REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW

MISC. APPL. NO 271 OF 2015

IN THE MATTER OF AN APPLICATION BY JEAN ELEANOR MARGARITIS OTTO FOR LEAVE TO APPLY FOR A JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION THE CABINET SECRETARY MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT, THE DIRECTOR OF IMMIGRATION SERVICES, THE HON, ATTORNEY GENERAL AND THE CHIEF MAGISTRATE'S COURT-MILIMANI

AND

IN THE MATTER OF THE KENYA CITIZENSHIP AND IMMIGRATION ACT, NO 12 OF 2011

AND

IN THE MATTER OF ARTICLES 20, 21, 22(1) (3)(A), 23(1), 27, 28, 29, 40, 47,50, 165, 238(2) AND 239(3) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LAW REFORM ACT CAP 26, LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES OF THE CIVIL PROCEDURE ACT CAP 21 OF THE LAW OF KENYA

REPUBLIC…….…. APPLICANT

AND

THE CS, IN CHARGE OF INTERNAL SECURITY……...1ST RESPONDENT

DIRECTOR OF IMMIGRATION SERVICES…..... 2ND RESPONDENT

ATTORNEY GENERAL…….....…….. 3RD RESPONDENT

CHIEF MAGISTRATE, MILIMANI……..….....……...4TH RESPONDENT

***EX-PARTE* JEAN ELEANOR MARGARITIS OTTO**

JUDGEMENT

Introduction

1. By an amended Motion on Notice dated 16th September, 2015, the ex parte applicant herein, **Jean Eleanor Margaritis Otto,** seeks the following orders:

a. **That an order of Certiorari do issue to remove into the High Court and quash any such decision, declaration and directive of the 2nd Respondent made on the 3rd July 2015 to arrest, detail and/or prefer criminal charges against the Ex parte Applicant and/or in any other manner interfere with or harass the Applicant based on the facts contained in the charge sheet dated 3/7/2015 in Criminal Case No. 1150 of 2015 – Republic versus Jean Eleanor Margaritis Otto.**
b. **That an order of Certiorari do issue to remove into the High Court and quash all previous and/or any such subsequent proceedings in the Criminal Case No. 1150 of 2015 – Republic versus Jean Eleanor Margaritis Otto against the Ex parte Applicant and based on the facts contained in the charge sheet dated 3/7/2015.**
c. **That an order of prohibition do issue directed to the 1st, 2nd, 3rd and 4th Respondents prohibiting them, their agents, servants, and/or officers or otherwise from proceeding with any arrest, detention and/or prefer criminal charges against the Ex parte Applicant and/or in any other manner interfere with or harass the Applicant based on the facts contained in the charges sheet dated 3/7/2015 in Criminal Case No. 1150 of 2015 – Republic versus Jean Eleanor Margaritis Otto.**
d. **Costs of this application be provided for.**

Applicants' Case

2. According to the applicant, she is an American Citizen and holder of Passport No. 452027130 issued on 27th November, 2009 and which expires on 26th November, 2019. She averred that she has visited and lived in Kenya over time for lawful purposes and in the present instance entered into Kenya on 12th April 2015 on the strength of a six (6) months Business Visa that allowed entry and stay in Kenya with effect from 7th April 2015 and expired on 4th October, 2015. In her evidence she has been law abiding in Kenya and has all along been known in Kenya, particularly in Nairobi where she serves as a technical advisor for Afyainfo a USAID funded project implemented by an American Company, Abt Associates in conjunction with local partners including the Government of Kenya Ministry of Health and the University of Nairobi to build a strong a unified and intergraded national health information system to help improve the health of all Kenyans. She is however, based at the company's headquarters in Maryland in the United States of America but was at the material time on assignment in Nairobi Office in Upper Hill Area. The applicant averred further that her presence and stay in Kenya has been and still is on a valid Entry Permit/Visa.
3. However, on Friday 3rd July 2015 in the forenoon at around 7.30 o'clock the 2nd Respondent's officers were on an operation involving Immigration Officers under the instructions of the 1st Respondent at Bayhill Gardens and Nana Apartments and its environs in Nairobi's Upper Hilo Area when she was intercepted along Mawenzi Road in Upper Hill within Nairobi by a lady who identified herself an Immigration Officer and asked to identify herself which she did inter alia as an America Citizen but stated she did not have her passport with her at the time but did produce a photocopy of the same and a valid United States Maryland State Drivers License. She then requested if she could go back to her temporary housing which was at Bayhill Garden Apartments and get her Passport No. 452027130 which she got and handed to the Immigration Officer to confirm her immigration status in Kenya.
4. However, it was her evidence, her said passport was from that point kept in the Immigration Officer's custody and was not returned to her and was further kept out of her sight. After about

