



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW CASE NO. 170 of 2012**

**IN THE MATTER OF AN APPLICATION FOR PREROGATIVE ORDERS**

**REPUBLIC.....APPLICANT**

**VERSUS**

**CHIEF MAGISTRATES COURT**

**NAIROBI LAW COURTS.....1<sup>ST</sup> RESPONDENT**

**CHIEF MAGISTRATES COURT**

**MILIMANI COMMERCIAL COURTS.....2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS...3<sup>RD</sup> RESPONDENT**

**THE COMMISSIONER OF POLICE.....4<sup>TH</sup> RESPONDENT**

**THE DIRECTOR OF**

**CRIMINAL INVESTIGATION DEPARTMENT.....5<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL .....6<sup>TH</sup> RESPONDENT**

**AND**

**ELISHA K. ROTICH.....1<sup>ST</sup> INTERESTED PARTY**

**SUSAN CHEBET ORGUT.....2<sup>ND</sup> INTERESTED PARTY**

**WILLIAM SAGINI ORIBU.....3<sup>RD</sup> INTERESTED PARTY**

**EX PARTE SIMON NGOMONGE**

**JOHN KIBATHI MUTHAMA**

**JUDGEMENT**

**INTRODUCTION**

1. By a Notice of Motion dated 11<sup>th</sup> May 2012, the *ex parte* applicants herein **Simon Ngomonge** and **John Kibathi Muthama**, seek the following orders:
  1. **An Order of certiorari removing into this court and quashing all proceedings and orders in Milimani CMCC No. 5678 of 2011 Susan Chebet Orgut vs Simon Ngomonge and another and Nairobi Chief Magistrate's Court Criminal case No. 110 of 2012 R vs John Kibathi Muthama.**
  2. **An order of prohibition prohibiting the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents from arresting and preferring criminal charges against the 1<sup>st</sup> Applicant and/or any of my employees and/or agents in respect of the 1<sup>st</sup> Applicant's distress, advertisement and sale of motor vehicle registration number KAZ 718 J Landrover Freelander.**
  3. **An order of mandamus compelling the 4<sup>th</sup> and 5<sup>th</sup> respondents to forthwith release motor vehicle registration number KAZ 718 J Landrover Freelander to the 3<sup>rd</sup> party.**
  4. **The cost of these proceedings be borne by the respondents and the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties.**
2. The said Motion is grounded on Statement of Facts and supported by a verifying affidavit sworn by **Simon Ngomonge**, the 1<sup>st</sup> applicant herein on 23<sup>rd</sup> April 2013.
3. According to the said affidavit, the deponent is a licensed auctioneer trading in the name and style of **Dollar Auctions**. On 5<sup>th</sup> September, 2011 in his capacity as a licensed auctioneer he received instructions from **Wonderful International (K) Ltd** the managing estate agents for the owner of apartment number **D2 Argwings Kodhek Road's Belmont Court** to levy distress upon the goods of one **Elisha K. Rotich** the 1<sup>st</sup> Interested Party herein. Pursuant thereto on 7<sup>th</sup> October 2011, in the presence of the tenant, the deponent duly proclaimed his household goods and other movable items and on 22<sup>nd</sup> October 2011, he proceeded to levy distress but the tenant failed to respond to the distress and he locked the door to the rented premises. According to the deponent, he was later informed by his instructing client that motor vehicle KAZ 718J belonged to the tenant and was parked at the tenant's designated parking. While the deponent and his staff were in the process of towing the said motor vehicle, the tenant came, opened the car, removed all his personal documents requested them to drive the vehicle while promising to settle all outstanding dues the following day. They however they opted to tow it.
4. On 26<sup>th</sup> October, 2011, the 1<sup>st</sup> Interested Party went to the deponent's offices, acknowledged the fact that motor vehicle registration Number KAZ 718J beneficially belonged to him and pleaded with the deponent not to sell it. In the process he made a written undertaking to pay the outstanding rent arrears and auctioneers charges by close of day on 27<sup>th</sup> October, 2011 in default of which the vehicle would be disposed of through sale by public auction. The 1<sup>st</sup> Interested party did not however honour his undertaking as promised but despite that the deponent decided to give few more days hoping that he would eventually turn up which he never did. On 3<sup>rd</sup> November 2011, the deponent received a letter from **Njeru Gichovi & Company Advocates** who were acting for the managing Estate agents aforesaid instructing him to sell the subject motor vehicle and pursuant to the said instructions the deponent put up an advertisement for sale of the motor vehicle on 5<sup>th</sup> November 2011 in a local daily. Following the said advertisement, the said motor vehicle was subsequently sold by public auction on 12<sup>th</sup> November, 2011, to the highest bidder **William Sagini Oribu** (the 3<sup>rd</sup> Interested party) to whom possession thereof was delivered and on the 16<sup>th</sup> November 2011 the proceeds of the sale, less charges were remitted to the principal's advocates **M/s Njeru Gichovi & Company Advocates**.
5. Thereafter one **Susan Chebet Orugut** (the 2<sup>nd</sup> Interested Party) moved to court vide Milimani CMCC No. 5678 of 2011 on 24<sup>th</sup> November, 2011 against the deponent and the 3<sup>rd</sup> Interested Party. In the said suit the 2<sup>nd</sup> Interested Party stated that that she was informed on the same day,

