IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC. CIVIL APP. NO. 397 OF 2013

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

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

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

AND

IN THE MATTER OF PENAL CODE, CAP 63, LAWS OF KENYA

AND

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

AND

IN THE MATTER OF AN APPLICATION BY NYABOGA MARIARIA FOR LEAVE TO APPLY FOR CONSERVATORY, PROHIBITION, CERTIORARI ORDERS

REPUBLIC……..…….....…….APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION…...…..1ST RESPONDENT

THE O.C.S , CENTRAL POLICE

STATION, NAIROBI…...…….……..2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE……3RD RESPONDENT

***EX PARTE*: NYABOGA MARIARIA**

JUDGEMENT

Introduction

1. By a Notice of Motion dated 13th November, 2013, the *ex parte* applicant herein, **Nyaboga Mariaria**, seeks the following orders:

1. An order of Certiorari, to remove into this Honourable Court for the purpose of being quashed, and quash, the proceedings and/or the Respondents decision to charge the *Ex parte* Applicant, Nyaboga Mariaria.

2. An order of Prohibition and/or Conservatory, directed at the 1st, 2nd and 3rd Respondents, prohibiting the Director of Public Prosecutions and/or his agents, the 2nd and 3rd Respondents from charging or presenting a charge sheet against the *Ex Parte* Applicant herein, Nyaboga Mariaria in any court with an offence relating to the transaction in, L.R. NO. 9104/91.

3. That costs of this Application be borne provided for.

2. The application was supported by an affidavit sworn by the applicant on 25th April, 2013.
3. According to him, he acted for the vendors of a parcel of land more specifically known as LR No. 9104/91 as an advocate and diligently and pursuant to the provisions of the sale agreement dated 22nd May 2013 and registered as a document with the ministry of lands on the 15th August 2013. He deposed that it was express provisions of the sale agreement that the completion period be within ninety (90) days, from 22nd May 2013, and that the purchasers, and/or the lawyers should give a professional undertaking, before the vendor releases completion documents. The said completion date, according to him was 21st August 2013. However, the purchaser failed to give a professional undertaking as per provisions of the sale agreement before the expiry of the completion period and consequently, clause 11 of the agreement took effect. According to the deponent, the deposit was supposed to be released to the vendor, upon execution of the sale agreement.
4. Despite that it was deposed that without regard to the laid down provisions of law, and the stipulations of the sale agreement, the 1st, 2nd and 3rd Respondents decided to charge him before the Chief Magistrates Court in Nairobi with a charge of obtaining money by false pretences and he was bonded to appear and take a plea before the aforesaid court on 5th November, 2013. In his view, he cannot be charged with an offence of obtaining money by false pretences, contrary to Section 313 of the ***Penal Code***, Cap 63, Laws of Kenya, without regard the provisions of the sale agreement hence the decision by the Respondents to charge him with a Criminal offence arising out of a conveyance relating to LR No. No. 9104/91, when he acted as an advocate for the vendor, and strictly pursuant to the sale agreement which sale agreement was later registered under the ***Registration of Document Act*** was improper.
5. According to the applicant, he did not know the complainant against him and had never acted for him, nor did he act as a seller (vendor) of LR. 9104/91. In his view, the ***Advocates Act***, Cap 16, Laws of Kenya has provided a mechanism on how he should be handled or dealt with in case of any mischief on his part and not as a criminal suspect. It was therefore his case that the action and the decision of the 1st, 2nd and 3rd Respondents to prefer the charges against him in the Chief Magistrate Court at Nairobi violates the legal principles of the Constitution of the Republic of Kenya, ***The Advocates Act***, Cap 16 laws of Kenya and the express provisions of the sale agreement governing the transaction in issue. He further deposed that the intended charges in the Nairobi Chief Magistrate's court against him, any continuous prosecution in the aforesaid criminal case, is in breach of the 1st, 2nd and 3rd Respondents' constitutional duty and obligations, to act in good faith in the interest of the public and justice to all in the duty of the 4th Respondent as a public prosecutor.
6. The applicant contended that the intended charges against him would amount to breach of his fundamental rights and freedoms as an officer of this court and an advocate of High court of Kenya and therefore calls for this honourable court's intervention by way of reviewing the 1st, 2nd and 3rd Respondents' decision to charge him with the said criminal offence. He reiterated that the 1st, 2nd and 3rd Respondents in their actions failed to appreciate the provisions of the constitution and the *Advocates Act* Chapter 16, Laws of Kenya and the sale agreement and that they acted with

malafide in deciding to prefer the said charges against him. To him, the 1st Respondent by himself and/or his agents, the Kenya Police abused the prosecutorial powers bestowed upon him by the Constitution of the Republic of Kenya as the director of Public Prosecutions, to undertake all criminal proceedings against any person offending written law, any court, other than the court martial while adhering to fairness and the principals of Law and honour and that it is an established principle of law that the 1st Respondent and/or his agents should not be allowed to exercise the prosecutorial powers bestowed on him by the constitution in an unlawful manner or in any other manner that will frustrate the control of the public of criminal proceedings and the administration of justice in our Kenyan court by acting illegally.

