



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JR APPLICATION NO. 9 OF 2013

**IN THE MATTER OF AN APPLICATION BY GIRO COMMERCIAL BANK LIMITED FOR
LEAVE TO APPLY FOR AN ORDER OF CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF MISC. CRIMINAL CASE NO. 2325 OF 2012 AND CASE NO. 2327 OF
2012**

AND

**IN THE MATTER OF EVIDENCE ACT CAP 80 OF THE LAWS OF KENYA AND THE
CRIMINAL PROCEDURE CODE**

BETWEEN

GIRO COMMERCIAL BANK.....APPLICANT

VERSUS

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

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

TRICON INTERNATIONAL LIMITED.....1ST INTERESTED PARTY

MAHENDRABHAI MITHABHAI PATEL.....2ND INTERESTED PARTY

EX PARTE

GIRO COMMERCIAL BANK

JUDGEMENT

Introduction

1. By a Notice of Motion dated 29th January 2013, **Giro Commercial Bank Limited**, the ex parte

applicant herein seeks the following orders:

1. That an order of Certiorari be issued to remove into this honourable court and quash the warrant to investigate account No. 4002127 and 3003759 issued on 23rd October 2012 in Misc Criminal Case No. 2325 of 2012 and the warrant issued on 24th October 2012 in Misc. Criminal Case No. 2327 of 2012 respectively.
2. That an order of Prohibition be issued directed to and prohibiting the Respondents from executing and/or effecting the said warrant in the present form or in any intended variation thereof.
3. That an Order of Prohibition be issued directed to and prohibiting the respondents from further investigating the 1st interested party's bank accounts number 4002127 and 3003759 at giro Commercial Bank Limited or any other account of the 1st interested party.
4. That this honourable court be pleased to give any further orders and/or directions it may deem fit in respect to the application herein.
5. That the costs of this application be provided for.

Applicant's Case

2. The said application is based on the grounds stated in the statement as hereunder:
 1. On 23rd October 2012 and 24th October 2012, the Chief magistrate Court issued a warrant to investigate account No. 4002127 and 3003759 in the name of Tricon International Limited held at Giro Commercial Bank Ltd and to carry away various documents listed therein for the purposes of investigation into alleged commission of criminal offences.
 2. The said warrants were served upon the ex-parte Applicant on 19th November 2012 and its officers are liable to be punished under section 180 (2) of the Evidence Act Cap 80 if they fail to comply.
 3. There is a civil dispute pending in court between the ex-parte Applicant and the 1st Interested Party in HCCC No. 399 of 2012 in respect to the same subject matter and/or documents.
 4. The warrant is illegal and constitutes an abuse of law and power by the respondents and is therefore malicious, in bad faith and purely meant to harass and intimidate the ex-parte Applicant to concede to the claim of the 1st Interested Party in the pending civil suit.
 5. The dispute and issues between the parties are therefore of a civil nature and can only be adjudicated upon by a civil court and the criminal charges are purely meant to intimidate the ex-parte Applicant to abandon or sacrifice its rights in the pending suit.
 6. The warrant is totally unfounded and the respondents have acted illegally, maliciously and in bad faith and their sole intention is to harass, intimidate and ruin the Applicant's good name in the public at the behest of the 1st Interested Party.
 7. The documents intended to be impounded constitute the evidence of the Applicant in the pending civil suit and the Applicant will be seriously prejudiced if the documents are taken away.
 8. The purported prosecution is repugnant to justice and the rule of fair play and natural justice.
3. The said application was supported by statement and affidavit verifying the facts therein sworn by **Tilas Nthia Muringi**, the Applicant's Risk Manager on 15th January, 2013.
4. According to the ex parte applicant, a Police Officer named **Mr Makau** attached to Economic Crimes Unit and Commercial Crimes Unit of the of the Criminal Investigations Department served the applicant with warrants authorising one **Cpl Tinga Mwangi Charles** to investigate accounts held in the name of **Tricon International Limited** and to carry away statements, account opening forms and other documents specified in the warrant. According to the ex parte applicant the subject accounts as well as documents are the subject of HCCC No. 399 of 2012 filed by **Tricon International Limited**, the 1st interested party herein (hereinafter referred to as Tricon) and the ex parte applicant. In the said case, it is contended that Tricon obtained orders compelling the ex