thirty (30) minutes of withholding the same, the lady Immigration Officer proceeded to show her a handwritten "1m" above the entry stamp on the same passport stating the illegible handwriting invalidated her visa and limited her stay in Kenya to one (1) month between 12th April 2015 when she arrived in Kenya and to exit by 11th May 2015 unless the stay was lawfully extended which was contrary to the six (6) months business Visa that allowed her entry and stay in Kenya with effect from 7th April 2015 and expired on 4th October 2015 and was also contrary to stipulation in the said visa which only required the Visa Holder to register for stay exceeding ninety (90) days. The Immigration Officer then requested to visit the her office in Upper Hill to complete the investigation a requested she acceded to and was escorted to the USAID Project Office in Royal Ngao House on Hospital Road where she furnished the Immigration Officers with all documentation they requested, including her US Business Card. Thereafter, the officers requested that she returns to Bay Hill Apartments to provide the 'evidence' to the Senior Officer in charge despite informing the Immigration Officers that she was lawfully present in Kenya by virtue of the said Business Visa.

5. According to the applicant, she was then threatened with imprisonment and deportation which could be avoided and at some point the Immigration Officer's insinuated that if she "cooperated" her stay in Kenya could be sanitized and that all she needed was to "motivate the sanitization process". The applicant however retorted that she was never going to buy her freedom as she was not a criminal and had always been very law abiding and was not going to engage in anything that bordered on corrupt or criminal practices at which point she was informed that she was "in custody" and was being taken to Nyayo House and was further threatened with imprisonment and deportation yet had not been officially charged. Upon arrival to Nyayo House, she was informed that she was being sent to court the very same morning and it was only when she asked what her charges were, that she was formally charged and given a charge sheet prior to immediately being taken to Milimani Law Courts where she was arraigned before the 4th Respondent on the same date of 3rd July 2015 with the purported criminal charge of being unlawfully present in Kenya contrary to Section 53(1) (j) of the Kenya Citizenship and Immigration Act No. 12 of 2011 in Criminal Case No. 1150 of 2015 – Republic versus Jean Eleanor Margaritis Otto and the trial was scheduled to commence on 8th September 2015.
6. According to the applicant, her attention had never been drawn to the said contradiction on the illegible "entry stamp" as she had always applied for and obtained Business Visas for her visits/stay in Kenya for periods of at least Three (3) to Six (6) Months subject to extensions (if need be) ever since she started visiting Kenya back 2012. She reiterated that she applied for and obtained a six (6) Months Business Visa that allowed her entry and stay in Kenya with effect from 7th April 2015 and expired on 4th October 2015 and any other document of decision to contradict the said Business Visa without expressly cancelling the same is irregular, illegal, *ultra vires* and void *ab initio* and cannot therefore form a basis for a criminal charge and proceedings against her as purported by the Respondents in the Criminal Case No. 1150 of 2015 – republic –versus Jean Eleanor Margaritis Otto. Further, she contended, the said six (6) Months Business Visa that allowed her entry and stay in Kenya with effect from 7th April 2015 and expired on 4th October 2015 only stipulated that she tends to registration for her stay in event her stay exceeded Ninety (90) days which at the point of her arrest, she had not exceeded.
7. In her view, the 1st, 2nd and 3rd Respondents have no powers to arrest, detain and/or arraign her in court in such an arbitrary manner on trumped-up criminal charge for her failure to comply with the Respondents' officer's unlawful demands hence the Respondents' said actions are manifestly unreasonable, illegal, unconstitutional and in blatant violation of my rights, abuse of power and smirk of *malafides.* To her, it is very wrong and unlawful for the Respondents to subject her to criminal charges and proceedings while she holds a valid visa issued by the Government of the Republic of Kenya at its foreign mission in Washington DC. Her stay in Kenya, she averred, has been lawful and she has never engaged in any business activity to warrant the unlawful arrest, detention and/or charge in a criminal court which were solely intended to intimidate her to succumb to the unreasonable and illegal demands by the 1st, 2ndand 3rd Respondents' officers.
8. The applicant contended that the Respondents have frustrated her legitimate expectations with respect to fair treatment irrespective of Race and Nationality and that her right to equality and freedom from discrimination and the right to equal protection and equal benefit of the law under

