



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**MILIMANI LAW COURT**

**JR. MISC. CIVIL APPLICATION NO. 303 OF 2013**

**IN THE MATTER OF THE LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF CONSTITUTION OF KENYA**

**AND**

**IN THE CRIMINAL PROCEDURE CODE, CAP 75, LAWS OF KENYA**

**AND**

**IN THE MATTER OF PENAL CODE, CAP 64, LAWS OF KENYA**

**AND**

**IN THE MATTER OF ADVOCATES ACT, CAP 16 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE CHIEF MAGISTRATES COURT AT KIBERA, CRIMINAL CASE NO. 6161 OF 2012, REPUBLIC VERSUS LASHINA VINODCHANDRA RAILUNDALIA AND THOMAS NYAKAMBI MAOSA**

**AND**

**IN THE MATTER OF AN APPLICAIOTN BY THOMAS NYAKAMBI MAOSA TO APPLY FOR ORDERS OF PROHIBITION, CERTIORARI AND MANDAMUS**

**THOMAS NYAKAMBI MAOSA.....APPLICANT**

**-VERSUS-**

**THE KIBERA CHIEF MAGISTRATE.....1<sup>ST</sup> RESPONDENT**

**THE KILIMANI DIVISIONAL CID OFFICER.....2<sup>ND</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 2<sup>nd</sup> September, 2013, the *ex parte* applicant herein, **Thomas Nyakambi Maosa**, inappropriately described in these proceedings as the applicant seeks the following orders:

1. **An order of Certiorari to remove into this honourable court for the purpose of being quashed, and quash, the consolidated charge sheet, dated 26/3/2013, by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents, in the Kibera Chief Magistrate’s Court Criminal Case no. 6161 of 2013, Republic versus Thomas Nyakambi Maosa and Another.**

2. **An order of Prohibition directed at the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents, prohibiting the Director of public prosecutions and/or his agents, from prosecuting or further prosecuting the charges contained in the said charge sheet dated 26/3/2013, and/or the amended charges sheet thereto, by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents, in the Kibera Chief Magistrates Court Criminal Case No. 6161 of 2012 Republic versus Thomas Nyakambi Maosa, or any variation thereof or any charge or charges akin to it, or arising from the same transaction of NRB/BLOCK 94/66, and/or, the 1<sup>st</sup> Respondent, prohibiting that court and/or any other Magistrate, in the Republic of Kenya, from hearing, or further hearing, for determination of the charges contained in the said charge sheet in Criminal Case No. 6161 of 2012 Republic versus Thomas Nyakambi Maosa or any variation thereof, or any charge or charges akin to it, or arising from the same transaction.**

3. **That costs of the application be provided for.**

2. The application was supported by an affidavit sworn by the applicant on 16<sup>th</sup> August, 2013.
3. According to him, he was charged by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents before the 1<sup>st</sup> Respondent with an offence of obtaining money by false pretences, contrary to Section 313 of the *Penal Code*, Cap 63, Laws of Kenya. The particulars of the charge were that he obtained a sum of Kshs 21,840,00/= from the complainants, **Puthucode Krishnaiyer Seshadri** and Another (hereinafter referred to as “the complainants”) while pretending that he, jointly with his co accused in the criminal case, **Lashina Vinodchandra Raikundalia** were in position to sell LR No. Nairobi/Block 94/66 (hereinafter referred to as “the suit land”), to the said complainants yet he neither knew nor acted for the complainants therein or elsewhere.
4. According to the applicant, his said co-accused is neither his employee or employer, nor his partner in the firm of Maosa & Co. Advocates.
5. He however disclosed that the Complainants had filed an originating summons application vide O.S. No. 112 of 2013, at the Nairobi High Court, demanding the money allegedly deposited as stakeholder in his bank account. In the affidavit sworn by **Puthucode Krishnaiyer Seshadri** in support of the said O.S. the complainants did not allege that he was selling the land in issue to them. Instead they alleged that he acted for them as their advocate, in the land transaction relating to the suit land, and that, he without their authority, released the stakeholders of Kshs 21,849,000/= deposited with him to hold until property passed to the vendors, the said complainants hence the claim for the said sum.
6. The Applicant however averred that though he did not act for the complainants at all times material to the case, they alleged that he acted for them in the purchase of the issue. However, the complainants have not alleged in the O.S. No. 122 of 2013 that the Applicant sold land to them, but that the Applicant acted for them as their lawyer in the conveyance of the land they were buying more specifically known as L.R. No. Nairobi/Block 94/66 and not as a seller which land is