- parte applicant to furnish the applicant with all statements and documents pertaining to **Tricon's** accounts.
5. However, instead of proceedings as directed despite the Ruling and directions given by the **Hon. Mr. Justice Mabeya** on 19th July, 2012, the 1st Interested Party and/or its directors instead wrote two(2) letters dated 24th July, 2012 and 26th July, 2012 respectively to the Central Bank of Kenya purporting to challenge the Ruling of the honourable judge. Consequently on 1st August, 2012, **Mr. Justice Mabeya** being dissatisfied with the conduct of the directory of the 1st Interested Party lifted the orders given on 25th June, 2012 for reasons that the 1st Interested Party had demeaned and abused the process and dignity of the honourable Court. The Judge further directed that all pending applications be fixed for hearing at the registry.
 6. **Tricon** then abandoned the prosecution of the said Civil Case and instead secured the impugned warrants which in the applicant's opinion is a ploy meant to circumvent the due process of the law and assist **Tricon** to obtain the orders sought in the civil suit through the criminal process and hence harass and intimidate the applicant into conceding **Tricon's** claim in the pending civil since the documents constitute evidence upon which the applicant intends to rely in the said civil suit.
 7. According to the deponent, the warrant is illegal and constitutes an abuse of law and power by the Respondents and is therefore malicious, in bad faith and purely meant to harass and intimidate the Applicant to concede to the claim of the 1st Interested Party in the pending civil suit. The dispute and issues between the parties, in his view, are therefore of a civil nature and can only be adjudicated upon by a civil court and criminal charges are purely meant to intimidate the Applicant to abandon or sacrifice its rights in the pending suit. The warrant, therefore, is totally unfounded and the Respondents have acted illegally, maliciously and in bad faith and their sole intention is to harass, intimidate and ruin the Applicant's good name in the public at the behest of the 1st Interested Party. The same warrant is repugnant to justice and the rules of natural justice and fair play and the proper remedy is to issue an order of Certiorari and Prohibition as sought herein.

1st Respondent's Case

8. On behalf of the 1st respondent, a replying affidavit was sworn by **Cpl. Tinga Mwangi Charles**, a police attached to the Directorate of Criminal investigations and an investigations officer in this case.
9. According to him, on 10th October 2012, the Director of Criminal Investigations received a written complaint from **Tricon** vide a letter dated 9th October 2012 which complaint was against one **Vipul Vishnuprasad Amin, Mahendra Mithabhai Patel** (the second interested party herein) and **Ramesh Chauhan**. Upon receipt of the said letter of complaint, an enquiry file was opened with a view to ascertaining the authenticity or otherwise of the same, making the appropriate decision and taking the necessary lawful action upon completion of investigations. Part of the said investigations entailed taking a statement from one of the signatories of the letter, **Mr Sharad Chandra Patel** which investigations established that **Tricon International Limited** was incorporated in 1998 with the main objective of carrying on oil transport business within Lake Victoria a project which was financed by Industrial Development Bank (herein after referred to as "IDB") which also provided a letter of credit. The initial directors and shareholders of the company were **Shared Patel**, as the main financier, **Mahendra Patel** and **Ramesh Chauhan**. One **Vipul Amin** who was the son in law of Shared Patel was employed as the managing director of the company. When Mr Shared Patel, who travels regularly out of the country on business trips moreso to the United Kingdom, left the country for Britain he left the management of the company and the implementation of the oil project to the two other directors and **Mr. Vipul Amin** who had been employed managing director.
10. However, in June, 2012, the Company Secretary of **Tricon** one **Mr. Philip J. Ransley**, a retired judge of the High Court discovered activities of a fraudulent nature in the company's file held with the Registrar of Companies at Sheria House, Nairobi and in April 2012, **Mr. Shared Patel** discovered that **Mr. Vipul Amin** the managing director had irregularly opened bank accounts in both the Bank of Baroda and Giro Commercial Bank Limited and observed that Account number 4002127 held at Giro Commercial Bank was solely operated by **Mr. Vipul Amin**; the resolution