7. To the applicant, the decision of the 1st, 2nd and 3rd Respondents to charge him with criminal charges is calculated to embarrass, harass, blackmail and/or coerce him to pay the complainant the deposit contrary to the provisions of the sale agreement in issue. He averred that this honourable court has powers over all quasi judicial bodies institutions and organizations and it is empowered to stop the Respondents from presenting its charge sheet against him in the Chief Magistrates Court at Nairobi or any other court elsewhere touching on the matters relating to the said transaction. Further this honourable court has unfettered discretion/jurisdiction to issue conservatory orders restraining the Respondents from presenting its charge sheet against him in court on 5th November 2013 pending the hearing and the determination of this application.
8. It was the applicant's view that if this honourable court issues conservatory orders precluding the Respondents jointly and severally from charging me with criminal charges or from presenting the charge sheet against him in Chief Magistrates court at Nairobi or any other court in Kenya, the Respondents will not suffer any prejudice as this court has powers to order and/or to allow the Respondents to proceed with the intention to charge him with the criminal charges if his application fails after full hearing thereof. He urged the Court to take judicial notice that if charged with criminal case he would suffer irreparable loss, damages, and reputation as an officer of the court because he would given a wide negative coverage and publicity by both the plain and electronic medias yet his reputation is an asset that this court has powers to protect against negative reports that will otherwise be avoided following a proper and good investigations.
9. According to him, he released the stake holder to the vendor, upon issuing the relevant notice in consonance with clause 11 of the sale agreement and after the expiry of the 90 days completion period receipt of which the vendor acknowledged. He averred that the cash bail receipt/police bond specifically bonded him to attend court and take a plea on the charges relating to the transaction on the 5th day of November, 2013 hence it is not correct to aver that the Respondents have not yet decided to charge him.
10. In his view, the Respondent's act of bonding him to attend court on 5th day of November 2013 demonstrates that the Respondents had made a decision to charge him with the charges outlined in the copies of a charge sheet hence it was not true that he was bonded to attend for the purposes of further investigations. To him the circumstances herein ought to persuade the Court to preclude the Respondents from proceeding with the registration of the charge sheet in the Chief Magistrate's Court at Milimani Law Courts since the Respondent's averments, that there is no intention of the Respondent's of charging him with a criminal offence in court, are not true and candid but are calculated to mislead the court.
11. The applicant expressed surprise, that the Respondents had two sets of charge sheets with two different complainants on claims arising from the transaction in issue before court. To him whereas one of the charge sheets indicated that that he allegedly obtained a sum of Kshs. 3.2 million from **Lawrence Andiika** on 22nd May 2013 by falsely pretending that he was in position to sell to him plot No. I.R 46738 another charge sheet alleged that on the same day he obtained a sum of Kshs. 3.2 million from **Rajesh Rughani**, by falsely pretending that he was in position to sell to him plot No. I.R 46738.
12. He however contended that the material before court demonstrated that he acted in the transaction substratum of this judicial review as the vendors advocate, and not as a vendor while the vendor negotiated with the interested party (purchaser) and agreed on the purchase price. He averred that the interested party/purchaser, has neither claimed nor alleged in his pleadings filed herein that he was a vendor in the transaction hence the allegations of obtaining money by false pretences, cannot hold, more especially when he was not a seller, and the provisions the sale agreement

spells out vividly on how the 10% deposit would be handled after the expiry of the completion period.

