunctive orders restraining any dealings with the property. Interim injunctive orders were issued on 28th November, 2007 by Justice Visram (as he then was) and a caveat was lodged against the title.

53. The 2nd Interested Party contends that under Article 157(4) of the Constitution, the DPP is empowered to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector General shall comply with any such direction.

54. Further, that Article 157(6) of the Constitution bestows prosecutorial powers on the DPP and authorises the DPP to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed. The DPP is also allowed to take over and continue any criminal proceedings commenced in any court (other than a court martial) by another person or authority but with the permission of the person or authority.

55. It is the 2nd Interested Party's case that Article 157(10) of the Constitution provides that the DPP 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, the DPP shall not be under the direction or control of any person or authority.

56. According to the 2nd Interested Party, the decision by the DPP to institute criminal proceedings against the Applicant was informed by the outcome of the investigations undertaken by the Directorate of Criminal Investigations and the decision is therefore sound in law and ought not to be impeached as sought by the Applicant.

57. Citing the decision of the Supreme Court of Fiji in **Matalulu v Director of Public Prosecutions [2003] 4LRC 712** the 2nd Interested Party contends that prosecutorial power can only be reviewed on the following grounds: excess of constitutional or statutory power such as an attempt to institute proceedings in a court established by disciplinary law; if the DPP acts under control or direction of another person; acting in bad faith, for example commencement or discontinuation of prosecution in consideration of payment of a bribe; abuse of the court process,

although the proper forum for review of that action would ordinarily be the court involved; and where the DPP has fettered his or her discretion by a rigid policy e.g. one that precludes prosecution of a specific class of offences.

58. It is the 2nd Interested Party's case that none of these grounds has been proved by the Applicant. According to the 2nd Interested Party the investigations reveal that the Applicant forged a sale agreement and whether or not he is guilty of that offence is a matter to be determined by the trial court.

59. It is also the 2nd Interested Party's assertion that judicial review is not the proper procedure for determining the innocence or otherwise of an accused person. On this argument the decision of G.V. Odunga in **Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR** is relied on. At paragraph 91 of that decision the learned judge stated:

“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.”

60. Counsel for the 2nd Interested Party also pointed to the limited role of judicial review in criminal matters by citing an article by Greenville Cross SC titled; **Judicial Review: Prosecution Decisions and Criminal Trials** in a journal called **Effective Judicial Review: A Cornerstone of Good Governance** dated 11th December, 2008 where at page 4 he opines that:

“In deciding whether or not to prosecute, the unique skills of the trained prosecutor are brought to bear. Finely balanced considerations of public interest may come into play, the full weight attaches to the views of the victim, the feelings of the community and of alternatives to prosecution. Judicial review is concerned with the legality of the decision rather than with the merits, and there is little scope for its intrusion into decisions taken by a prosecutor acting in accordance with established prosecution policy. The administration of justice is dependent, in large measure, upon the probity of the prosecutor, and unless it is at least arguable that exceptional circumstances exist the courts must act decisively to nip in the bud challenges to the exercise of the prosecutorial discretion which might at first blush appear attractive but which in reality lack real substance.”

61. The 2nd Interested Party urges this Court not to usurp the constitutional mandate bestowed upon the DPP to make prosecutorial decisions. It is argued that the mere fact that intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for interfering with those proceedings by way of judicial review.

62. The 2nd Interested Party therefore prays for the dismissal of the application with costs.

63. In response to the affidavits of the Respondent and the 2nd Interested Party, the Applicant swore a supplementary affidavit on 13th October, 2014.

64. The additional information that emerges from that affidavit is that there is a forensic document examiner's report Ref. No. CID/ORG/8/3/1/563-14 dated 26th March, 2013 showing that the signature on the sale agreement allegedly forged by the Applicant does not belong to the Applicant. The Applicant urges the Court to note that the respondents in their replying affidavit failed to disclose that there was a forensic report showing that the signature and office stamp impression on the sale agreement allegedly forged by the Applicant did not belong to the Applicant.

65. The Applicant also exhibited a letter dated 4th July, 2014 addressed to the DPP by the 3rd Respondent (Director of Criminal Investigations Department) in which the 3rd Respondent had told the DPP that upon further investigations and review of the enquiry file it was necessary for the decision to prosecute the Applicant to be reconsidered.

66. The Applicant avers that the decision by the DPP whether to prosecute a case is based on the investigations carried out by the 2nd and 3rd respondents herein and the decision of the DPP to prosecute him contrary to the outcomes of investigations means that the decision is based on improper and irrelevant considerations, is against public policy and an abuse of the legal process.

67. According to the Applicant, the letter of the 3rd Respondent dated 4th July, 2014 had also revealed that no complaint to the police was made against him by the directors of Uzima Publishing House on 24th May, 2007 as alleged by the 2nd Interested Party.

68. In the further affidavit, the Applicant also pointed out the numerous contradictions between the statements of the people proposed to testify against him.

69. For record purposes, it is noted that on 24th June, 2014 Uzima Publishing House was directed to file a formal application seeking to be enjoined in the matter as an interested party. No application was filed and neither did counsel turn up at the next mention date. Uzima Publishing House was therefore not represented in these proceedings although its directors were the alleged complainants against the Applicant.

70. Upon reviewing the pleadings and submissions in this matter, I find that the only question to be answered is whether the DPP's decision to have the Applicant charged was lawful, reasonable and complied with the rules of natural justice.

71. Several authorities have been cited by the parties showing the grounds upon which the exercise of prosecutorial powers by the DPP can be reviewed. What clearly emerges from all these decisions is that the power to review the decision of the DPP to prosecute should be exercised with great restraint.