the subject matter of both the criminal case in Kibera and the said Originating Summons in which there are two different allegations about the Applicant's capacity therein. The Applicant however asserted that he have never acted as an advocate in any transaction whatsoever relating to L.R. No. Nairobi/Block 94/66, either for the vendor or the purchaser thereto. Assuming without prejudice, he acted for both parties to the sale transaction in issue and as alleged in O.S. NO. 112 of 2013, then in such a case, the **Advocates Act**, Cap 16, Laws of Kenya provides a mechanism on how the matter should be handled rather than as a criminal matter.

7. It was deposed that despite raising the same before the trial court and seeking that the court frames the constitutional issues arising therefrom for determination, the same was disallowed. The Applicant however was of the view that the decision of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents herein, to prefer the charges against him, in the Kibera Chief Magistrates Criminal Case Number 6161 of 2012 violated the legal principles of the constitution of the Republic of Kenya and the **Advocates Act**, Cap 16 Laws of Kenya and that the same charges and his continuous prosecution was in breach of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents' constitutional duty and obligations, to act in good faith, in the interest of the public and justice to all, in his duty as a public prosecutor. Further the charges amounted to breach of his fundamental rights and freedoms as an officer of this court, and an advocate of High Court of Kenya warranting this Court's intervention.

### **Respondents' Case**

8. In opposition to the Application, the Respondents filed a replying affidavit sworn by **Sylvester Mango**, a police officer attached to the Directorate of the Criminal Investigation Department engaged in the investigation of the subject case.
9. According to him, investigation into the matter the subject of the application commenced after the law firm of Ms. Stanley Henry Advocates wrote to the DCI concerning the suit parcel of land. It was disclosed that the complainants were **Mr. Puthucode Krishnayer Sheshadri** and his wife **Mrs. Prema Sheshadri** who were defrauded of cash Kshs.21,840,000/= by **Ashna Vinodchandra**, **Thomas Maosa** and **Mary Jane Kemutho**. It was alleged that **Ashna Vinodchandra** posed as an agent to the vendors, while **Thomas Maosa** posed as the vendor's lawyer in the transaction and that when **Mrs. Prema Sheshadri** saw an advertisement in the local dailies, she developed interest and made a telephone call on the cell number provided in the advertisement. The person who received the call immediately referred **Mrs. Prema Sheshadri** to **Ashna Vinodchandra** and a meeting was arranged between **Mrs. Prema Sheshadri** and **Ashna Vinodchandra** at Sarit Centre Westlands (Nairobi). Initial negotiations commenced and **Mrs. Prema Sheshadri** was also shown the original title deed to the parcel of land and she went ahead and made a copy of it which she retained.
10. It was deposed that from the copy of the title deed provided, **Mrs. Prema Sheshadri** realized the title was registered in the names of **Aggrey Christopher Ackello Oguto** and **Hellen Anna Bertha Brigitte**. On inquiring **Ashna Vinodchandra** explained to her that those were her clients and that they stay in Malindi and she had all the blessings from them to transact the transfer. However, when **Mrs. Prema Sheshadri** asked for any commitment none was forthcoming. **Mrs. Prema Sheshadri's** husband **Mr. Puthucode Krishnayer Sheshadri** was later briefed on the transaction in their house in Lavington, and being convinced, he bought the property. Later **Ashna Vinodchandra** assisted **Mrs. Prema Sheshadri** to get a certificate of search from Ardhi house where it was confirmed that truly the parcel of land belonged to the vendors.
11. It was disclosed that a meeting was arranged at Serena Hotel between the vendors and the purchasers, where the purported vendors showed up and negotiations proceeded whereat it was eventually agreed on the purchase price, mode of payment, and other modalities involved in the transfer. Among the things negotiated was **Thomas Maosa** who was proposed to be the vendors lawyers was also to be the purchasers lawyer a thing which the complainants were not comfortable with but they were convinced by **Ashna Vinodchandra** who assured them that he won't pay. A sale agreement was later drawn and delivered to **Mr. Puthucode Krishnayer Sheshadri** and **Mrs. Prema Sheshadri** by **Ashna Vinodchandra** which the complainants executed and subsequently wired money to **Thomas Maosa's** Account as provided for in the sale agreement.
12. It was averred that upon the completion of payment, no transfer of land was done to **Mrs. Prema Sheshadri** as envisaged and the complainants came to realize that they had been defrauded when