Article 27(1) of the Constitution of Kenya have been and continue to be breached by the Respondents unless prohibited by order of this court. Further, she has a right to be treated in a dignified manner under **Article 28** of the Constitution of the Republic of Kenya and her arrest detention and arraignment in court on trumped up charges was therefore illegal and a breach of the provisions of **Article 238 (2) (b)** which entails that National Security shall be pursued in compliance with the Law and with the utmost respect for the Rule of Law, democracy, human rights and fundamental freedoms as well as **Article 239 (3) (a)** of the Constitution of Kenya which requires National Security Organs not to act in a partisan manner. In her view, this court has inherent power and duty to secure fair treatment for all persons who are brought before it and also to protect her rights hence the orders sought herein.

Respondents' Case

9. On the part of the Respondents, it was contended that on 3rd July, 2015 a joint operation by security agencies was carried out at Bayhill Garden and Nina Apartments where the Department of Immigration was the Lead Agency with instructions to verify immigration status of all residents of the said apartments after 2nd Respondent received operational intelligence that there were undocumented foreigners at the said apartments. As a result of the said operation, thirty (30) foreigners were forwarded to the Immigration Headquarters Nyayo House for verification of their immigration status. Out of these, Twenty three (23) were Chinese Nationals, two (2) South African Nationals, four (4) Indian Nationals and the Applicant an American National. After thorough verification of their travel documents/passports twenty five (25) were released upon ascertaining their immigration status were valid. The other five (5) were subjected to further investigations into the validity of their immigration status. As a result three (3) were found to have valid residents/permits. However, the remaining two (2) a Chinese National namely Yang Zhu were found not to have registered as a foreign National and consequently charged vide criminal case number 1148 of 2015 at Chief Magistrate court at Milimani. The other, the applicant in this matter, was charged for unlawful presence in Kenya contrary to Section 53(1)(j) of the Kenya Citizenship and Immigration Act No. 12 of 2011 in the Criminal Case No. 1150 of 2015 which is the subject of this application.
10. According to the respondents, the decision to charge the Applicant with the immigration offence disclosed was premised on investigations of her immigration status as endorsed on page D of her American Passport number 452027130 which indicated that she entered the Country on 12th April 2015 through Jomo Kenyatta International Airport and issued by the immigration officer holder of Immigration security stamp number 06676 with a visitor's pass for one month from the date of entry whose purpose was business. The said pass that permitted the Applicant to enter and remain temporarily in Kenya for a period of one month expired on the 12th of May 2015 hence the at the time of her arrest on the 3rd July 2015 was unlawfully presented in the Country as she had no valid pass or permit authorizing her to stay or remain in the Country. However, as the Immigration stamp endorsed on the Applicant's visa is a the pass that allows her to remain in Kenya, she was permitted to remain in Kenya for the one month period stipulated in the stamp.
11. While conceding that the Applicant has been in and out Kenya in the past and her visa has always been stamped and the period she is present in Kenya has always been endorsed by the immigration officer at the entry point, it was contended that she is thus aware of the procedure.
12. To the respondents, the authority to enter and/or remain in Kenya for a foreign National is under a valid permit or pass pursuant to Section 34 of the ***Kenya Citizenship and Immigration Act 2011*** (hereinafter referred to as "the Act") unless exempted under Section 34(3) a to g of the said Act and the Applicant herein has not demonstrated that she falls under any of the exemption category. It was averred that transit through, stay and exit out of the Country is controlled by the Act and the regulations thereto and that passes are issued by Immigration officers pursuant to Section 36 of the said Act and regulations 26 to 36 thereto.
13. It was averred that in respect to the Applicant, her visitors' pass issued pursuant to regulations 31| (1) (c) states that ***A person who wishes to enter Kenya for any other temporary purpose which an Immigration Officer may approve*** and a proviso thereunder states that ***where an application for a visitors' pass is to be made at the point of entry the completion of an entry declaration form shall be deemed to be an application for a visitors pass.*** Further the requirement of any

