REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COURTS

MISC CIVIL APPLICATION NO. 327 OF 2011

REPUBLIC.....APPLICANT

AND

CHIEF MAGISTRATE'S COURT NAIROBI.....1ST RESPONDENT

THE DIRECTOR OF CRIMINAL

INVESTIGATION DEPARTMENT..... 2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

SIMON MWANGI NIJOROGE.....1ST INTERESTED PARTY

LUCY WANJIRU NJOROGE.....2ND INTERESTED PARTY

EX PARTE BETH WANJA NJOROGE

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 9th January 2012, filed in Court on 12th January 2012, the *ex parte* applicant herein, **Beth Wanja Njoroge,** seeks the following orders:

1. **That an order of certiorari be issued quashing all the proceedings in the Nairobi Chief Magistrate's Court in Criminal Case Number 1429 of 2011.**
2. **That an order of prohibition be issued restraining Respondents from proceeding with the hearing of Nairobi Chief Magistrate's Court Criminal case Number 1429 of 2011 and/or prosecuting the Applicant herein.**
3. **That an Order of Mandamus be issued compelling the director of Criminal Investigation Department to produce the original forensic Report made by Mr. Antipus Nyanchwa.**

4. **That the costs of this application be provided for.**

APPLICANTS' CASE

2. The Motion was grounded on the Statutory Statement filed on 16th December 2011 and the verifying affidavit sworn by **Beth Wanja Njoroge**, the applicant herein on 15th December 2011.
3. According to the applicant, she was charged in the Chief Magistrate's Court in Criminal Case Number 1429 of 2011 where the Complainant is **Simon Mwangi Njoroge**. According to her, what led to the charges is a transaction which was done by an Advocate by the **Kwame** has not complained against her nor said that the document was forged. It is deposed that the Complainant is not involved in the transaction leading to the Transfer of land he is complaining about since he is not a Director nor a share holder of the Company which transferred the land to the applicant. It is therefore the applicant's case that no prejudice shall be occasioned to the respondents if this Application is allowed.

INTERESTED PARTYS' CASE

4. In opposition to the application, **Simon Mwangi Njoroge**, the 1st interested party swore an affidavit on 2nd April 2012.
5. In the said affidavit he deposed that the matters set out in the ex-parte Applicant's Notice of Motion dated 9th January 2012 directly involve him and that he is the complaint in Nairobi Criminal case No. 1429 of 2011; ***Republic vs. Beth Wanja Njoroge***, wherein the ex-parte applicant has been charged with a criminal offence of forging a transfer document in respect of all that parcel of land known as L.R. No. 8083/3 and registered as I.R. No. 15186/1 ("the parcel of land"). According to him, the said parcel of land was registered in the name of **Jogoo Kimakia Bus Service Limited**, which Company was co-owned by the late **Bedan Njoroge Nduati** together with the ex-parte Applicant and her two co-wives, **Teresia Waithira Njoroge** and **Rachel Njeri Njoroge**.
6. According to him, as a beneficiary of the estate of the late **Bedan Njoroge Nduati**, he is aware that the said deceased in his Will bequeathed unto amongst others, the 2nd Interested Party, as his daughter, the old club house together with the kitchen which are erected on L.R. No. 8083/3. Despite that the Ex-parte Applicant has on numerous occasions encroached and/or trespassed onto the 2nd interested Party's property on the said parcel of land and threatened to evict her therefrom on the strength of a forged transfer document which was illegally and/or criminally obtained, executed and registered in favour of the ex-parte Applicant in respect of the said parcel of land. According to information obtained from his advocates he believes that the said forged transfer document is null and void since **Rachel Njeri Njoroge** who is purported to have executed the same swore an affidavit in Nairobi HCCC No. 190 of 2009; ***Beth Wanja Njoroge vs. Simon Mwangi Njoroge & Wanjiru Njoroge*** denying any knowledge whatsoever of the said transfer and/or its execution. Similarly, based on the same advice it is his belief that the 2nd respondent has a Constitutional duty to investigate any criminal allegations levelled against the ex Parte Applicant and cannot therefore be so barred from doing so while the 1st Respondent has a Constitutional duty to hear and determine criminal matters brought before it in a fair manner and unless otherwise, cannot be barred from so doing.