- they visited the parcel of land found a notice for “Land Not for Sale” placed on it. The matter was then reported to the director of criminal investigations by **Mr. Puthucode Krishnayer Sheshadri** and investigations conducted. Efforts were made to trace the purported vendors **Prof. Aggrey Christopher Ackello Ogutu** and **Hellen Anna Bertha Brigitte** whose statements were recorded to the effect that they were genuine owners of the parcel of land and at no time did they enter into any agreement with the Applicant to sell the land on their behalf. Neither had they ever been to Serena Hotel for the sale transaction. They also indicated that they did not know a lawyer by the name **Thomas Maosa**.
13. They however disclosed that at one point they lost their title deed and the title deed was later recovered from **Ashna Vinodchandra** at ardhhi house when he attempted to conduct search using the title deed and the latter was arrested and taken to the police. Asked whether they knew the purchasers complainants they categorically stated that they had ever met and disowned the sale agreement and the signatures appended thereon termed them as forgeries. They also indicated that they did not have any input on the sale agreement and the whole matter should be investigated and prosecution done.
  14. According to the deponent, in the course of investigation it was realized that the sum of Kshs.21,840,000/= was transferred from **Mr. Puthucode Krishnayer Sheshadri's** account to **Thomas Maosa** account at the family bank Nairobi which investigations revealed that immediately **Mr. Puthucode Krishnayer Sheshadri** wired money, **Mary Jane Kemutho** armed with power of attorney signed by **Thomas Maosa** withdrew the money and disappeared with it. A report was collected from family bank on all the transactions including the withdrawal slips. **Ashna Vinodchandra** went further to collect a sum of Kshs.840,000/= in cash which she acknowledged.
  15. Accordingly, the deponent averred that investigations established that there was no land in place for **Ashna Vinodchandra** to sell or transfer to the complainants and that the Applicant also did not have any client he was acting for. To the contrary, **Ashan Vinodchandra** presented fictitious people to the complainants at Serena Hotel and hence duped them to entering some agreement. That the Applicant conspired with **Ashna Vinodchandra** to defraud the complainants of their money by providing his account details and drafting an agreement which he knew so well that there were no vendors and in order to defeat justice gave power of attorney to **Mary Jane Kemunto** who withdrew all the money hence the institution of criminal charges against one **Ashna Vinodchandra** and **Thomas Maosa** vide Kibera criminal case no. 6161 of 2012.
  16. To the deponent, the application herein has been filed in bad faith, misconceived and abuse of the court process and meant to defeat the cause of justice. He further deposed that the directorate of criminal investigations' is established under Section 28 of the **National Police Service Act** under the direction, command and control of the inspector general of the national police service and cited its functions and objectives under the section and the Constitution.
  17. In his view, the applicant failed to demonstrate that in undertaking investigations in the complaint lodged with the national police service and in making the decision to prefer criminal charges against them, either the director of public prosecution or any member of staff of the office of the director of public prosecution or the National Police Service acted without or in excess of the power conferred upon them by the law or infringed, violated, contravened or in any other manner failed to comply or respect and observe the foregoing provisions of the constitution of Kenya 2010 or any other provisions thereof or any other provisions of the law. To the contrary, the Director of Public Prosecutions independently reviewed and analyzed the evidence contained in the investigations file compiled by the directorate of criminal investigations including the witness statements, documentary exhibits and statements of the Applicant as required by the law and it was on the basis of the said review and analysis that the DPP gave instructions to prosecute the Applicant. Therefore, the decision to charge the applicant was informed by the sufficiency of evidence on record and the public interest and not on any other considerations.
  18. To the deponent, 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 charges hence the contention by the applicant that the case against him is oppressive and malicious and amounts to an abuse of court process is unfounded and bad in law.
  19. In the deponent's view, the High Court would be crossing into the line of the independence of the DPP to descend into the arena of finding whether there is prima facie case against the Applicant