72. The reasons for this caution were explained by Grenville Cross, SC in the already cited journal at pages 5 and 6 as follows:

“That the decision whether or not to prosecute is only reviewable in what the House of

Lords has recently called “highly exceptional circumstances” is reassuring to the prosecutor, for various reasons. First, it respects the position of the prosecutor. Second, it enables the criminal courts to deal with the issues that affect criminal cases. Third, it ensures that cases proceed to trial for resolution, and are not subject to delay. The issue of delay is an important one, and those concerned with the grant or otherwise of judicial review must keep in mind that persons accused of crime may often have reasons of their own for delaying the start of their trial for as long as possible.”

73. The need to grant judicial review only in exceptional circumstances in criminal trials has also been expressed by the Supreme Court of India in the case of **State of Maharashtra & others v Arun Gulab Gawali & others Criminal Appeal No. 590 of 2007 (27 August, 2010)** as follows:

“12. The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor it can ‘soft-pedal the course of justice’ at a crucial stage of investigation/ proceedings. The provisions of Articles 226, 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as ‘Cr.P.C.’) are a device to advance justice and not to frustrate it. The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of power of the Court, but the more the power, the more due care and caution is to be exercised in invoking these powers.”

(Emphasis supplied).

74. However, that is not to say that the remedy should not be granted where it is deserved. The Supreme Court of India in the cited case outlined the grounds for quashing a criminal prosecution as:

“(I) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;

(II) where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;

(III) where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; and

(IV) where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.”

75. Indeed the Kenyan Constitution is alive to the fact that prosecutorial power can be abused by the DPP and that is why it provides at Article 157(11) that:

“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.”

76. The DPP has not been given power to exercise as he deems fit. He has been given authority to

only act within the parameters of the Constitution and the laws of the country. Where an applicant demonstrates that the DPP has crossed the set boundaries then the Court should not hesitate in granting appropriate relief.

77. The question therefore is whether in the circumstances of this case the DPP exercised his power lawfully, rationally and in compliance with the rules of natural justice. I have already reproduced at length the chronology of events as narrated by each party. As can be seen, there is no agreement as to what exactly happened.

78. Two things, however, clearly emerge. There is a forensic examiner's report showing that the signature and the stamp on the sale agreement which the directors of Uzima Publishing House claim was forged by the Applicant did not belong to the Applicant. There would therefore be no basis for alleging that the Applicant forged a sale agreement to indicate that the sale price of the suit property as agreed by the deceased and Uzima Publishing House was Kshs.37,000,000/= instead of Kshs.27,000,000/=.

79. Secondly, there is the letter dated 4th July, 2014 from Ndegwa Muhoro, the Director of Criminal Investigations Department addressed to the DPP advising that it was not prudent to charge the Applicant. The gist of that letter is that there is no evidence to support the allegation by the directors of Uzima Publishing House that the Applicant had forged a sale agreement. The letter also states that the directors of Uzima Publishing House did not report the alleged forgery to any police station.

80. It is also noted that although it is alleged that the Applicant forged a sale agreement in 2007, there is no evidence that any investigation was carried out at that time. Investigations were only carried out after the Applicant complained about the forged Notice of Withdrawal of Caveat and court order in 2011. The respondents did not bother to explain why the alleged forgery of a sale agreement was never investigated prior to the Applicant's complaint. It is hard to disagree with the Applicant's assertion that the alleged forgery of an agreement was a ploy meant to silence him because of his persistence in trying to have those who forged a court order and a Notice of Withdrawal of a Caveat arrested and charged.

81. In the circumstances of this case it is easy to agree with the Applicant that the DPP's action is contrary to public policy and an abuse of power. This is so considering also that Police Constable Isaac Ogutu failed to disclose in his replying affidavit that there was the forensic examiner's report dated 26th March, 2013 indicating that the signature and office stamp alleged to belong to the Applicant in the forged document did not actually belong to him. The decision to charge the Applicant in the light of the existence of this crucial information smacks of bad faith.

82. The 3rd Respondent's letter dated 4th July, 2014 cannot be held against the DPP as it was written long after the decision to prosecute the Applicant had been made. The Applicant is correct that the letter goes a long way to show that there is no evidence to sustain any charges that might be brought against him by the respondents.

83. It appears there is no iota of evidence that connects the Applicant with the alleged forgery of a sale agreement. Lack of evidence is one of the grounds for quashing the decision of the DPP to prosecute an accused person.

84. However, the lack of evidence to connect the Applicant with the forgery does not in any way change the fact that the deed of assignment forwarded to the counsel of the 2nd Interested Party by the Applicant indicated that the purchase price agreed between the late Dungarwalla and Uzima Publishing House Ltd was Kshs. 37,000,000/= million instead of Kshs. 27,000,000/=. It is therefore likely that the agreement presented to the 2nd Interested Party was also forged to reflect the higher figure so that the late Dungarwalla would gain Kshs. 20,000,000/= million from the assignment of his rights instead of the Kshs. 10,000,000/= agreed between him and the 2nd

Interested Party.

85. Whatever the case, I find that the decision to prosecute the Applicant was an attempt to abuse the court process as there is no evidence to connect him with the alleged crime. His application therefore succeeds and the respondents are barred from arresting, charging and prosecuting the Applicant on the strength of the evidence that was used to make the decision to prosecute him.

86. Each party will meet own costs of these proceedings.

Dated, signed and delivered at Nairobi this 10th day of June, 2015

W. KORIR,

JUDGE OF THE HIGH COURT