AFFIDAVIT SWORN BY KWAME NKURUMAH

7. There was an affidavit filed on the 8th November 2012 sworn by one Kwame Nkrumah, an advocate of the High Court of Kenya working as an in-house lawyer with Roy Group of Companies. In the said affidavit he deposed that some time in the year 2004 while in his office at Trishul Towers Ngara, he came to know one **Mr. Mbugua** popularly known as "Councillor" who introduced him to **Mr Bedan Njoroge Nduati**. The latter approached him to draw a transfer document for him in favour of **Beth Wanja Njoroge** which he drew and the parties executed and he attested their signatures. However, he deposes that he did not affix the photographs appearing on the face of the Transfer since it was then not a requirement to fix the same on the Transfer. He

nevertheless confirmed that the faces appearing on the said Transfer is the one of **Bedan Njoroge Nduati** who was ell known to him but could not confirm whether the face of the female appearing thereon is the one for the lady who appeared before him as a co-director due to time lapse as the lady was not known to him before.

EX PARTE APPLICANT'S SUBMISSIONS

8. It was submitted on behalf of the ex parte applicants, while reiterating the contents of the supporting affidavit, that the person who lodged the complaint with the police is not known to the company hence was not competent to lodge the complaint with the police when the Directors are there. It is submitted that the applicant was arraigned in court before the investigations were complete since no statement had been taken from the advocate who was involved in the transaction. It is submitted that by not relying on the original forensic report the prosecution is not up to a good cause and has some hidden agenda by hiding some documents with vital information from the court. It is submitted that since the questioned documents were prepared by an advocate who witnessed the signatures and who has not denied preparing the same, the same could not have been forged hence the need to restrain the Court from proceeding with the hearing of the case until proper investigations are conducted and all documents availed to the Court. It is the applicant's position that since the Directors and the Shareholders of the Company have not complained there is no reason for dragging the applicant to court based on a complaint made by a person who has no locus.
9. It is submitted that the Court has the power to compel a public officer to carry out a duty which he is mandated by law to do hence the 2nd respondent ought to be compelled by an order of mandamus to avail a report which they have refused to avail. It is submitted that similarly the court has powers to restrain public officers from abusing their powers as the prosecution is doing hence the application ought to be allowed.
10. In her further submissions filed on 6th May 2013, it was contended that based on the affidavit sworn by **Kwame Nkrumah**, the transfer is not forged moreso in light of the fact that the respondent has not responded to the application but has chosen instead to seek copies of the documents filed in this court to conduct its investigations a proof that the applicant was arraigned in court before the investigations were complete. In support of her case the ex parte applicant relies on **Republic vs. Chairman Kandara Land Disputes Tribunal & Another ex parte Joel Gicharu Wainaina & 2 Others High Court JR ELC Case No. 24 of 2010**, **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR**, **Ex parte Floriculture International Limited High Court 144 of 1992**, **William vs. Spautz [1992] 66 NSW LR 585**, **Ex parte Jared Benson Kangwana High Court Misc. 446 of 1995**, **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**, **R vs. Attorney General ex parte JPL Nyaberi High Court Misc. Civil Application No. 1151 of 1999**.
11. It is submitted that based on the 1st interested party's affidavit, it is clear that the criminal charges are a breach of criminal law and can best be handled under the Law of Succession in the Estate of the deceased **Bedan Njoroge Nduati** and the on-going civil case.
12. It is therefore submitted that the present case is an abuse of criminal process and the court ought to quash the same.

1ST AND 3RD RESPONDENTS' SUBMISSIONS

13. On behalf of the 1st and 3rd respondents, it was submitted that since the applicant has no exhibited what is sought to be quashed as required under Order 53 rule 7 of the Civil Procedure Rules, the omission is fatal.
14. It is further submitted that under the Magistrate's Courts Act, the 1st respondent is within its mandate to hear and determine the issues before it.
15. It is submitted that the issues relating to the complainant's locus and the fact that the advocate who drew the documents has admitted the same can be dealt with in the trial and not under Order 53 and reliance is placed on **Republic vs. Eppring and Harlow General Commissioners ex**

parte Goldstones 3 All ER 257 and it is submitted that judicial review proceedings are not meant to be a substitute for civil proceedings. It is submitted that the grounds for issuance of judicial review orders have not been demonstrated by the ex parte applicant against the 1st and 3rd respondents hence the application ought to be dismissed. **INTERESTED PARTY'S SUBMISSIONS**