yet the Applicant has not demonstrated that the DPP has not acted independently or has acted capriciously, in bad faith or abuse the process in a manner to trigger the High Court's intervention. Further the Applicant failed to demonstrate that the DPP lacked the requisite authority acted in excess jurisdiction or departed from the rules of natural justice in directing that the Applicant be charged with offences disclosed by the evidence gathered.

20. It was therefore contended that the application was filed in bad faith and is an attempt to defeat justice.

### **Interested Party's Case**

21. The interested party on their part opposed the application vide a replying affidavit sworn by **Puthucode Krishnaiyer Seshadri**, one of the complainants in the criminal case on 14<sup>th</sup> February, 2014.

22. According to the deponent, it was not true that the applicant was a stranger to the complainants but to the contrary the Applicant is an advocate of the high court of Kenya whose advocate-client (professional) relationship with the complainants arose out of a purported conveyancing transaction. He disclosed pursuant to an advertisement in the *Daily Nation* regarding the sale of a plot situate in Nyari area, Nairobi upon calling up the telephone number appearing in the advertisement his wife was introduced by the purported agents to a **Miss Ashna Raikundalia**, a lawyer of Asian descent who thereafter introduced them to the Applicant as the advocate handling the transaction on behalf of the purported vendors after which based on the persuasion from **Ashna Raikundalia** (the Applicant's co-accused in the criminal proceedings sought to be quashed herein) they agreed to instruct the Applicant to act as their advocate, as buyers of the suit plot.

23. On 14<sup>th</sup> November, 2011 they entered into an agreement for purchase from **Aggrey Christopher Ackello Ogutu** and **Anna Berta Brigitte Hillen** (hereinafter called the 'vendors') of the suit property for a total consideration of Kshs.21,000,000/- with the Applicant being the mutual advocates for the purchasers and the vendors. It was an express term of the said agreement that the complainants would pay to the Applicant the entire purchase price and the applicant would hold the purchase price as a stakeholder pending completion as follows:-

- i. The deposit of the purchase price of Kshs.3,000,000/- immediately upon execution of the said agreement,
- ii. Kshs.5,000,000/- on or before 10<sup>th</sup> January, 2012,
- iii. Kshs.5,000,000/- on or before 31<sup>st</sup> January, 2012 and
- iv. The balance of Kshs.8,000,000/- on registration of the transfer.

24. It was deposed that it was a further express term of the said agreement that the completion date would be 120 days from the date of execution of the said agreement or such other date as the parties would agree in writing hence the completion date was 19<sup>th</sup> March 2012.

