



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS APPLICATION NO. 204 OF 2012

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO FILE JUDICIAL REVIEW
PROCEEDINGS FOR PROHIBITION**

AND

**IN THE MATTER OF THE BUSINESS DEALINGS BETWEEN EERICK MWIRIGI MBABU,
WU-JI, GSA INDUSTRIAL COMPANY LIMITED, NGS TRADING COMPANY, MAOMIN
MAONAN FUYING LEATHER COMPANY LIMITED AND TAN TAT GODWON COMPANY
LIMITED.**

REPUBLICAPPLICANT

VERSUS

COMMISSIONER OF POLICE.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

EX PARTE

EERICK MWIRIGI MBABU

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 18th May, 2012, filed in Court on 21st May, 2012, the *ex parte* applicants herein, **Eerick Mwirigi Mbabu**, seeks the following orders:

1. **THAT** this Honourable Court be pleased to grant an order of prohibition to stop the Commissioner of Police from arresting, charging, detaining or instituting any criminal prosecution against the Applicant arising out of a complaint to the Commissioner of Police and/or Criminal Investigations Department by one Wu-Ji, and/or M/s GSA Industrial Company Limited, NGS Trading Company, Maomin Maonan Fuying Leather Company

- Limited and TAN Tat Godwon Company Limited (hereinafter the “Chinese Companies”).**
2. **THAT costs of this application be provided for.**

APPLICANTS' CASE

2. The Motion was grounded on the Statement of Facts filed on 16th May, 2012 and was supported by a verifying affidavit sworn by the applicant on 16th May, 2012.
3. According to the applicant, **Edenswin Traders Limited** is a company duly registered in the Republic of Kenya that deals in the Export of leather while **GSA Industrial Company Limited, NGS Trading Company, Maomin Maonan Fuying Leather Company Limited** and **TAN Tat Godown Company Limited** are Chinese companies that deal in the import of leather from Kenya among other countries. According to the applicant, **Wu-Ji** is a Chinese national and at all material times he represented himself to the applicant and indeed dealt with the applicant, the applicant's company and his agents as an agent of **GSA Industrial Company Limited, NGS Trading Company, Maomin Maonan Fuying Leather Company Limited** and **TAN Tat Godown Company Limited** which are Chinese registered companies (hereinafter “the Chinese Companies”) with authority to transact on their behalf.
4. According to him, in the years 2010 and 2011, the applicant, through his company, conducted the business of exporting leather from Kenya to the Chinese Companies in China and in the said business, he always dealt with **Wu-Ji** as the Agent and representative of the Chinese Companies. That business relationship continued well with the applicant shipping the leather to the Chinese Companies in China and the Chinese Companies in turn paying for it on credit. However, sometime towards the end of 2011, that relationship turned sour when the Chinese Companies refused to pay for leather already shipped to them by the applicant at which time the applicant had shipped leather worth US\$ 2,976,026.40 to the Chinese Companies while the Chinese Companies had only paid US\$ 530,000 to the applicant leaving a shortfall of US \$ 2,444,026.40 owing. Instead of the Chinese Companies paying the said sum of US\$ 2,444,026.40 or returning the leather already shipped to them, started claiming a refund of US\$ 120,000 which had been paid to the applicant on account and which the applicant used to offset against the amount that the Chinese Companies owed him.
5. It was deposed by the applicant that instead of the Chinese Companies settling the amount due and owing from them to him or using the internationally recognized channels of settling a commercial dispute if at all they felt there was a one, they resulted in using unorthodox means to coerce the applicant to pay a nonexistent debt by threatening him with arrest both here in Kenya and China. Towards this end the applicant received summonses through his cell phone from one Police Officer by the name **Baraza**, mobile phone number 0720 – 696069 requiring the applicant to present himself at the Criminal Investigations Department Headquarters for questioning in relation to a complaint made by **Mr. Wu-Ji**. According to him, he was apprehensive that once he presented himself he would be arrested and charged in Court.
6. The applicant averred that together with his company he had sued the Chinese Companies for the recovery of monies due and owing from them in Milimani HCCC No.239 of 2012 which case was pending determination. He contended that the matters herein relating to the business dealings between himself, his company and the Chinese Companies are purely of a civil nature and the interference of the police in the same is a blatant and fragrant breach of the law and the Court process hence his intended arrest and prosecution will be a gross abuse of the Court process, the criminal law and the criminal justice system whose purpose is to coerce and/or exert pressure on him and his company to pay money allegedly due and owing to the Chinese Companies out of a business relationship that had existed between them.
7. According to the applicant, he does not owe any money to the Chinese Companies and reiterated that the business dealings leading to the rise of the alleged debt are purely of a civil nature and not under the ambit of Police investigations and that his intended arrest and criminal proceedings are for an improper and extraneous purpose yet the legitimate purpose of criminal proceedings is to attain the objects of criminal law and the criminalization of a civil dispute for an improper or extraneous purpose is oppressive and vexatious. To him, it is neither in the interest of public policy nor public interest and the law for a prosecution to be maintained where there is a contractual relationship in existence and the same amounts to abuse of the Court process and the

law. Further, it is oppressive, harassing vexatious and malicious, and not reasonably justifiable in a democratic society, for a person to be subjected to criminal proceedings for a purely civil dispute.