- 22<sup>nd</sup> October, 2011 that the motor vehicle had been distrained and eventually advertised in local daily newspapers but took any steps to prevent the said motor vehicle from being sold which according to the deponent leads to the conclusion that indeed the subject motor vehicle belongs to the 1<sup>st</sup> interested party and the civil suit aforesaid is just an after thought. In the same pleadings the 2<sup>nd</sup> Interested Party imputes that the 1<sup>st</sup> Interested Party is a stranger to her yet the deponent has since discovered that she is indeed the wife to the 1<sup>st</sup> interested party based on an obituary of **Batiem Eitah Chemutai Siele** of Standard Newspapers of 16<sup>th</sup> February, 2012.
6. It is further deposed that on 26<sup>th</sup> January 2012 the 2<sup>nd</sup> Applicant herein who is a member of the deponent's staff was charged in Nairobi Criminal Case Number 110 of 2012 with the offence of stealing the motor vehicle in question herein in which charge it was indicated that the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties herein are the complainants despite the fact that they know the history of the distress herein and the 1<sup>st</sup> Interested Party has never denied being in arrears of rent.
  7. According to the deponent, the institution of the criminal proceedings against the 2<sup>nd</sup> Applicant herein, who at all material times was his agent, is illegal, amounts to abuse of power and authority is malicious and should proceedings in the criminal case aforesaid ought to be quashed.
  8. On 8<sup>th</sup> December 2012 the motor vehicle in question herein was seized from the 3<sup>rd</sup> Interested party by the CID allegedly as an exhibit in the Criminal case against the 2<sup>nd</sup> Applicant herein but once the 2<sup>nd</sup> Applicant was charged the motor vehicle in question instead of remaining as an exhibit until the said malicious criminal case is concluded or earlier determined under the custody of the police or the court, on 3<sup>rd</sup> April 2012 he found the vehicle being driven around town and later found it parked in town along **Taifa Road** next to the City Council High Court parking. In the deponent's view, this conclusively confirms that the institution of the criminal case against the 2<sup>nd</sup> Applicant is malicious, illegal and is being done with connivance and collusion between the police and the Interested Parties and was intended to present the police with an opportunity to give back the vehicle to the interested parties irregularly under the disguise of "legality". It is also his belief that the institution of civil case number 5678 of 2011 against him and the 3<sup>rd</sup> applicant is an abuse of the process of court as the suit was instituted long after the interested parties became fully aware that the motor vehicle in question had been proclaimed, distrained and sold to the 3<sup>rd</sup> Applicant. To him, the 3<sup>rd</sup> Interested Party is being persecuted for nothing as he lawfully purchased the motor vehicle in question and paid consideration for the same and as such the 4<sup>th</sup> and 5<sup>th</sup> Respondents should be compelled to forthwith return the same to him. It is also his belief that since he is the holder of the auctioneering license pursuant to which the motor vehicle in question was seized, it is he who should have been charged for theft and not the 2<sup>nd</sup> Applicant which again shows that the preferring of criminal charges against the 2<sup>nd</sup> Applicant is malicious and an abuse of the process of court. To him, the 1<sup>st</sup> and 2<sup>nd</sup> interested parties cannot hold two positions; that the vehicle was stolen by the 2<sup>nd</sup> Applicant and at the same time claim that it was attached by the deponent in distress for rent. Having expressly stated in her pleadings that the motor vehicle was attached in distress for rent the 2<sup>nd</sup> Interested Party cannot make a complaint for the theft and sustain criminal proceedings against the 2<sup>nd</sup> Applicant hence the applicants' prayer that both the civil and criminal proceedings instituted at the instance of the interested parties herein be quashed.
  9. It is further deposed by the deponent that he is extremely apprehensive that the police may arrest him and also charge him with the offence of stealing as a continuation of abuse of their power and malice hence the prayer for an order of prohibition prohibiting the police from arresting and charging him and any of his employees and/or agents for any offence relating to the distraint of the said motor vehicle. The applicants also pray for an order that the 4<sup>th</sup> and 5<sup>th</sup> Respondents be ordered by way of mandamus to forthwith and unconditionally release motor vehicle KAZ 718J to the 3<sup>rd</sup> interested party within a limited period of time.

