REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 16 OF 2015

PUBLIC……..……..……..…. APPLICANT

-VERSUS-

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

THE CHIEF MAGISTRATE'S COURT KIAMBU.....2ND RESPONDENT

WILLIAM THIONG'O WANDERE*.....*EX-PARTE

JUDGEMENT

Introduction

1. By a Notice of Motion dated 3rd February, 2015, the *ex parte* applicants herein, **William Thiong'o Wandere**, seeks the following orders:

> **1. An order of prohibition directed at the Chief Magistrate's court at Kiambu prohibiting here on any other Magistrate from hearing or further hearing determining, or in any manner whatsoever dealing and/or proceeding with Criminal Case no. 1675 of 2013, Republic versus William Thiong'o Wandere & Another, or any variation thereof of the charge or charges in substitution thereof or a akin to the same in the above criminal case.**
>
> **2. An order of prohibition directed at the Director of Public Prosecutions barring him from further prosecuting criminal case number 1675 of 2013, Republic versus William Thing'o Wandere and Another in its present form or in any intended variation thereof of the charges thereon or a kin to the same.**

Applicants' Case

2. In support of its case, the ex parte applicant swore a verifying affidavit on 21st January, 2015.
3. According to him, he was the first accused in criminal case No. 1675 of 2013 presently pending before Chief Magistrate's Court in Kiambu.
4. He deposed that on 29th July, 2013 he was arrested by police officers and taken in on allegation of issuing a bad cheque. The police officers attached to Kiambu police Station interrogated him in

respect of a complaint that on 4th August, 2010 he issued a cheque number 000044 for Kshs 1,500,000/= in favour of one **Kitish Chandilar Karania** on account number 0291467208 with knowledge that the said account number 0291467208 had insufficient funds. On 2nd August, 2013, he was arraigned before the Chief Magistrate's court at Kiambu and charged along with one **Priscillah Wanjiru Thiong'o** in Criminal Case No. 1675 of 2013 with the offence.

5. He however contended based on legal advice that the charge sheet in the aforementioned criminal case is defective in that cheque number 000044 for the subject of the criminal charge was never presented for payment at his bank and that he was not the person who signed the cheque in which the prosecution's case is premised.
6. The applicant deposed that the said **Kitish Chandilar Karania** is a businessman and a director of Kiambu Service Store Limited which company was supplying spare parts to the defunct Ministry of Roads where he worked as a Senior Charge-hand. He also disclosed that the said **Mr. Kitish Chandilar Karania** is also an unlicensed money lender ('Shylock') who carries on an illegal business of lending money to people. Sometimes in the year 2007 the applicant approached the said **Mr. Kitish Chandilar Karania** and requested him to give the applicant a personal loan of Kshs 88,000/= to enable the applicant purchase a Government House in Kiambu County a request which the said **Mr. Kitish Chandilar Karania** acceded to on the security of a bank post dated cheque of Kshs 98,000/= which amount was inclusive on interest of Kshs 10,000/= which the applicant duly obliged and furnished a blank post dated cheque in the name of Mileend Enterprises a business entity in which **Mrs. Priscillah Wanjiru Thiong'o**, his wife is the proprietor thereof.
7. However on full repayment of the said loan, the applicant requested **Mr. Karania** to return the aforesaid blank post dated cheque to him but **Mr. Karania** kept telling him that he would collect the cheque from his brother who was in Nairobi at the time. After waiting for an unnecessarily long time for **Mr. Karania** to returned the cheque to him, **Mr. Karania** called him and offered to lend him Kshs. 200,000/= on the security of the previous cheque, an offer the applicant obliged which money was to be repaid within one month with an interest of Kshs. 20,000/=. The Applicant, however delayed in repaying the money and when he went to see **Mr. Karania** two months later he gave him Kshs 100,000.= which amount he accepted and told the Applicant he would treat it as interest for the amount he had loaned the Applicant. Unknown to the Applicant, it was deposed the said **Mr Karania** fraudulently forged the Applicant's wife's signature and filled in the blank cheque an amount of Kshs.500,000/= which had not been agreed upon and presented the same for payment at I&M Bank, Biashara Street, Nairobi.
8. On or about 23rd April, 2009 the Applicant's wife received a call from Equity Bank Limited Kiambu Branch to the effect that someone had tried to present a cheque of Kshs 500,000/= for payment on the account on Mileend enterprises whereupon she instructed the bank not to honour it as the Applicant had not authorised its presentation for payment.
9. The applicant deposed hat sometimes in the month of June 2009 he was summoned by **Mr. Mutinda** a CID officer who was based at Kiambu Police Station who read to him a statement recorded by **Mr. Karania** concerning a cheque number 000033 allegedly issued by the Applicant to him and the Applicant was told to go home and await the outcome of the investigations. In early July 2011 the said **Mr. Mutinda** summoned the Applicant to the CID office at Kiambu Police Station and told the Applicant to give him a bank cheque in the name of Mileend Enterprises so that he could compare it with cheque number 000033. He also requested the Applicant for specimen signatures and handwriting containing the words "Kiambu Service Store" and "one million five hundred thousand". The Applicant acceded to these requests, according to him in the hope that the Cheque would be returned after the investigations but unknown to him the said officer took the blank cheque to **Mr. Karania** who in turn forged the Applicant's signature and filled in the blank cheque an amount of Kshs 1,500,000/= which cheque was later used to fabricate the current criminal charge against the Applicant notwithstanding the fact that the said cheque was never presented for payment.
10. It was submitted on behalf of the Applicant that in this case as the cheque in question was drawn in favour of Kiambu Service Store and not the complainant, this was a fundamental defect which renders the charge fatally defective as this contravened the provisions of Article 50(2)(n) with respect to the charges being framed so as to enable the accused know the offence with which he is charged. Further since the cheque the Applicant is alleged to have issued was not presented for payment, it was submitted that the indictment did not disclose any criminal offence as the cheque