16. On behalf of the Interested Party it was submitted that it is the duty of the police to carry out thorough investigations and take proper action depending on the circumstances of the case when a person makes a complaint to the police regarding loss or unlawful disposition of his property. It is further submitted that Article 157(4) of the Constitution provides that the Director of Public Prosecutions shall have power to direct the police to conduct investigation while under Article 157(10) thereof the DPP does not require consent of any person or authority to commence criminal proceedings and is not under direction or control of any person. According to the interested party the applicant is seeking orders of the court to prohibit the court and the police from carrying out their statutory duty placed on them by both the statute and the Constitution of Kenya yet the police cannot be stopped from investigating cases of crime whenever a complaint is made to them. To the interested parties they have a genuine complaint of serious fraud perpetrated by the applicant regarding the estate of the late **Bedan Njoroge Nduati** hence the report to the police who are merely performing their statutory and Constitutional duty.
17. In support of the submissions the interested parties rely on **Republic vs. Commissioner of Police & Another Ex Parte Michael Monari & Another [2012] eKLR** and submits that the complaints raised against the applicant are grave and serious and that the case should be allowed to go into full trial so as to give the prosecution an opportunity to adduce evidence in support of the fraud charges levelled against the applicant herein. Further reliance is placed on **R vs. Atorney Geneal ex parte Kipngeno Arap Ngeny, High Court Misc. Civil Application No. 406 of 2001** as well as **Cape Holdings Limited vs. Attorney General & Another [2012] eKLR** and it is submitted that so long as the powers are exercised impartially with the aim to deter criminality and to protect the peoples rights as demonstrated by the Respondents herein, the Court should not entertain this application as it has no merit and a stumbling to the performance of statutory duties by the 1st and 2nd respondents and as such the application should be dismissed with costs.
18. On the issue of locus it is submitted that under section 88(2) of the ***Criminal Procedure Code*** Cap 75 of the Laws of Kenya, a person who believes from a reasonable and probable cause that an offence has been committed by another person may make a complaint thereof to a magistrate having jurisdiction hence the complaint by the interested parties. It is submitted that Order 53 of the ***Civil Procedure Act*** (sic) is not open for a party to invoke in circumstances where there is a clear and effectual remedy laid out in the substantive law and since the Chief Magistrate's Court had the mandate to hear and determine issues in respect of locus of the complainant the applicant overlooked this provision by instituting a judicial review instead of raising these issues in the main suit. It is submitted that the ex parte applicant has not demonstrated to this court that the complainant lacks capacity to institute the said proceedings hence the judicial review application should be dismissed and reliance is placed on **Republic vs. Epping and Harlow Genera Commissioner ex parte Goldstones 3 All ER 257**.
19. In the interested parties' view the applicant's case depicts malice, oppression, callousness and caprice on the part of the ex parte applicant by trying to use the court to defeat justice. According to them great justice shall be occasioned not only to the 2nd Interested party but also to other beneficiaries to the disputed property who includes minors if the court grants the orders sought.

DETERMINATIONS

20. 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.**

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

22. 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, it has been held time and again, 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 an order of prohibition, 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).**

23. 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."

24. 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."

25. 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 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 cases is constituting double jeopardy. The courts have, however stated that the power to issue an order of prohibition to stop a criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related facts, or to say that a person should never be prosecuted in criminal proceedings when he has a civil suit against him relating to matters in the criminal proceedings... The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution... A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse

of the judicial procedure, much that the public interest would be best served by the staying of the prosecution... In the instant case there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under section 77 of the Constitution. It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the applicants might not get 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."

26. 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."

27. I also agree with the decision in **R vs. Attorney General exp Kipngeno Arap Ngeny** (supra) 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".

28. As was aptly put in **Republic vs. Commissioner of Police & Another Ex Parte Michael Monari & Another** (supra):

"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".