25. It was the interested parties' case that they performed their obligation under the sale agreement by timeously paying the entire purchase price Kshs. 21,000,000/- and other monies, to the applicant to hold as a stakeholder on terms and conditions stipulated in the agreement for sale and not to release the said monies to the vendors or any other person for that matter until the registration of the transfer of the sale property in their names was complete. However, by a letter dated 2<sup>nd</sup> March, 2012 addressed to the interested parties, the vendors sought an extension of the completion date by 45 days on the ground that the Applicant would take some time to have the transfer of the property registered and in the said letter and the vendors confirmed that the Applicant had received the entire purchase price of Kshs. 21,000,000/- from the interested parties which request was acceded to by the interested parties.

26. On 27<sup>th</sup> March, 2012 the Applicant requested the interested parties to deposit with him, which they did, the sum of Kshs. 500,000/- in respect of stamp duty charges on the transfer and at the further request of the Applicant, on 27<sup>th</sup> April, 2012, they paid to him an additional sum of Kshs.

- 340,000/- being extra stamp duty charges on the transfer.
27. However, in breach of the terms of the said agreement the applicant failed to register the transfer of the property in the interested parties' names even after the extension of the completion date and vide a letter dated 22<sup>nd</sup> May, 2012 addressed to the vendors and delivered to the Applicant pursuant to clause 21 of the said agreement, the interested parties gave notice of repudiation of the contract of sale in the event that the transfer of the property in their names was not effected within 21 days. Despite that the Applicant failed to register the transfer of the property in the interested parties' names after the expiry of the 21 days' notice and therefore the sale contract was repudiated. By a letter date 29<sup>th</sup> August, 2012, the interested parties demanded from the Applicant the refund of the entire purchase price and all other monies paid by them to the Applicant in respect of stamp duty all amounting Kshs. 21,840,000/-. However, the Applicant did not refund the monies to them despite several requests therefor and instead by his letter dated 19<sup>th</sup> September, 2012 addressed to the interested parties gave his professional undertaking for refund of the said sum of Kshs. 21,840,000/- within 45 days from the date thereof. This undertaking, the deponent deposed was however not fulfilled despite repeated promises by him to make the refund.
28. Vide a complaint letter dated 9<sup>th</sup> November, 2012 the interested parties lodge a complaint with the lands fraud department at the criminal investigations departments headquarters against the Applicant and his agent, **Ashna Raikundalia**, for the fraud perpetrated on them and the suspects were arraigned in court facing criminal charges in Nairobi (Kibera) Chief Magistrate Court Criminal Cases Number 6161 and 6372 of 2012. They interested parties also commenced civil proceedings in the High Court at Nairobi being Milimani High Court Civil Case No. 112 of 2013 (OS) seeking enforcement of the terms of the applicant's professional undertaking to refund to them all the monies deposited with him.
29. It was therefore the interested parties' case that the notice of motion herein is an attempt by the Applicant to scuttle the criminal charges brought against him for the fraud committed against them, the singular, central and pertinent issue, to their understanding being whether the sum of Kshs. 21,500,000/- was deposited by them into the applicant's back account number 012000016410 at Family Bank, Kenyatta Avenue and that upon the failure of the applicant to complete the registration of the transfer of the suit plot in their names he proceeded to issue a professional undertaking as our advocate, on our behalf as buyers, to refund the entire purchase price and stamp duty charges paid to him and which he has failed to refund to date.
30. The deponent went further to state that to demonstrate to the court the diversionary and mischievous attempt on the part of the Applicant to scuttle the criminal proceedings aforesaid and to clarify matters for the court to achieve a just and expeditious disposal of this matter:
- i. The Applicant did not deny that the bank account number 012000016410 held at Family Bank, Kenyatta avenue into which the sum of Kshs. 21,500,000/- was deposited by them belonged to him and exhibited photostat copies of the account opening documents together with the identification documents belonging to the applicant and furnished to the bank during the opening of the subject back account."
  - ii. The applicant did not deny that the sum of Kshs. 21,500,000/- was duly deposited by the applicants into his bank account aforesaid and exhibited photostat copies of the RTGS receipts in respect of the deposits."
  - iii. The applicant did not deny that the purchase price monies were withdrawn from his bank account in cash as soon as each instalment thereof was deposited therein and exhibited photostat copies of the bank statement and cash withdrawal slips in proof of the deposits and subsequent withdrawals made on the subject back account."
  - iv. The specimen signatures furnished to family bank limited by the Applicant as seen in annexure PKS- 2 hereof were similar to the signature appended by the applicant in his replying affidavit to the originating summons sworn on 1<sup>st</sup> July, 2013.
  - v. The suit plot herein was actually transferred to some third parties vide a transfer of