was returned based on its denomination rather than dishonour.

11. It was further contended on the basis of section 316A(2) of the ***Finance Act, 2004*** that since the cheques in question were post-dated cheques they were not covered by the current indictment.
12. It was submitted that the cheque no. 000044 the applicant is alleged to have issued was issued by Mileend Enterprises and not the applicant.

1st Respondent's Case

13. The 1st Respondent in opposition to the application filed a replying affidavit sworn by **Christopher Gatuiri Gatembu**, the investigating officer stationed at the DCIO Kiambu Police Station on 16th February, 2015.
14. According to him, a complaint was made by **Kirtish Charndilal Karania** 9hereinafter referred to as "the Complainant") on 11th July, 2010 alleging that the Applicant had on diverse dates borrowed money from him with a promise that he would reimburse the complainant in the methods portrayed in the schedule attached. The complainant further alleged that the Applicant and his wife the co-accused **Priscillah Wanjiru Thiong'o** in the month of September 2010 visited his premises and agreed to pay monies duly owed to the complainant in the terms prepared by the Applicant and his wife. However, notwithstanding the commitments made by the Applicant and his wife over the years to make good of the monies loaned, the Applicant and his wife never returned nor refunded the sums duly owed to the complainant.
15. Subsequently, the investigation commenced and the following information was revealed:-

    a. That the Applicant had no numerous occasions borrowed money from the complainant with a promise to refund the complainants as provided in the statement of the complainant.

    b. That the Applicant committed himself to the said arrangement by issuing the complainant with a number of cheques.

    c. That some of the cheques issued in respect of the account under Equity belong to the Applicant's wife trading under the business name of Mileend Enterprises .

    d. That the Applicant issued cheques Nos. 000033 and 000044 to the complainant with instructions that the cheques were payable on the same date given, however upon presentation of the said cheques to the bank, the cheques returned with the remarks respectively, "returned unpaid" and "banks do not receive cheques with payment of Kshs 1,000,000".

    e. That subsequent thereto the Applicant and his wife approached the complainant outlining the terms of how they intend to clear the debt in three instalments as follows:-

    1. Kshs. 500,000 on 1/10/2010
    2. Kshs. 500,000 on 1/10/2010
    3. Kshs. 500,000 on 1/10/2010

    f. That the Applicant pursuant to investigations was requested to provide the counterfoil of the cheques issued to the complainant for purposes of investigation, however the request was neglected/ignored/refused by the Applicant

    g. That the returned cheques were subjected to forensic examination to ascertain the signatories of the said cheques and a forensic expert report on 31st May, 2012 revealed that the specimen handwriting provided compared with the signatures in the questioned cheques were made by the same author, the Applicant herein.