- given to the Bank at the time of opening the said account was not signed by the directors of the company as is the procedure; and the picture appearing on the signature card belonged to one **Urvesh Patel** while the signature on the card was that of **Ramesh Chauhan** one of the directors.
11. It was against the foregoing background, that **Mr. Shared Patel** wanted investigations carried out on behalf of **Tricon International Limited** to ascertain whether there were any fraudulent dealings in respect of the accounts and investigations were commenced with a view to ascertaining the said claims and allegations part of which included an application for and obtaining of warrants to investigate the accounts in question through Nairobi Chief Magistrate's Court Criminal Miscellaneous Application No. 2325 of 2012. According to the deponent, the bank of Baroda and IDB provided most of the documents requested by through warrants issued by the court and has also undertaken to provide the rest of the documents. It is the said application and the warrants issued by the subordinate court that form the basis and the subject matter of the current Judicial Review application.
 12. According to him, the investigations carried out so far have confirmed most of the allegations of fraud by the complainant as set out in the letter of complaint dated 9th October 2012 referred to above hence it cannot be said that the warrants of search are malicious, in bad faith or meant to intimidate the ex parte applicant to concede the claim of the 1st interested party in any pending suit. To him no criminal charges have been preferred against any party contrary to the assertion by the ex parte applicant in grounds 5 and 8 of the notice of motion dated 29th January 2013 and the proper procedure of challenging the orders of the subordinate court would be by way a revision for the superior court to call for and examine the record of the subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of the orders of the subordinate court. In his view, the ex parte applicants can provide certified copies of the documents requested and use the original in the civil case.
 13. He deposed that the mandate of the Directorate of Criminal Investigations to undertake the investigation of the accounts in question is derived from Articles 239 sub Article 1(c), Article 243 sub Article 2(a) and 244 of the Constitution of Kenya 2010 and that further, the Directorate of Criminal Investigations is empowered to detect and prevent the commission of crime as more specifically set out in the **National Police Service Act** of 2011 and more particularly in Sections 3, 24, 28, 35 and part seven (7) of the said Act. The Directorate of Criminal Investigations is also authorized under Sections 118 and 121 (1) of the *Criminal Procedure Code* Cap 75 and Section 180 of the **Evidence Act** Cap 80 of the Laws of Kenya to apply for, obtain and execute warrants of search in any criminal investigations.
 14. The deponent contended that the orders of the High court in HCCC No. 399/2012 in the Ruling dated 25th June 2013 were set aside by the orders of the same court on 1st August 2012 and that the effect of the orders of 1st August 2012, was that the 1st interested party was not abusing the court process and indeed the judge allowed the 1st interested party to pursue the regulatory body in the banking sector. To him the dispute herein cannot be sorted out without recourse to investigations of the accounts in question and the 2nd interested party being still a shareholder of the 1st interested party should thus be supporting the cause by the 1st interested party.
 15. That deponent's position was that the subordinate court which issued the warrants to investigate the accounts under reference acted within the law and specifically under Article 159 and 169 of the Constitution of Kenya 2010 and there is no evidence that the subordinate court or the Directorate of Criminal Investigations Department acted either without or in excess of their mandate under the enabling laws of the land or without jurisdiction to warrant the grant of orders sought hence the writs of certiorari and prohibition prayed for by the ex parte applicant are not available to them since Section 193A of the **Criminal Procedure Code** Cap 75 of the Laws of Kenya, concurrent criminal and civil proceedings are permitted. It is only after investigations are completed that it will be established whether or not any criminal activity arises therefrom and further a decision made whether or not to prefer charges against any person or entity. Since such an investigation can either incriminate or exonerate a person against whom a complaint is made, it can truly be said that the ex parte applicants are putting the cart before the horse.

1st Interested Party's Case

16. In opposition to the application **Tricon**, through its Managing Director one **Miren Amin** contended that the Director of Public Prosecutions cannot be permanently stopped from executing his Constitutional and statutory mandate of investigating and prosecuting crime. According to the deponent, **Tricon**, as the proprietor of the subject accounts is the only one with the right to complain on the issues touching on the manner in which the accounts are being run. And call the police to investigate the same. In its attempt to stop the investigations in respect thereof, it is contended that the applicant is obstructing justice. Since the e said Civil Suit is not a criminal case, it is **Tricon's** position that the same cannot be the subject of investigations into commission of criminal offence hence cannot be the basis for obtaining the orders sought herein hence the orders sought are unmerited.