RESPONDENTS' CASE

8. In response the Respondents filed a replying affidavit sworn by **Corporal Samuel Wahome**, a Police Officer attached to the Criminal investigations Department, Nairobi.
9. According to him, on 13th April, 2012 one **Mr. Wuji** from China in the company of **Mr. Mohamed Hussein Mohamed**, reported that they had advanced to the applicant herein USD 205,363/- (equivalent to Kes.21,768,475/- on diverse dates to ship hides and skins to Hong Kong China and on receipt of the report of the complaint, he was instructed by the officer commanding Economic and Commercial Crimes Unit, to investigate the same. The said investigations revealed that on the 30th March, 2011 the applicant and the complainant herein entered into an agreement with the applicant herein trading as **Edenswin Traders Limited** by which the applicant was to export 2,200 dozens of skins to China and pursuant thereto, the applicant was paid an advance payment of USD 40,000/- and a further USD 45363/- on 1st April, 2011 receipt of which was acknowledged by the petitioner herein. Thereafter on 28th October, 2011 the complainant wired USD 20,000/= from China to the applicant's Account Number 502256017 held at Chase Bank Hurlingham Branch and a further USD 100,000/- was on the 3rd of November, 2011 wired by the complainant to the same account operated by the applicant. On receipt of the said sums, it was averred that the complainant routed the consignment to a different consignee and the applicant went underground and switched off his mobile phone.
10. According to the deponent, investigation revealed that the applicant was financed by **Investeq Capital Limited** in the transaction and the agreement was that the applicant enters into a joint venture with the financiers and they were to operate a joint account. The said the financiers, **Investeq Capital Limited**, however realized that the applicant herein was getting monies from other suppliers contrary to their agreement and that the applicant had removed their mandate as signatories to the joint account. As a result, the financiers reclaimed their money and terminated the contract with the applicant.
11. According to him, Civil Case Milimani HCCC No.239 of 2012 was filed in court on 23rd April, 2012 after the applicant realized that the complainant had lodged complaint with the police and the police were looking for him hence this is pure divisionary tactics to try and portray the matter as civil in nature which action, according to him, is a gross abuse of the court process and an attempt to defeat justice. He deposed that the applicant is out to frustrate the hearing of the criminal case, well aware that the complainant has to travel all the way from China in order to attend trial.
12. In his view, Article 157(6)(a) mandates the Director of Public Prosecutions to institute and undertake criminal proceedings against any person in respect of any offence alleged to have been committed; Section 193A of the **Criminal Procedure Code** provides that the subsistence of civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings; Article 157(11) provides that Director of Public Prosecutions in exercising his constitutional mandate 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; the applicant has been charged with an offence known to law, the prosecution has enough evidence to charge the applicant hence the issues meant to vindicate the applicant should be canvassed in the criminal court and fairly determined and not in the judicial review court; and that the application is frivolous and an abuse of the court process and meant to circumvent the criminal justice system.
13. It was further contended that from the chronology of events above narrated, it is apparent that the applicant was intent to defraud the complainant and that the allegations are best canvassed in the trial court; that the police did not act under the control or direction of any party but were discharging their duty and indeed act independently after conducting through investigations, as mandated by Article 244 of the Constitution of Kenya, 2010 and section 24 of the **National Police Service Act**; that the purported application is based on deliberate concealment, distortion and non-disclosure of material facts made with the latent intent to mislead the Honourable Court as to the true facts leading to the subject criminal complaint, investigations and charges.

14. According to him, it is manifestly clear from the foregoing that the respondents acted within their respective mandate under the relevant establishing legislation and in the circumstances it cannot be said that the actions of the respondents were in breach of mandate vested upon the respondents hence the application dated 18th May, 2012 and ought to be dismissed with costs.