16. According to the deponent, at the conclusion of investigations it was clear that the acts undertaken

by the Applicant in terms of seeking a loan from the complainant and the issuance of cheques by the Applicant over the years (2008-2010) with no guarantee and/or intention of the refund materializing allude to elements that substantiate a criminal offence within the laws of Kenya. As a result thereof, the Applicant and his wife were arrested and charged them with the offence of issuance of bad cheques in July 2013 as indicated in the Charge Sheet.

17. In the deponent's view, the charges referred to in Criminal Case No. 1675 of 2013 were properly before the trial court and disclosed an offence recognized under the laws of Kenya. He disclosed that the case before the trial court was part-heard with three witnesses remaining before the prosecution closed it case and was scheduled to proceed for further hearing on 11th February, 2015 and subsequently 27th February, 2015.
18. Based on counsel's advice, the deponent believed that under section 193A of the ***Criminal Procedure Code***, 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; that under Article 157(6) of the Constitution of Kenya 2010, the Respondent exercises state powers and functions of prosecution which entails the institution, undertaking, taking over, continuance and or termination of criminal proceedings amongst other functions and duties; that in addition thereto the Respondent in the discharge of its duties and functions, is required to respect, observe and uphold the following constitutional provisions, *inter alia*;

    i. To have regard to Public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process under Article 157(11);

    ii. Uphold and defend the constitution;

    iii. The national values and principles of governances enshrined in Article 10 in the application, interpretation of the constitution as well in making and implementing the laws and public policy decisions.

    iv. Respect, observe, protect, implement, promote and uphold the rights and freedoms in the Bill of Rights enshrined in Article 21(1);

    v. To be accountable to the public for decisions and actions taken and generally observance Article 73 (2) (d);

    vi. To be accountable for administrative acts and observance of the values and principles of public Service Article 232(e).

19. It was deposed that the Applicant had not demonstrated that in making the decision to prefer criminal charges against him, that the Respondent has acted without or in excess of the powers, conferred upon them by law or have infringed, violated, contravened or in any other manner failed to comply with or respect and observe the foregoing provisions of the constitution or another provision thereof.
20. It was further added that the Respondent independently reviewed and analyzed the evidence contained in the investigations file as submitted (including the witness statements, documentary exhibits) as required by law and it was because of the said review and analysis that criminal proceedings commenced against the Applicant.
21. According to the 1st Respondent, the Applicant is seeking a curtail the mandate of the Criminal justice system actors as enshrined within the constitution of Kenya; the matter is not urgent to render the interim prayers sought as the Applicant was arraigned in August 2013 and has only sought this Courts intervention two years later where the prosecution is about to close its case; the Applicant have not adduced sufficient evidence before this court on merit to show that prejudice has been occasioned and damage suffered to render the continued prosecution of the criminal proceedings an outright abuse f the court process; 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; the Applicant seeks to adduce his defence before this honourable court which has solely been trusted with powers to ascertain whether the institution of criminal charges is an abuse of process, against the rules of natural justice or is I bad faith; the Respondent does not act under the direction or control of any person or authority and as such Article 249 (2) of the Constitution, provides that an independent office is subject only to the Constitution and the law and is not subject to the direction or control by any person or authority; and the allegation by the Applicant is without merit, legal reason or backing.

22. The Court was therefore urged to exercise extreme care and caution not to interfere with the Constitutional powers of the Respondent to institute and undertake criminal proceedings and should only interfere with the independent judgment of the Respondent if it is shown that the exercise of his powers in contrary to the constitution, is in bad faith or amounts to an abuse of process. To the 1st Respondent, the Applicant's averments that the charges are trumped up and made to achieve an ulterior motive or collateral purpose are misconceived, unfounded, unmeritorious and baseless. In the said Respondent's view, the Applicant failed to demonstrate that the Respondent had not acted independently or had acted capriciously, in bad faith or had abused the legal process in a manner to trigger the High Court's intervention.
23. Further, it was contended that the Applicant failed to demonstrate that the Respondent lacked jurisdiction, acted in excess of jurisdiction or departed from the rules of natural justice in directing that the Applicant be charged with criminal offence.