13. In his view, this demonstrates malice aforethought on the part of the complainant/interested party's in conspiracy with 2nd and 3rd Respondents and that the intended charges, not being supported with any material evidence, can only serve to embarrass and subject him to public ridicule as an officer of this court who acted pursuant to the ***Advocates Act***, Cap 16 Laws of Kenya , and on the vendors instructions.
14. To the applicant, this Court has immense discretion and constitutional authority/duty to entertain this application and tame the excesses, and arbitrary execution of the Respondent's constitutional mandate to receive complainants criminal in nature, like that of the interested party, investigate into them, and charge the suspects in court of law, if he investigations reveal that the crime has been committed if yes, and there is evidence to support a charge or otherwise. He asserted that in his case there is no evidence before this court or elsewhere to charge him with the offences enumerated in the two copies of the charge sheets annexed to the Respondents and interested party's pleadings herein.
15. It was his position that he had not sought orders of this court to restrain/preclude/gag and/or bar the respondents from carrying on their constitutional mandate to investigate, the interested party's complain but was only asking the Court to tame intention of the respondents to charge him with a criminal offence without evidence to do so.
16. The applicant averred that the interested party had preferred a disciplinary committee cause No. 27 of 2014, touching on the subject matter herein, which cause was scheduled for inter parte hearing on 7th July 2014.
17. Apart from that the interested party company had filed a civil suit in this court vide HCC No. 196 of 2014, **HighBeam Ltd versus Mariaria Wilberforce Nyaboga T/A Mariaria & Co. Advocates** which suit touches on matters pending before this court (that is the recovery of the stakeholder). From the suit papers, the deponent deposed that the transaction of sale had no criminal elements at all and for the Respondents, and the interested part's decision, to charge him with the criminal charges was therefore malicious and not well intended and that the proper procedure in recovering money being held as a stakeholder if any, is a civil process or through LSK Disciplinary cause proceedings, and not criminal proceedings.

Respondents' Case

18. In opposition to the application, the Respondent filed a replying affidavit sworn by **PC Joseph Wambua**, the investigating officer on 7th April, 2014.
19. According to him, around September 2013 the Central Police Station received a complainant from the **High Beam Ltd** through **Lawrence Andika** in which the complainants alleged that the Applicant herein, an advocate of the High Court of Kenya was acting for one **Brig. Duncan Wairei** ("the vendor") in a land transaction and while acting for the said vendor he subsequently forwarded to the complainants a forged certificate of title.
20. According to him, investigations were commenced and statements recorded from the complainant and other persons who took part in the transaction including the *Ex parte* Applicant and preliminary investigations established that indeed the *Ex parte* Applicant acted for the said vendor, in conveyance of L.R. No. 9104/91 L.R No. 46738 ("the suit property") who was selling the said property at a price of Kshs 32,000,000.00 out of which Kshs million being 10% of the deposit was to be paid to the Applicant as stakeholder. The sale agreement was consequently drawn and executed after the 10% deposit was paid.
21. It was deposed that further investigations established that the title in respect to the suit property that was forwarded to the buyers advocate by the vendors advocate was however rejected at the Land Registry, as a forgery and investigations revealed that the Applicant subsequently withdrew the 10% deposit that he held as a stakeholder, for his own personal gain.
22. It was deposed that the *Ex parte* Applicant was summoned to record his statement at the police station with regard to the investigations of the aforesaid allegations and was bonded for that purpose. As result, the police drafted a charge sheet with the intended charges that are known to law.
23. According to the deponent, as the Applicant has not challenged the Respondent's decision that the

evidence available could not meet the threshold required by law to institute the intended charges, the decision cannot be impugned. Further, the duplicate police file was forwarded to the officer of the 1st Respondent vide our letter dated 17th February 2014 for their review and appropriate directions and on the 6th March 2014 and upon reviewing of the duplicate police file the 1st Respondent was of the view that there was a substantial area that needed to be investigated before making an appropriate decision to charge the Applicant.

24. According to the deponent, in view of the above direction the *Ex parte* Applicant has not been charged and is therefore pre empting investigations. To him, judicial intervention should be limited to acts that are manifestly in breach of law or where the decision maker reached a wrong decision influenced by other consideration other than law, evidence and the duty to serve the interest of justice. Based on the advice from the State Counsel the deponent contended that judicial intervention should be limited to acts that are manifestly in breach of law or where the decision maker reached a wrong decision influenced by other consideration other that law, evidence and the duty to serve the interest of justice.
25. However, it is manifestly clear from the foregoing that the Respondents acted within their respective mandates under the relevant establishing legislation and in the circumstances, it cannot be said that the actions of the Respondents were in breach of the mandate vested upon them hence it is in the best interest of justice that the police in this matter be allowed to complete investigations and the 1st Respondent be allowed to make appropriate decision based on all evidence on record.

Determinations

26. I have considered the application, the affidavits both in support of and in opposition to the application the submissions for and against the grant of the orders sought and this is the view I form of the matter.
27. It is always important to remember that in these kinds of proceedings, the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution and that the mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review. This is so because judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.
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."