APPLICANT'S SUBMISSIONS

15. On behalf of the applicant, it was submitted that since the relationship between the parties was contractual, based on *Halsbury's Laws of England 4th Ed. Vol. 37*, the same should be a subject of civil proceedings and not criminal. Citing **Republic vs. Kenya Anti-Corruption Commission & Another ex parte Crossley Holdings Limited [2012] eKLR** and **Republic vs. Commissioner of Police ex parte Tarus [2003] KLRat 582, Kigoroglo vs. Rune Sherika [1969] EA 426**, it was submitted that where there is a multiplicity of action in civil and criminal the former ought to be opted for.
16. Citing **Republic vs. Chief Magistrate's Court at Mombasa ex parte Gamjel & Another [2002] KLR at 703**, it was submitted that it is not the purpose of criminal investigations or a criminal charge or prosecution to help individuals in the advancement or frustration of their civil cases and that that is an abuse of the process of the court.
17. Since there is a civil suit for recovery pending in court between the applicant and his company on one hand and the Chinese Companies on the other which has not been determined, the criminal case has been instituted as collateral so as to challenge the civil suit and compel the applicant to drop his claim against the Chinese Companies. The applicant further relied on **Mohammed Gulam Hussein Fazal Karmali & Another vs. Chief Magistrate's Court Nairobi & Another [2006] eKLR, William vs. Spautz [1992] 66 NSW LR 585 at 16 and 17, Ex Parte Jared Benson Kangwana HCM 446 of 1995, R vs. Attorney General ex parte K D Pattni, Bernard Kaloe & Another HCMA No. 1296 of 1998**.
18. Based on **George Karanja Karangu vs. The Commissioner of Police & Another [2008] eKLR**, it was submitted that while under section 193(a) of the Criminal Procedure Code, criminal proceedings can be instituted and prosecuted even if there are pending civil proceedings, each case has to be considered on its own merits and there is a need to ensure that state organs do not abuse their power by being used to settle purely civil or commercial matters through criminal process.

RESPONDENTS' SUBMISSIONS

19. On behalf of the respondents, it was submitted that prohibition is inappropriate in this case as it looks into the future and can only stop what has not been done. In this case the applicant is seeking an order of prohibition to stop the institution of criminal proceedings against him yet the applicant has already been arrested and criminal proceedings instituted against him. In support of this submission the respondent relied on **Kobil Petroleum Limited vs. Kenya Ports Authority JR Case No. 532 of 2008** and **Kenya National Examinations Council vs. Republic ex parte Geoffrey Gathenji Njoroge & 9 Others Civil Appeal No. 266 of 1996**.
20. According to the respondent the grounds relied upon by the applicant have not been proved. According to the respondent, based on **Cape Holdings Limited vs. Attorney General and 2 Others Misc. Application No. 240 of 2011**, the existence of civil proceedings or arbitral proceedings *ipso facto* does not constitute a bar to institution of criminal proceedings arising from the same transaction. The Court was therefore urged to balance public interest with private interest in determining this matter.

DETERMINATIONS

21. It was submitted that since the criminal proceedings against the ex parte applicant had already commenced an order of prohibition is no longer available. As indicated at the beginning of this judgement, the ex parte applicant is seeking "**an of prohibition to stop the Commissioner of Police from arresting, charging, detaining or instituting any criminal prosecution**" against the Applicant arising out of a complaint to the Commissioner of Police and/or Criminal Investigations Department by one **Wu-Ji**, and/or the Chinese Companies. Although on 17th May 2012 when the

Court granted leave, the Court declined to direct that the grant of leave thereof operates as a stay of the proceedings in question, I have not seen any evidence that the said prosecution was subsequently commenced. Accordingly, there is no material before me upon which I can hold that an order of prohibition cannot issue. Nothing would have easier than for the Respondents to even disclose the criminal case number.

22. In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. See **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479.**

23. Article 157(10) of the Constitution provides as follows:

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.

24. However Clause (11) of the said Article 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.

25. It is therefore clear that whereas the discretion given to the Director of Public Prosecutions to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt.

26. In this case, the ex parte applicant's case is that the subject of the criminal proceedings is contractual in nature and that the Respondents' action of commencing criminal proceedings is meant to coerce the ex parte applicant into either submitting to the Chinese Companies' claim or abandoning his own claim against them. Apart from the fact that the applicant has instituted civil proceedings against the said Chinese Companies who are the complainants in the said criminal proceedings, which institution itself is a subject of controversy as the Respondent contend that the institution of the said civil proceedings was undertaken after the criminal complaint was lodged and is meant to block the criminal process from taking off, there is no other evidence adduced by the ex parte applicant to support the allegation of the alleged motive.