Determinations

24. I have considered the parties' respective cases, as contained in their affidavits as well as submissions on record.
25. The law in these kinds of cases is 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. 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.
26. 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

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."

27. 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."

28. 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."

29. 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....”

30. 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... 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."

31. In this case the ex parte applicant contends that the charge sheet is defective on two grounds. The first ground is that the cheque in question was never presented for payment. If this was true, the failure to present the cheque for payment would constitute a defence in the criminal case. Whether or not the cheque was presented goes to the ingredients of the criminal charge but does not in my view render the charge sheet defective since such a finding would depend on the evidence presented by the parties before the trial court. It was also contended that the charge sheet does not disclose the offence with which the Applicant was charged. To the Applicant whereas the complainant is **Mr Karania**, the cheque in question was drawn in favour of Kiambu Service Store. In my view, this issue goes to the determination whether the evidence to be presented by the prosecution support the charge preferred against the Applicant. It does not as the Applicant contends disclose no offence. What the Applicant is alleging is that based on the evidence available the charge preferred cannot succeed. That is a matter for the determination of the trial Court.
32. The Applicant also alleges that the subject cheque was a forgery. How the applicant expects this Court in these kinds of proceedings to determine such an issue is in my view a mystery. Forgery can only be determined based on the evidence presented.
33. It was also contended that the cheques in question were post-dated and were issued by Mileend Enterprises and not the Applicant. However the Applicant admitted that he was the one who presented the said cheque. To contend that the Applicant ought not to be charged with the offence in question when he is the one who presented the same in my view amounts to blowing hot and cold. I am not saying that such a charge ought to stand. However, this Court cannot state with certainty in these proceedings that such a charge is incapable of being sustained. That is an issue purely for the determination of the trial Court.
34. As for the issue of post-dating, based on the evidence before the Court, this Court cannot make a factual finding as to the exact time when the date was inserted in the cheque. That is a matter of evidence which will be determined after hearing the parties and considering the nature of the evidence in their possession.
35. The Applicant contends that the criminal proceedings were instituted for ulterior motive and that they were meant to force the Applicant to pay a disputed civil debt. However it was upon the Applicant to present credible prima facie evidence that this was the case. The burden and standard of proof was expounded in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** where 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.."

36. I must however give a word of caution with respect to the exercise of the Director of Public Prosecution's powers under Article 157 of the Constitution. In exercising its mandate, section 4 of the ***Office of the Director of Public Prosecutions Act*** enjoins the DPP to take into account the provisions of the said section of the said Act which 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.***

37. It follows that the discretion and powers given to the 1st Respondent under Article 157 of the Constitution cannot be said to be unfettered or absolute. 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."

38. Similarly in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**, it was held:

"**Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries...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 ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters....."**

39. In this case however, the issues raised by the Applicant are in my view issues for the trial Court. To determine the same would amount to this Court on a judicial review application usurping the powers of the trial Court and that is not the jurisdiction conferred on this Court in these kinds of proceedings.

40. In this case the court must take into account the fact that the criminal process against the 1st applicant is on course and it is disclosed that only three witnesses have yet to testify. The said proceedings were instituted in the year 2013 yet these proceedings were commenced in the year 2015. It is not contended that in the course of the said proceedings an event took place which manifested an intention to secure some other purpose than the need to vindicate the committal of the offences charged. 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".

41. In similar vein, the state of the criminal case sought to be quashed ought to be considered. Whereas there is nothing that can bar the Court from terminating pending criminal proceedings at any stage of those proceedings, it must always be remembered that judicial review remedies are discretionary in nature and one of the factors which would militate against the grant thereof is delay in seeking relief. As was held by **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728 and Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707: "***Speed and promptness are the hallmarks of judicial review.***"** Judicial review, it has therefore been held**,** acknowledges the need for speedy certainty as to the legitimacy of the target activities and requires the applicants for judicial review to act promptly. See **Mutemi Kithome vs. The District Land Adjudication & Settlement Officer Mwingi District & Others Nairobi HCMA No. 1108 of 2004 [2006] 1 EA 116.**
42. Therefore whereas under the ***Law Reform Act*** there is no limitation as to when to apply for orders of prohibition the Court in determining whether or not to grant the relief sought will take into account the delay in making the application and the import and impact of such delay in the administration of justice.
43. This position was similarly appreciated in *Judicial Review Misc. Civil Appl. No. 139 of 2014 between* ***Vania Investments Pool Limited and Capital Markets Authority & Others*** where the learned Judge pronounced himself as hereunder:

"The issue of failure to invoke alternative remedies is intricately linked with the issue of delay. Applications seeking leave to commence judicial review proceedings must be made promptly as soon as grounds giving rise to the need for judicial review become known. Undue and inordinate delay in applying for judicial review is a major factor for consideration. Lord Hope of Craighead in Regina v London Borough of Hammersmith and

Fulham (Respondents) and Other Exparte Burkett &

Another (FC) (Appellants) [2002] UKHL 23 noted the need for the applicant to move the court promptly when he observed that,

> ***"[64] On the other hand it has repeatedly been acknowledged that applications in such cases should be brought as speedily as possible. Ample support for this approach is to be found in the well-known observations of Lord Diplock in O'Reilly v Mackman [1983] 2 AC 237, 280-281 to the effect that the public interest in good administration requires that public authorities and third parties should not be kept in suspense for any longer period than is absolutely necessary in fairness to the person affected by the decision… But decisions as to whether a petition should be dismissed on the ground of delay are made in the light of the circumstances in which time was allowed to pass. As Lord President Rodger put it in Swan v Secretary of State for Scotland 1998 SC 479, 487:"It is, of course, the case that judicial review proceedings ought normally to be raised promptly and it is also undeniable that the petitioners let some months pass without starting these proceedings. None the less, in considering whether the delay was such that the petitioners should not be allowed to proceed, we take into account the situation in which time was allowed to pass."***

44. Apart from that it is stated in ***Halsbury's Laws of England*** **4th Edn. Vol. 1(1) para 12 page 270:**

"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders."

45. In deciding whether or not to grant orders of judicial review, the Court must consider whether or not the orders sought by the applicant are the most efficacious remedies in the circumstances. As stated in ***Halsbury's Laws of England 4th Edition Vol. 1(1) paragraph 122***, the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles. Sound legal principles, in my view would dictate that where what is sought to be prohibited has reached a very advanced stage due to the failure by the applicant to act promptly, it may well be prudent to allow the process to run its course. As was expressed in **Kuria & 3 Others vs. Attorney General** (supra):

"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."

46. In these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. As judicial review proceedings are concerned with the process rather than merits of the challenged decision or proceedings the court is not entitled to make definitive findings on matters which go to the merit of the impugned proceedings.
47. The Applicant has contended that he is unlikely to get a fair trial due to the delay in preferring the charges against him. According to him there was an unexplained delay for 3 years. However as was held by this Court in **George Joshua Okungu & Another vs. The Chief Magistrate's Court Anti-Corruption Court at Nairobi & Another Petition No. 227 and 230 of 2009**:

".....it is not mere delay in preferring the charges that would warrant the halting of the criminal proceedings. Rather, it is the effect of the delay that determines whether or not the proceedings are to be halted. In this case, there is no allegation made by the Petitioners to the effect that the delay has adversely affected their ability to defend themselves. In other words, the Petitioners have to show that the delay has contravened their legitimate expectations to fair trial."

48. In this case the applicant has not contended that as a result of the long delay in bringing the criminal charges his defence has been compromised for example by making it impossible for him

to efficiently present a formidable defence which he could have done had the charges been preferred earlier on.

49. I have considered the applicants' case as well as the respondent's case. I am however not satisfied that this is a proper case in which the court ought to bring the criminal proceedings to a halt. The applicants will be afforded an opportunity to defend themselves, cross-examine witnesses and adduce evidence in support of their case and that in my view is the proper course to take in the circumstances of this case.

Order

50. Accordingly, the order that commends itself to me is that the Notice of Motion dated 3rd February, 2015 be and is hereby dismissed with costs to the Respondents.

Dated at Nairobi this day 7th day of July, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kipng'eno for the Applicant

Cc Patricia