2nd Interested Party's Case

17. On the part of the 2nd interested it was deposed by one **Vipul Vishnuprasad Amin**, the holder of his registered power of attorney that the 2nd interested party herein, **Mahendrabhai Mithabhai Patel** (hereinafter referred to as **Patel**) is a shareholder and director of **Tricon** and that **Patel** has been subjected to untold agony by the machinations of one **Sharad Patel**, the executive chairman and shareholder of **Tricon** who has engaged in illegal, unjust and scandalous conduct with a view to usurping the company and distributing the same to the immediate family members. According to him, though the 1st respondent purports to be acting on the basis of a complaint from the said **Sharad Patel** (hereinafter referred to as **Sharad**), no documents have been filed by either the said **Sharad** or on behalf of **Tricon** who have not even appeared.
18. According to him pleadings and affidavits filed on behalf of the applicant together with the grounds and statement of facts are a fair and true reflection of both the legal and factual position that the disputes arising as pertains to the 1st interested party's affairs are civil in nature and are the subject matter of Milimani HCCC Number 399 of 2012 which cause was initiated by **Sharad Patel** and the immediate members of his family purporting to be directors of the 1st interested party together with the deponent's son **Miren Amin** purporting to be the managing director of the said company following illegal and perverse machinations and manipulations by the said **Sharad Patel** including the illegal, unilateral and dubious purported ousting of the deponent as the managing director and purported appointment of **Miren Amin** as managing director coupled with the purported appointment of **P.J. Ransley** as the company secretary of **Tricon**.
19. According to him, the issues cited above are awaiting determination and adjudication by the honourable court in HCCC Number 399 of 2012 and the said **Sharad Patel** having failed to steam roll the court in HCCC Number 399 of 2012 and having been found to have been in contempt of court has now resorted to dubious and farcical criminal complaints with a view to intimidate and harass the 2nd interested party with a view to disintitling the 2nd interested party of his chare in **Tricon** and also to force him out of the directorship of the company by way of illegal and wanton acts of intimidation harassment and abuse.
20. In his view, the origins of this crude state of affairs is that he was previously wed to **Sharad Patel's** daughter **Hasmita Patel** but they undergone a bitter divorce and now undergoing a bitter legal dispute pertaining to the division of matrimonial property in **Family Division Civil Suit Number 33 of 2008 (O.S.)** and the consequent result is a fecund attempt by **Sharad Patel** to frustrate the 2nd interested party who is the deponent uncle by any means.
21. He disclosed that the affairs of **Tricon** including its shareholding and directorship are the subject matter of HCCC Number 399 of 2012 which cause was initiated by the same **Sharad Patel** which cause he appears to have abandoned once his subterfuge and utter disregard for truth, facts and the law were brought into play.
22. To him the letter of complaint by **Sharad Patel** contains what can only be deemed to be part of an attempt to utilize the police to harass and intimidate the 2nd interested party irrespective of the ongoing civil proceedings in HCCC Number 399 of 2012. However in issuing the impugned warrants, the Chief Magistrate's court was not informed of the existence of the said suit and this material and deliberate non disclosure of the existence of a suit before a superior court is an illumination of the conduct of **Sharad Patel** and his minions. Therefore, it was deposed the so called investigations purportedly conducted by the 1st respondent and cited at paragraph 6 of their

- replying affidavit are a myth and are dubious as no statement has been taken from the 2nd interested party and it is a wonder that the 1st respondent has arrived at the conclusions pelted out at the said paragraph without bothering to record a statement from the 2nd interested party.
23. He disputed the allegation that **Sharad Patel** was the main financier of **Tricon** and asserted that the company was financed by the Industrial Development Bank and contended that as the executive officer of **Tricon**, ought to have been aware and in control of all its affairs. With respect to the appointment of **P.J. Ransley** as the company secretary of **Tricon** he averred that the same is dubious as the said **P.J. Ransley** was unilaterally and illegally appointed by **Sharad Patel** having usurped the role of the board of directors and his purported appointment and subsequent illegal actions in his said purported role is the subject matter of determination HCCC Number 399 of 2012. To him, the purported illegal accounts at the Giro Commercial Bank are a myth and one wonders upon what basis the 1st respondent has arrived at such a farcical conclusion. In any event the same are the subject matter of HCCC Number 399 of 2012.