### **RESPONDENT'S CASE**

10. In opposition to the application, the respondents filed the following grounds of opposition:

1. **That the application herein lacks merit.**
2. **That the application herein is intended to curtail the statutory obligations and duties of the police.**
3. **That should the applicants be arrested and charged they will have the opportunity to demonstrate their innocence in the criminal court.**
4. **That the application herein is an abuse of the due processes of the court and the same should be dismissed with costs.**

#### **INTERESTED PARTIES' CASE**

5. The interested parties on the other hand in opposition to the application filed a replying affidavit sworn by **Susan Chebet Orgut**, the 2<sup>nd</sup> interested party herein on 22<sup>nd</sup> May 2012.
6. According to her on 22<sup>nd</sup> October 2011 she was informed by **Elisha K. Rotich**, the 1<sup>st</sup> interested party that Motor vehicle Registration Number KAZ 718J had been attached from his compound pursuant to attachment notice issued on 22<sup>nd</sup> October 2011 yet the said Motor vehicle Registration Number KAZ 718 J proclaimed therein belongs to her. She is however aware that the said **Elisha K. Rotich** entered into a tenancy agreement with one **Nancy Muthoni Gichungwa** in respect of Apartment No. D2, Belmont Court, along Argwins Kodhek Road and accordingly she is not liable to performance of any of the terms of the said Agreement being the lawful owner of the Motor Vehicle and not being neither a party to the tenancy Agreement aforesaid nor having at the material time resided on the suit premises the subject of the aforesaid distress.
7. She further deposes based on the information received from the 1<sup>st</sup> Respondent that the proclamation notice served on **Elisha K Rotich** on 7<sup>th</sup> October 2011 did not indicate Motor Vehicle registration Number KAZ 718 J as not one of the goods proclaimed hence the action is malicious and illegal and in any even the Vehicle did not belong to **Elisha K. Rotich** and could therefore not be subject to such proclamation. It is further contended that the 1<sup>st</sup> Applicant advertised the said Motor Vehicle for sale and purported to sell the same to the 3<sup>rd</sup> interested party while knowing or having sufficient reasons to believe the purported attachment was unlawful for all purposes and all subsequent steps taken by the 1<sup>st</sup> Applicant were null and void. To her, the 1<sup>st</sup> Applicant acted maliciously and in bad faith by failing to exercise any due diligence to ascertain the ownership of Motor Vehicle registration Number KAZ 718J and no relief ought to be granted to him on account of coming to court with unclean hands.
8. Upon realizing that the actions of the 1<sup>st</sup> applicant and the 3<sup>rd</sup> interested party were detrimental to her right to ownership of the vehicle she commenced Civil Suit No. 5678 of 2011 in the Chief magistrate's Court and obtained injunctive orders against 1<sup>st</sup> Applicant and the 3<sup>rd</sup> interested party and was granted relief sought. Based on the advice obtained from her advocates, she believes that the application for Judicial Review is misplaced and speculative as the 1<sup>st</sup> Applicant ought to have appealed against the decision of the lower court if he was dissatisfied with the decision of the lower court. It is her position that the 3<sup>rd</sup> interested party has attempted to obtain similar relief's sought by the Applicants in an Application dated 15<sup>th</sup> December 2011 in the CMCC 5678 of 2011 which Application was dismissed and the present judicial review application is filed in collusion with the 1<sup>st</sup> Applicant and the 3<sup>rd</sup> Interested party and is intended to circumvent the previous decision of the lower court instead of preferring an Appeal. It is her position that the circumstances of the attachment of the Motor vehicle was suspicious which prompted her to report the same to the Police for investigations and the 4<sup>th</sup> and 5<sup>th</sup> respondents are duty bound to investigate and where necessary arrest and charge the suspects as they did in Criminal case No. 110 of 2012 and the applicants should await decision of the court on the criminal charges.