lease registered at Nairobi lands registry on 29.05.2012 (at the same time that the applicant hereof was handling the sale transaction) and, therefore, it is obvious that there was no parcel of land in respect of which the Applicant was undertaking a transaction of sale and purchase.

31. Based on the foregoing the deponent believed that the Applicant, acting as the advocate in the subject sale transaction, acted contrary to their express instructions stipulated under clauses 3.1 and 9.2 of the agreement for sale dated 14. 11. 2011 by converting monies held by him in a fiduciary/trust capacity to his own personal use and should be held to account in that respect. Further, the applicant herein involved himself in a fraudulent and criminal act, for the purpose of this suit, and notwithstanding the pendency of the criminal proceedings that have been brought to bear upon him, the High Court, undoubtedly, has the powers and jurisdiction to issue orders compelling him to pay them the monies deposited in his bank account aforesaid and therefore their suit in the High Court is proper and merited. The deponent also cited the provisions of section 193A of the **Criminal Procedure Code** with respect to concurrent existence of criminal and civil proceedings. And averred that there was no proper basis laid out by the Applicant for the criminal proceedings against him to be stayed leave alone to be stopped.
32. To the deponent, conviction on the part of the applicant in the criminal case facing him will not result in the restitution or refund to them of the monies paid to the applicant and it is only a civil court that can decree restitution and therefore the suit in the High Court should be allowed to proceed to full trial and determination on its merits and without any delay or hindrance simultaneously with the criminal proceedings.
33. He further deposed that there is no provision whatsoever in the **Advocates Act**, Cap.16, laws of Kenya that provides that an advocate handling a transaction on behalf of the client cannot be charged for a criminal offence arising from his handling of the transaction and, therefore, the applicant hereof was properly charged before the Kibera Chief Magistrates criminal court.

### **Determinations**

34. I have considered the application, the affidavits both in support of and in opposition to the application the submissions for and against the grant of the orders sought and this is the view I form of the matter.
35. It is always important to remember that in these kinds of proceedings, the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution and that the mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review. This is so because 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.
36. 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.”

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

“The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion if acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution...Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct.”

38. However, 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 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...”

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

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

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

“the police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”.

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

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

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

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

*(a) the diversity of the people of Kenya;*

*(b) impartiality and gender equity;*

*(c) the rules of natural justice;*

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

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

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

*(g) protection of the sovereignty of the people;*

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

*(i) promotion of constitutionalism.*

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

**“the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system..... In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003* is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: “The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time..... In our role as “sentinels” of fundamental rights and freedoms of the citizen which are founded on laissez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent “sentinels” of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right.”**

43. Where therefore it is clear that the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognised under the Constitution and the *Office of the Director of Public Prosecutions Act*, that would, in my view, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of

discretion. As was held by **Wendoh, J** in **Koinange vs. Attorney General and Others [2007] 2 EA 256:**

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

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

45. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute ought to be interfered with.

46. In this case it is the applicant's case that the criminal charges have been preferred in circumstances which violate the rules of natural justice and in disregard of relevant matters. In exercising their discretion to charge a person both the police and the DPP's office must take into account and must exercise the discretion on the evidence of sound legal principles. As was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another:**

**“...policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes”.**

47. Therefore the police are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of

the parties is not considered is not necessarily fatal to the prosecution. However, where exculpatory evidence is presented to the police in the course of investigation and for some reasons known to them, they deliberately decide to ignore the same one can only conclude that the police are driven by collateral considerations other than genuine vindication of the criminal judicial process. Neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of malice and hence abuse of discretion and power.