27. The law is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office and therefore the mere fact that the intended or on-going criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant in those proceedings. However, if the applicant

demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a 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. In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration. See **R vs. Monopolies and Mergers Commission Ex Parte Argyll Group Plc [1986] 1 WLR 763** and **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**.

28. 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.”

29. 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. The other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the prosecution is sufficient to support the charge. The criminal trial process is regulated by statutes, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court, which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the

function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.”

30. 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 argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit... The fact that it has not been argued before however does not mean that the law stops dead at its tracks. An order of prohibition looks to the future and not to the past; it is concerned with the happenings of future events and little, if any, of past events. Where a decision has been made, there is little that the court can do by an order of prohibition to actually stop the decision from being made, because simply that which is sought to stop has already been done. However in such circumstances, the power of judicial review is not limited to the other orders of judicial review other than prohibition. With respect to civil proceedings prohibition lies not only for the excess of jurisdiction but also from a departure of the rules of natural justice... So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions... This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law... In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be

done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed... There is nothing which can stop them from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made... Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another. However, it does not mean that a civil suit and a criminal case cannot co-exist at any one particular time. This is because the section envisages the re-prosecution of a criminal case substantially dealt with either in fact or law, a case in which issues have been laid to rest. There is no mention in the section that the simultaneous existence of a civil and criminal cases is constituting double jeopardy. The courts have, however stated that the power to issue an order of prohibition to stop a criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related facts, or to say that a person should never be prosecuted in criminal proceedings when he has a civil suit against him relating to matters in the criminal proceedings... The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution... 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. It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. 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.”

31. In Republic vs. Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703, it was held:

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

32. Therefore the determination of this case must be seen in light of the foregoing decisions. In this case the ex parte applicant’s case is that the Respondent is using the criminal process to circumvent the civil case. However, the mere fact that criminal proceedings are being undertaken at the same time as the civil proceedings does not *ipso facto* amount to an abuse of the court process. The applicant ought to go further and show that the dominant motive for the institution of the criminal proceedings is to scuttle the civil process or force the applicant into abandoning his civil claim or force the applicant into submitting to the civil claim. If it is shown that the object of the prosecutor 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 other words the prosecutor must be actuated more 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 in such circumstances would be to further that ulterior motive and that is when the High

Court steps in. In this application it has not been shown or even alluded to that there was an event which took place which manifested an intention to secure some other purpose than the need to vindicate the committal of the offences charged. It must be remembered that justice must be done to both the complainant and the accused and where there is evidence upon which the prosecution can reasonably mount a prosecution, it is not for the High Court in a judicial review proceeding to inquire into the sufficiency or otherwise of such evidence since the High Court ought not to usurp the role of the trial court in determining the merits of the criminal case.

33. In this case it is not disputed that there was an agreement in which the ex parte applicants and the Chinese Companies as a result of which money did exchange hands. The relationship seems to have broken down bitterly and each of the parties to the transaction is claiming against the other with one party contending that they were cheated in the transaction. Whether that is so is for the trial court to determine.

34. On my part, based on the material before me, I am unable to say that the intended criminal process is meant to achieve some collateral purpose. It may well be that the transaction between the parties herein gave rise to civil liability. However, the Court is not sure that the same facts cannot under any circumstances give rise to a criminal liability as well. The decision whether or not to commence a criminal proceeding is at the discretion of the Director of Public Prosecution and whereas that discretion must be exercised bona fide and ought not to be abused, concrete evidence must be presented before the Court in order for the Court to interfere with the exercise of the discretion. An order of prohibition is an order of serious nature and cannot and should not be granted lightly.

31. In this case there is no allegation that the trial court will not be able to ensure that justice is meted to the parties before it. In fact, it is the court's view, without deciding, that the allegations made by the ex parte applicants herein, if true, may well found a *bona fide* defence to the offence with which they he is charged and the mere fact that he has a defence to the charge is no ground for prohibiting the criminal trial from proceeding.

35. Having considered the material before me I am not satisfied that a case has been made out by the applicant warranting the grant of the orders sought herein. The *ex parte* applicant is at liberty to defend himself in the lower court where there will be an opportunity afforded to him to challenge the veracity of the evidence against him. At this stage I cannot say with certainty that the criminal process has been commenced *mala fides* or with ulterior motives.

ORDER

36. Accordingly, the order that commends itself to me is that the Notice of Motion dated 18th May, 2012, filed in Court on 21st May, 2012 be and is hereby dismissed with costs to the Respondents.

Dated at Nairobi this day 13th day of February, 2014.

G V ODUNGA

JUDGE

Delivered in the presence of Mr Mwatsuma for Mr Njogu for the Respondent and the Applicant in person.