#### **EX PARTE APPLICANT'S SUBMISSIONS**

9. On behalf of the applicants it is submitted that the institution of criminal proceedings against the 2<sup>nd</sup> ex parte applicant and the concurrent institution of civil proceedings against the 1<sup>st</sup> ex parte applicant and the 3<sup>rd</sup> interested party is an abuse of the process of the court. While reiterating the

contents of the verifying affidavit, it is contended that the institution of the criminal case against the 2<sup>nd</sup> ex parte applicant is malicious, illegal and is being done with connivance and collusion between the police and the interested parties and while the institution of the civil case against the 1<sup>st</sup> ex parte applicant and the 3<sup>rd</sup> interested party is an abuse of the process of the court having been instituted after the interested parties were fully aware that the motor vehicle in question had been proclaimed, distrained and sold in accordance with the law.

### **1<sup>ST</sup>, 2<sup>ND</sup> AND 6<sup>TH</sup> INTERSTED PARTIES' SUBMISSIONS**

10. On behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> interested parties, it is submitted that the court cannot address the issue whether or not the vehicle in question was stolen in these proceedings as that can only be addressed in the criminal case. With respect to the issue of ownership of the vehicle it is similarly submitted that the same can only be competently determined in the civil case.
11. It is submitted that any act of unlawfulness is a matter of evidence and the police have special powers of investigations and if a party is satisfied that there are reasonable grounds for suspecting that an offence under the Act has been committed by any person, that person may authorise the investigating officer (police) to investigate the crime/offence. It is submitted that if the orders sought herein are granted, the police would not be able to investigate, arrest and charge the reported offenders hence the orders sought herein ought not to issue. Since there is already a criminal case before the Chief Magistrate's Court, it is submitted that the order of prohibition cannot issue. It is submitted that since the matters raised are issues of ownership and high criminal allegations, the orders of certiorari ought not to issue hence the application should be dismissed with costs to the respondents.

### **2<sup>ND</sup> INTERESTED PARTIES' SUBMISSIONS**

12. On behalf of the 2<sup>nd</sup> interested party, it is submitted while reiterating the contents of the replying affidavit that the action by the applicants of attaching the suit motor vehicle was unprocedural, unlawful and illegal. It is contended that if the applicants are aggrieved by the orders issued in the civil case, they ought to lodge an appeal against the order in light of the fact that their attempts to challenge the same failed. It is submitted that the applicants have neither demonstrated that they have been denied the right to be heard nor have they demonstrated that decision was irregular, irrational or without jurisdiction hence the application should be dismissed with costs.