person who wishes to enter Kenya shall be subject to regulation 16 of the Act hence compels the Applicant inter alia to personally report his/her entry to an immigration officer, complete an entry declaration form 20 and personally deliver the same to the officer.

14. It was disclosed that indeed the Applicant had a multiple journey visa issued on 7th of April 2015 by the Consular Officer at Kenyan Embassy Washington DC and that Kenyan Visas are issued pursuant to Section 35 of the Act which provides at Section 35(4) the possession of a visa shall not exempt any person entering Kenya from complying with any legislation relating to immigration. Further, multiple journey visas are issued to nationals of Countries as set out in the Firth Schedule, Category two Nationals to which Country the Applicant belongs and that the issuance of multiple journey visa only exempt the holder from applying another visa when making multiple entries within the validity period of the said visa but does not preclude the holder from applying a permit or pass.
15. According to the respondents, the perusal of the body of her application points to an attempt by the Applicant to raise a defence of mistake of fact against a charge she is a facing in the lower court that is subject of this application and she is liberty to raise the same during her trial at the lower court which has competent jurisdiction to determine the facts and law in respect to the charge she is facing.
16. It was therefore the respondents' case that the notice of motion is therefore baseless, misconceived and devoid of any merit and the orders sought should not be granted because if granted the functions, operations and independence of the Respondent will be prejudiced.

Determination

17. Having 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 the authorities cited on behalf of the parties thereto, this is the view I form of the matter.
18. The principles which guide the grant of the orders in the nature sought herein are now well crystallised in this jurisdiction. What is important is the application of the same to the facts of each case. Several decisions have been handed down which, in my view, correctly set out the law relating to circumstances in which the Court would be entitled to prohibit, bring to a halt or quash criminal proceedings. However while applying the said principles to a particular case, the Court must always be cautious in its findings so as not to prejudice the intended or pending criminal proceedings so as not to transform itself into a trial court. The Court in judicial review proceedings is therefore not permitted to delve into the merits or otherwise of the criminal process as that would amount to unnecessarily trespassing into the arena specially reserved for the criminal or trial Court. This Court in determining the issues raised therefore ought not to usurp the Constitutional and statutory mandate of the Respondents to investigate and undertake prosecution in the exercise of the undoubted discretion conferred upon them.
19. As was held by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:

    "The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision…"

20. It was well put by **Professor Wade** in a passage in his treatise on ***Administrative Law***, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475**:

    "The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."

21. However, according to ***Judicial Review Handbook***, 6th Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority/power.
22. Under the current Constitution, this Court is empowered to invoke its judicial review jurisdiction in the proceedings of this nature in order to grant appropriate orders including the orders sought herein. In other words judicial review jurisdiction has now been fused with the remedies under the Constitution and this is clearly discernible from the remedies crafted under section 11 of the ***Fair Administrative Action, Act. 2015***. As was held by the South African Constitutional Court in **Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health Case CCT 31/99** that:

    "The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims — thus, the command that law be developed and interpreted by the courts to promote the "spirit, purport and objects of the Bill of Rights." This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes. There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply. What would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them. The same is true of constitutional law and common law in respect of the validity of administrative decisions within the purview of section 24 of the interim Constitution. What is "lawful administrative action," "procedurally fair administrative action" and administrative action "justifiable in relation to the reasons given for it," cannot mean one thing under the Constitution, and another thing under the common law…Although the common law remains relevant to this process, judicial review of the exercise of public power is a constitutional matter that takes place under the Constitution and in accordance with its provisions. Section 167(3)(c) of the Constitution provides that the Constitutional Court "makes the final decision whether a matter is a constitutional matter". This Court therefore has the power to protect its own jurisdiction, and is under a constitutional duty to do so. One of its duties is to determine finally whether public power has been exercised lawfully. It would be failing in its duty if it were to hold that an issue concerning the validity of the exercise of public power is beyond its jurisdiction."