30. However, in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69,** the High Court held:

"The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer... In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute. It is further alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for

which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another...A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution.....In the instant case there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under section 77 of the Constitution...There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the applicants might not get affair 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. I also associate myself with the decision in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** that:

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

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

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

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

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

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

In fulfilling its mandate, the Office shall be guided by the Constitution and the

following fundamental principles—

(a) the diversity of the people of Kenya;

(b) impartiality and gender equity;

(c) the rules of natural justice;

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

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

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

(g) protection of the sovereignty of the people;

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

(i) promotion of constitutionalism.

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

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

35. Where therefore it is clear that the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognised under the Constitution and the ***Office of the Director of Public Prosecutions Act***, that would, in my view, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion. As was held by **Wendoh, J** in **Koinange vs. Attorney General and Others [2007] 2 EA 256**:

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

36. It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on the executive the Court may interfere. The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**
37. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute ought to be interfered with.
38. In this case it is the applicant's case that the criminal charges have been preferred in circumstances which violate the rules of natural justice and in disregard of relevant matters. In exercising their discretion to charge a person both the police and the DPP's office must take into account and must exercise the discretion on the evidence of sound legal principles. As was held by

Ojwang, J (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**:

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

39. Therefore the police are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered is not necessarily fatal to the prosecution. However, where as it is alleged in this case exculpatory evidence is presented to the police in the course of investigation and for some reasons unknown to them they deliberately decide to ignore the same one can only conclude that the police are driven by collateral considerations other than genuine vindication of the criminal judicial process. Neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of malice and hence abuse of discretion and power.
40. In this case, it is the applicant's case that he was retained to act in a conveyancing transaction and that he was neither the vendor nor the seller and carried out his obligations as per the terms of the agreement for sale. He therefore was of the view that the intended charges against him for obtaining money by false pretences were completely baseless.
41. That the Respondent are aware that the applicant was acting in the said transaction as an advocate for the vendor and not as the vendor is clear from the replying affidavit. He was therefore an agent of a disclosed principal. The fact that the title to the property sought to be sold was found to have been forged cannot in the circumstances of this case be held against the applicant. There is nothing in the replying affidavit which even remotely implies that the applicant was aware that the said title was a forgery. It is therefore not surprising that the 1st Respondent advised that the matter be held in abeyance. It is however clear that the police had already made up their minds to charge the applicant since not only had he been bonded to appear in Court but the charge sheet had already been prepared.
42. Taking into account the circumstances of the case including the fact that there is a civil case pending as well as disciplinary proceedings against the applicant, one can only conclude that the invocation of the criminal justice system was meant to coerce the applicant into settling refunding the deposit rather than for the vindication of a crime suspected to have been committed and that is not the purpose f the criminal justice system and to do so would be contrary to the mandate of the Director of the Public Prosecutions.
43. In my view, to charge an advocate who was involved in a conveyancing transaction with obtaining money by false pretences when the evidence shows that the advocate was not a party to the transaction in question reeks of malice. This is not to say that an advocate cannot in the course of a conveyancing transaction commit a criminal offence but the offence intended to be preferred against the applicant in the circumstances of this case was clearly inappropriate and the futility of doing so must have dawned on the 1st Respondent hence the tactical retreat.

44. Accordingly, it is my view and I so hold that the intended levying of criminal charges against the applicants herein is ill motivated, malicious and an abuse of both investigatory and prosecutorial powers.
45. Having considered the issues raised herein I am not satisfied that this application is merited.

Order

46. In the result I grant the orders sought in the Notice of Motion dated 13th November, 2013, and issue the following orders:

1. An order of Certiorari, is hereby issued remove into this Honourable Court for the purpose of being quashed, the proceedings and/or the Respondents decision to charge the *Ex parte* Applicant, Nyaboga Mariaria which decision is hereby quashed.

2. An order of Prohibition is hereby issued directed at the 1st, 2nd and 3rd Respondents, prohibiting the Director of Public Prosecutions and/or his agents, the 2nd and 3rd Respondents from charging or presenting a charge sheet against the *Ex Parte* Applicant herein, Nyaboga Mariaria in any court with an offence relating to the transaction in, L.R. No. 9104/91.

3. That costs of this Application are awarded to the applicant.

Dated at Nairobi this 4th day of November, 2014

G V ODUNGA

JUDGE

Delivered in the absence of the parties

Cc Patricia