### **DETERMINATIONS**

13. 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.**
14. I have considered the application. It is important to first deal with the circumstances under which the Court will grant order terminating, prohibiting the commencement or continuation of a criminal trial process.

15. 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. 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)**.
16. 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.”**

17. 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.”

18. 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 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. 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 case 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.”

19. 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 a 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.”

20. Therefore the determination of this case must be seen in light of the foregoing decisions. In this case it has been averred by the 1<sup>st</sup> applicant and not denied that the 2<sup>nd</sup> applicant who is the accused person in the criminal case was the 1<sup>st</sup> applicant’s agent. From the record it is clear that the 2<sup>nd</sup> interested party was well aware that the suit motor vehicle was attached and/or sold in purported distress of rent. It may be that the said attachment and/or sale was unlawful and illegal.

However, that does not make it criminal. A purely civil dispute ought not to be turned into a criminal process. Where a party knows very well that the circumstances of a dispute constitute a civil dispute to invoke the criminal process is in my view an abuse of the criminal process and the court will not hesitate to terminate such an abuse. The process of the court ought to be invoked in good faith with a view to vindicating the wrongs done to a person and not for the purposes of some collateral advantage which the law does not recognise as genuine. Therefore whereas in judicial review proceedings the court will not venture into the merits of the criminal charge, in the circumstances of this case, it is clear that the institution of the criminal proceedings is meant to further some other motives other than the vindication of the rights of the complainant. This conclusion arises from the fact that the 2<sup>nd</sup> interested party knew very well the circumstances under which the suit vehicle was attached and purportedly sold, she knew the auctioneer involved, she properly instituted civil proceedings for determination of the issue yet she went ahead to file a complaint against an agent of the auctioneer and based on the said complaint the police impounded the suit vehicle and instead of keeping it in safe custody as an exhibit decided to release the same to the 2<sup>nd</sup> interested party. These circumstances clearly show that the real motive of the criminal process was not to vindicate the grievances of the 2<sup>nd</sup> interested party but it was a ploy to impound the vehicle and hand the same over to the 2<sup>nd</sup> interested party. By conducting themselves thus the police in effect became the agents of the 2<sup>nd</sup> interested party rather than independent investigators in the matter.

21. This court cannot countenance such abuse of the criminal process.

22. With respect to the civil process, it is my view that there are proper legal avenues for challenging the same if the process is being abused. The issues raised by the 2<sup>nd</sup> interested party on the unlawfulness or illegality of the process leading to the purported sale of the suit vehicle cannot be wished away. They need to be ventilated and determined by the court in the civil

process. Accordingly based on the material before me I am unable to find that by filing the civil case, the process of the court was being abused.

## **ORDER**

23. In the premises these are the orders that commend themselves to me:

- 1. An Order of certiorari is hereby issued removing into this court and quashing all proceedings and orders in the Nairobi Chief Magistrate's Court Criminal case No. 110 of 2012 R. Vs John Kibathi Muthama and the same are hereby quashed.**
- 2. An order of prohibition is hereby issued prohibiting the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents from arresting and preferring criminal charges against the 1<sup>st</sup> Applicant and/or any of his employees and/or agents in respect of the 1<sup>st</sup> Applicant's distress, advertisement and sale of motor vehicle registration number KAZ 718 J Landrover Freelander.**
- 3. I am however unable to grant the order of mandamus sought for the reasons that the party in whose favour the said order is sought is not the applicant and in any case it has not been shown that the said vehicle is in the custody of the 4<sup>th</sup> and 5<sup>th</sup> respondents.**
- 4. The costs of the applicants will be borne by the 1<sup>st</sup> and 2<sup>nd</sup> interested parties.**

**Dated at Nairobi this 5<sup>th</sup> day of July 2013**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of Miss Chege for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents***