23. Since our Constitution is incremental in its language, the grounds for the grant of judicial review relief ought to be developed and expounded and expanded so as to meet the changing needs of our society so as to achieve fairness and secure human dignity.
24. Therefore, the mere allegation that the intended or ongoing criminal proceedings are in all likelihood bound to fail, does not merit the grant of judicial review relief in the nature of either prohibiting or quashing criminal proceedings. In other words, an applicant who alleges that he/she has a good defence in the criminal process ought to advance that defence in a criminal trial rather than to base his/her application for judicial review thereon. However, if the applicant demonstrates by way of credible evidence that the criminal proceedings that the police or the Director of Public Prosecutions intends to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.
25. 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."

26. 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 from that which the courts indeed the entire system is constitutionally mandated to administer....."

27. 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... 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..."

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

28. **"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."

29. Proceedings of this nature, ordinarily, do not deal with the merits of the case but only with the process. In other words these proceedings determine, *inter alia*, whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made, whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters, whether the decision to commence the criminal charges go contrary to the applicant's legitimate expectation, whether the respondents' decision to charge the applicant is irrational. It follows that where an applicant brings such proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction to determine such a matter and will leave the parties to resort to the usual forums where such matters ought to be resolved. In other words, such proceedings are not the proper forum in which the innocence or otherwise of the petitioner is to be determined and a party ought not to institute such proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in these kinds of proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and whether such proceedings amount to a violation of his/her rights and fundamental freedoms and once the Court is satisfied that that is not the case, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.
30. Therefore the determination of this case must be seen in light of the foregoing decisions. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the Respondents to investigate and prosecute ought to be interfered with.
31. In this case the applicant contends that the motive for institution of the criminal proceedings was meant to achieve some collateral purposes other than the vindication of a criminal offence committed. To be blunt that applicant is alleging that the respondents instituted the criminal proceedings due to her refusal for a demand to yield to the payment of a bribe by the respondents' officers. Obviously, the refusal to give bribes is not one of the basis upon which criminal proceedings ought to be instituted and if that is the dominant purpose for the commencement of the criminal proceedings, this Court will not hesitate to bring to an end such maliciously instituted proceedings.
32. 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".

33. Therefore the police and prosecutors are expected to be professional in the conduct of their investigations and prosecutorial duties 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.

34. In this case, the applicant's damning evidence on oath that the respondent's officers made implied overtures to her to "sanitise" her stay in the country has not been denied at all in the replying affidavit. That damning testimony remains largely uncontroverted.

35. In my view to permit the prosecutor to arbitrarily exercise his constitutional mandate based on ulterior criminal motives as is alleged in these proceedings would amount to the Court abetting abuse of discretion and power and criminality. It was therefore held in **Regina vs. Ittoshat [1970] 10 CRNS 385 at 389** that:

"this Court not only has the right but a duty to protect citizens against harsh and unfair treatment. The duty of this Court is not only to see the law is applied but also, which is of equal importance, that the law is applied in a just and equitable manner."

36. I wish to state that the protection against arbitrariness applies to both citizens and non-citizens alike.

37. Similarly in **Paul Imison vs. Attorney General & 3 Others Nbi HCMCA No. 1604 of 2003**:

"I do not think that our Constitution which is one of a democratic state would condone or contemplate abuse of power...The Attorney General in some of his constitutional functions does perform public duties and if he were to be found wanting in carrying them out or failing to perform them as empowered by the Constitution or any other law, I see no good reason for singling him out and failing to subject him to judicial review just like any other public official. I find nothing unconstitutional in requiring him to perform his constitutional duties. A monitoring power by the court by way of judicial review would have the effect of strengthening the principles and values encapsulated by the Constitution. To illustrate my point, Judicial Review tackles error of law and unlawfulness, procedural impropriety, irrationality, abuse of power and in not too distant future, human rights by virtue of the International Conventions which Kenya has ratified. In exercising the Judicial Review jurisdiction the court would not be sitting on appeal on the decisions of the Attorney General, he will still make the decisions himself but the lawfulness, etc. of his decisions should be within the purview of the courts..."