Applicant's Submissions

24. On behalf of the applicant, it was submitted based on **Kuria & 3 Others vs. Attorney General HCMA No. 966 of 2000** and **Madatally Manji vs. Chief Magistrate's Court Civil Application No. 30 of 2002** that there is no material or basis to support the purported offence of fraud and the intended investigation and/or prosecution is therefore vexatious and meant to harass the ex parte applicants and the 2nd interested party. According to the applicant the 1st interested party ought to have lodged the complaint of criminal dealings before commencing the civil suit if at all it was genuine in its allegations. However it cannot do both simultaneously after hitting a wall in the civil proceedings which are still pending determination. The applicant also relied on **Mohammed Gulam Hussein fazal Karmali & Another vs. Chief Magistrate's Court Nairobi & Another [2006] eKLR.**

1st Respondent's Submissions

25. On behalf of the 1st Respondent, it was submitted that once a complaint is made the police have a duty to investigate and they would be failing in their constitutional mandate to detect and prevent crime if they failed to do so the only consideration being that reasonable suspicion ought to be established. Thereafter the rest is left to the trial court since the law provides safeguards that ensure that an accused person gets a fair trial before the criminal court that tries him.
26. It was submitted that this court cannot take the evidence from the applicant who has been charged in the lower court and purport to grant prohibition hence this court lacks jurisdiction to grant the orders sought herein. In support of these submissions reliance was placed on **Paul Stuart Imison & another vs. The Attorney General & 3 Others, High Court Petition Number 57 of 2009, Jacob Juma vs. the Director of Public Prosecutions & 8 others High Court JR Petition No. 652 of 2009, Paul Mwangi Nderitu vs. the Principal Magistrate Nairobi, High Court Misc. Application No.901 of 2001, Kinono Kibanya vs. Republic, High Court Criminal Application No. 453 of 2003, Surjit Singh Hunjan vs. Principal Magistrate and another, High Court Misc. Application No 519 of 2005, Peter Ndirangu Kinuthia vs. Officer Commanding Kikuyu Police Station & another, Court of Appeal Civil Application No. NAI 173 of 2002, Teresia Wanjiru Githinji vs. The Attorney General & another, High Court Misc. Application NO. 1295 of 2005, Cape Holdings Limited vs. Attorney General & 2 others, High Court Misc. Application No. 240 of 2011, Cargo Distributors Limited vs. Director of Criminal Investigations, High Court Misc. Application No. 39 of 2006, Dr. William Moruri Nyakiba & another Vs the Chief Magistrate & 2 others High Court Misc. Application No. 414 of 2006 and David Njane Ruiyi & Another vs. Republic, High Court Revision Case number 352 of 2009.**

1st interested party's Submissions

27. On behalf of the interested party it was submitted that the law permits issuance of warrant to

- investigate banker's accounts by the judge or magistrate pursuant to section 180(1) of the **Evidence Act** as read with sections 118 and 121 of the **Criminal Procedure Code** (hereinafter referred to as the Code). And that the allegation of illegality is baseless since the warrant was made in compliance with the express provisions of the law.
28. It was submitted that section 193A of the Code allows for concurrent civil and criminal proceedings in a matter. It was therefore submitted that the 1st respondent was within its jurisdiction to investigate the account limited to obtaining certified copies as contemplated in section 180(2) of the **Evidence Act**.
29. By seeking orders prohibiting the Respondents from investigating the 1st interested party's bank accounts would amount to limiting the Respondents from the discharge of their legal duties. In support of the submissions the 1st interested party relied *inter alia* on **Paul Nganga Nyaga & 2 Others vs. Attorney General & 3 Others [2013] eKLR** and **Rosemary Wanja Mwagiru & 2 Others vs. Attorney General & 3 Others [2013] eKLR**.

2nd Interested Party's Submissions

30. On behalf of the 2nd Interested Party, he associated himself with the applicant's submissions and largely reiterated the averments made in the affidavit filed on his behalf herein.

Determinations

31. The principles which guide this Court in granting the orders sought herein are now well settled. The Court ought not to usurp the Statutory and Constitutional mandate of Police and the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon those offices. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings. 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)**.
32. 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.”

33. 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.....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.”

34. 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.”