48. In this case, it is the applicant's case that he neither knew nor was retained by the complainants in the transaction the subject of the criminal proceedings. In other words the Applicant's position is that he had completely nothing to do with the said transaction.

49. It is however, the complainants' case that the sale price was paid into the Applicant's account to be kept therein in his capacity as a

stakeholder. Not only have the Interested Parties made the averment to the effect that the said sum was paid into the Applicant's account but have exhibited documents which show that this was the case. It was also contended that as soon as the said sum was deposited a donee of power of attorney by the applicant withdrew the same from the Applicant's account. In the face of all these damning allegations the Applicant has maintained a deafening silence.

50. Although the Applicant contends that he was a stranger to the transaction in question there are receipts bearing his firm's name showing that payments were made to the firm by the complainants. Apart from that there is a copy of the letter exhibited by the complainants on what appears to be the applicant's letterhead dated 19<sup>th</sup> September, 2012 in which the applicant acknowledged having been paid Kshs 21,840,000/= and proceeded to give his "personal undertaking" to refund the said sum within 45 days from the date thereof. In my view, before an advocate gives an undertaking, it is always advisable to ensure that he has his client's money in his bank account. The presumption in such matters is therefore that an advocate who gives an undertaking has the money in question. One wonders why a total stranger to a transaction would feel philanthropic enough to undertake a refund of such huge sum of money if he had nothing to do with it. In my view the applicant's conduct does not support his version of the events. It was upon the Applicant to adduce credible evidence on the basis of which this Court could find that his prosecution ought to be halted. As was appreciated in **Kuria & 3 Others vs. Attorney General**, (supra):

**"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...There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the applicants might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot**

also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial.. In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names.”

51. In this case I am not convinced that on the basis of the material placed before me that the Applicant was not at all involved in the transaction. Whereas his mere involvement may not necessarily justify his prosecution where his case is sought to be explained away by some porous and contrived grounds, the Court may well be entitled to take a dim view of his bona fides and the remedies of judicial review being discretionary the Court may decline to grant the same.

52. The pendency of a civil case and the availability of the process under the *Advocates Act* were some of the grounds relied upon by the Applicant to seek the remedies herein. With respect to the pendency of the civil proceedings in form of originating summons, the mere fact that the facts constituting the basis of a criminal proceeding are similarly the basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. Section 193A of the *Criminal Procedure Code* on this issue provides:

*Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.*

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

“While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith...It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court.”

54. However caution must be taken with respect to parameters of interference. As was aptly put in Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR:

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

55. With respect to the provisions of the Advocates Act, section 80 of the *Advocates Act*, Cap 16 Laws of Kenya provides:

*Any person who, being an advocate, is entrusted in his professional capacity with any money, valuable security or other property to retain it in safe custody with instructions to pay or apply it*

***for any purpose in connection with his duty as an advocate fails to pay, apply or account for the same after due completion of the purpose for which it was given, shall be guilty of an offence:***

***Provided that no prosecution for an offence under this section shall be instituted unless a report has been made to the Attorney-General by the Committee under subsection (3) of section 61.***

56. It is therefore clear that the conduct complained of may well constitute an offence even under the ***Advocates Act*** and I do not agree with the Applicant that the mere fact that the said conduct may be subject of disciplinary proceedings precludes the 2<sup>nd</sup> to 4<sup>th</sup> Respondents from proceeding in the manner they did.

57. In the premises I find no merit in this application. As was held 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.”**

### **Order**

58. In the result the Notice of Motion dated 2<sup>nd</sup> September, 2013 fails and is dismissed with costs to the Respondents and Interested Parties.

**Dated at Nairobi this 6<sup>th</sup> day of July, 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Kabathi for Mr Mariaria for the Applicant**

**Cc Patrica**