38. This Court therefore has the powers and the constitutional duty to supervise the exercise of the Respondents' mandate whether constitutional or statutory as long as the discretion falls foul of section 4 of the ***Office of the Director of Public Prosecution Act*** and Article 157 of the Constitution.

39. In **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** it was held that:

"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...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...In doing so the Court may be guided by the following principles: (i). Where the criminal prosecution amounts to nothing more than an abuse of the process of the court, the Court will employ its inherent power and common law to stop it. (ii). A prosecution that does not accord with an individual's freedoms and rights under the constitution will be halted: and (iii). A prosecution that is contrary to public policy (or interest) will not be allowed...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. Evidence of extraneous purposes may also be presumed where a prosecution is mounted after a lengthy delay without any explanation being given for that delay...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...A criminal prosecution that does not accord with an individual's freedoms and rights, such as where it does not afford an individual a fair hearing within a reasonable time by an independent and impartial court, will be the clearest case of an abuse of the process of the Court. Such a prosecution will be halted for contravening the constitutional protection of individual's rights...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."

40. It is therefore clear that whereas the discretion given to the respondents to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a criminal act in order to satisfy the unquenchable thirst for amassing wealth by public officers, the Court will not hesitate to bring such proceedings to a halt. As was held in **Githunguri vs. Republic KLR [1986] 1**:

"A prosecution is not to be made good by what it turns up. It is good or bad when it starts. The long and short of it is that in our opinion it is not right to prosecute the applicant as proposed. "

41. I am alive to the pronouncement in **Githunguri vs. Republic** (supra) to the effect that:

"We speak in the knowledge that rights cannot be absolute. They must be balanced against other rights and freedoms and the general welfare of the community. We believe we are speaking correctly and not for the sake of being self laudatory when we say the Republic of Kenya is praised and admired by other people and other systems for the independent manner in which justice is dispensed by the courts of this country. We also speak knowing that it is our duty to ask ourselves what is the use of having a Constitution if it is not honoured and respected by the people. The people will lose faith in the constitution if it fails to give effective protection to the fundamental rights. The people know and believe that to destroy the rule of law you destroy justice thereby also destroying the society."

Order

42. In the premises, it is my view and I hold that the 1st and 2nd respondents' decision to prosecute the applicant in light of the uncontroverted malicious and collateral motives amounts to an abuse of the legal and court process. Accordingly, the orders which commend themselves to me and which I grant are as follows:

a. **An order of Certiorari removing into this Court for the purposes of being quashed the decision, declaration and directive of the 2nd Respondent made on the 3rd July 2015 to arrest, detail and/or prefer criminal charges against the ex parte Applicant and/or in any**

other manner interfere with or harass the Applicant based on the facts contained in the charge sheet dated 3/7/2015 in Criminal Case No. 1150 of 2015 – Republic versus Jean Eleanor Margaritis Otto which decision, declaration and directive is hereby quashed.

b. **An order of Certiorari removing into this Court for the purposes of being quashed proceedings in the Criminal Case No. 1150 of 2015 – Republic versus Jean Eleanor Margaritis Otto against the Ex parte Applicant and based on the facts contained in the charge sheet dated 3/7/2015 which proceedings are hereby quashed.**

c. **An order of prohibition directed to the 1st and 2nd Respondents prohibiting them, their agents, servants, and/or officers or otherwise from proceeding with any arrest, detention and/or preferring criminal charges against the Ex parte Applicant and/or in any other manner interfere with or harass the Applicant based on the facts contained in the charges sheet dated 3/7/2015 in Criminal Case No. 1150 of 2015 – Republic versus Jean Eleanor Margaritis Otto.**

d. **Costs of this application are awarded to the applicant to be borne by 1st and 2nd Respondents.**

43. It is so ordered.

Dated at Nairobi this 13th day of October, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Onyango for the Applicant

Mr Munene for the Respondent

Cc Patricia