35. Therefore the determination of this case must be seen in light of the foregoing decisions. However before going to the merits of the instant application it is important to note that what is sought to be prohibited is the continuation of investigation rather than a criminal trial. The Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial. That this Court has power to quash impugned warrants cannot be doubted. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the police to investigate allegations of commission a criminal offence ought to be interfered with. It is not enough to simply inform the Court that the intended trial is bound to fail or that the complaints constitute both criminal offence as well civil liability. The High Court ought not to interfere with the investigative powers conferred upon the police or the Director of Public Prosecution unless cogent reasons are given for doing so.
36. In this case it is not contended that the 2nd respondent had no jurisdiction to issue the warrants. It is contended that in seeking the said warrants the 1st Respondent's discretion was being misused at the behest of the 1st Interested Party and more particularly one **Sharad Patel** for ulterior motives i.e. to achieve what he had failed to achieve in the pending civil case. If this contention is correct the mere fact that the 1st respondent is empowered to seek the warrants and the 2nd respondent is similarly empowered to grant the same would not ipso facto bar this Court from quashing a decision given pursuant thereto and bringing such misconceived proceedings to a halt. As stated in the authorities cited hereinabove, 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. 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. The invocation of the law, by 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. 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. 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. 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. See **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69.**
37. In the present case it is alleged that there are pending civil proceedings between the parties herein. In HCCC No. 399/2012 **Tricon** sought and obtained interim orders to access the bank accounts were granted on condition that it furnishes the applicant with the necessary identification documents to enable the Applicant to comply with the order for access to the accounts. However, **Tricon** failed to comply therewith but instead wrote two (2) letters dated 24th July, 2012 and 26th July, 2012 respectively to the Central Bank of Kenya purporting to challenge the Ruling of the Honourable Judge. As a result of this misconduct the Court set aside its orders and directed the parties to fix the suit for hearing. Again instead of following the Court's directive **Tricon** abandoned the civil proceedings and instead instituted criminal proceedings in which it sought for and obtained orders which were in substance similar to the orders it sought in the Civil Case.
38. These allegations have not been seriously disputed by the 1st Interested Party. In my view this course of conduct on behalf of the 1st Interested Party manifests a concerted effort by the 1st Interested Party to achieve its aim at all costs. Whereas in my view there is nothing inherently wrong with commencement or continuation with both civil and criminal proceedings concurrently if the facts constitute both civil liability and criminal culpability, to seek orders in a civil case and when declined institute criminal proceedings with a view to achieving the same results amounts to playing lottery with the courts and its process. The Court would obviously frown upon such conduct and show its displeasure by bringing such proceedings to a halt.
39. The other ground advanced by the applicant is that the documents in issue are required by the applicant in order to prosecute its civil claim. In my view if the aim of seeking the documents is to remove them from the custody of the applicant thereby disable the applicant from meaningfully prosecuting its civil claim, that would similarly justify this Court in interfering. However, in this case, what was sought were copies of the documents in question. Accordingly, it is my view that such an order would not necessarily incapacitate the applicant in pursuit of its civil cause.
40. There was further allegation that the 1st respondent has not adduced material to prove that a criminal offence has been committed. I associate myself with the decision in **Surjit Singhunjan vs. Principal Magistrate and Another** (supra) that the police have a duty to investigate any complaint once such a complaint is made and that they would be failing in their mandate if they failed to do so. As long as they exercise their powers in good faith without ulterior motives such as where their powers are being used by parties to achieve goals other than the vindication of crimes reasonably suspected to have been committed, the Court would not be entitled to interfere. In these proceedings it is not for this Court to enter into the discourse whether or not the complaint made to the police justified the commencement of the conduct of the investigation.
41. In this case I am satisfied that the conduct of **Sharad Patel** on behalf of **Tricon** constitute a gross abuse of the Court process. However to grant the orders in the manner sought in this application would amount to permanently barring any investigations into allegations of criminal offences not only in respect of the accounts the subject of this application and what the applicant terms **any other account of the Interested Party**. Orders couched in such extensive and ambiguous terms cannot be granted.

Orders

42. Accordingly the orders which commend themselves to me and which I hereby grant are as follows:
1. **An order of Certiorari is hereby issued removing into this Court for the purposes of being quashed the warrant to investigate account No. 4002127 and 3003759 issued on 23rd October 2012 in Misc. Criminal Case No. 2325 of 2012 and the warrant issued on 24th October 2012 in Misc. Criminal Case No. 2327 of 2012 respectively and the same are hereby quashed.**
 2. **An order of Prohibition is hereby issued directed to and prohibiting the respondents from executing and/or effecting the said warrants.**

3. **An order of Prohibition be issued directed to and prohibiting the respondents from further investigating the 1st interested party's bank accounts number 4002127 and 3003759 at Giro Commercial Bank Limited pending the determination of Milimani HCCC Number 399 of 2012.**
4. **The costs of this application are warded to the Applicant and the 2nd Interested Party to be borne by the 1st Interested Party.**

Dated at Nairobi this day 13th of May 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kangethe for the Applicant

Mr Kiche for Mr Ohaga for the 1st interested party

Miss Chepkurui for Mr Odhiambo for 2nd interested party

Cc Kevin