29. In my view what the foregoing authorities determine is that the obligation placed on the police to investigate crime is not to be lightly interfered with. However, it is one thing to investigate crime and another to prosecute the suspects. The office of the Director of Public Prosecutions, is, in my view not a conveyor belt for transmitting persons against whom allegations are made to court for cleansing. The office of the Director of Public Prosecutions owes a duty to the public to ensure that the cases it takes to court have been properly investigated and they are cases which are prosecutable. If the court finds that a case is vexatious, the court will not sit back and rubberstamp a prosecution which is clearly malicious and an abuse of the process of the court. Once investigation is conducted and the DPP forms a *bona fide* opinion that criminal charges ought to be levied, the Court will not scrutinise the evidence in order to decide whether or not the offence is likely to succeed but will leave the mater in the able hands of the trial court to deal with the same appropriately. In other words it is not for the judicial review court to analyse the evidence in order to see whether a *prima facie* case exists.

30. In this case the ex pate applicants' case is that the 1st interested party who reported the offence has no *locus standi* in the matter. That alone however, is not sufficient to justify the halting of a criminal trial. The Commission of a criminal offence is not a wrong against a person per se but is a wrong against the state. Therefore each and every person is under an obligation to stop the commission or continuation of an offence once it is brought to his attention that a crime has been or is likely to have been committed and if after investigations the police find that there is sufficient evidence to charge a person the mere fact that the complaint was laid by bystander as it were does not warrant the interference by the court. As is rightly submitted by the interested parties, under section 89(2) of the Criminal Procedure Code:

A person who believes from a reasonable and probable cause that an offence has been committed by another person may make a complaint thereof to a magistrate having jurisdiction.

31. If any person can make a complaint of commission of a crime to a magistrate I do not why any

person cannot report a commission of a crime to the police.

32. It is however alleged that the police have in fact not conducted any investigations and reliance is placed on a letter dated 25th March 2013 addressed to the Registrar of the High Court by the office of the Director of Criminal Investigations. In the said letter it was stated as follows:

"This office is investigating a case of Forgery which is before Milimani Court No. ACC 2. Our Police CR: 121/661/2011 CF: 1429/2011 refers.

To enable conclude our investigation kindly furnish us with the certified true copies of applications and other documents related to the above application which was filled by D. P. Kinyanjui & Co. Advocates in support of his application for a judicial review."

33. From the tone of the said letter it is clear that as at 25th March 2013, the investigations into case were incomplete. The applicant however seems to have been arrested on 22nd October 2011 and taken to court on 25th October 2011.

34. In my view to arraign a person before investigations are complete amounts to an abuse of the court process. The court process is not an investigative forum but is meant to determine cases which have been investigated to see whether the result of the investigations demonstrate a commission of an offence. To arraign a person before a Court of law on a charge of commission of criminal offence before the investigations are conducted or when the same are incomplete amounts in my view to an abuse of the power vested in the office of the Director of Public Prosecutions as it amounts to placing the burden of proving innocence on the accused.

35. In light of the aforesaid letter and in light of the fact that the respondent has not filed any response to this application to demonstrate to the court the circumstances under which the impugned criminal proceedings were commenced, this court is satisfied that the Respondent's action in preferring the charges against the applicant was driven by other purposes other than the need to vindicate a commission of a crime. In other words the respondent has not shown that before instituting criminal proceedings, there was in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. The commencement of the criminal proceedings are an abuse of the process of the court and on the authority of **Stanley Munga Githunguri vs. Republic Criminal Application No. 271 of 1985**, this Court is obliged to stop such proceedings.

36. With respect to the prayer for mandamus, in the case of **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** it was held that:

"an order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same. If the complaint is that the duty has been wrongly performed, i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done."

37. Similarly in **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486**, the Court held:

"Mandamus is the appropriate remedy for compelling a person to perform a duty imposed on him by statute which duty he has refused to perform to the detriment of the applicant. *Fortiori* it should be an appropriate remedy to compel the performance of a constitutional duty...The court is perfectly entitled to intervene where it is alleged that the discretion is not being exercised judicially, that is to say, rationally and fairly and not arbitrarily, whimsically, capriciously or in flagrant disregard of the rules of natural justice but such intervention would only be by way of prohibition (if the act is incomplete) or certiorari (if the act is complete) and not by way of mandamus...Mandamus cannot issue to compel the exercise of discretionary power let alone its exercise with a view to arriving at a particular result."

15. The applicant has not demonstrated that there is a duty imposed on the director of Criminal Investigation Department to produce the original forensic Report made by **Mr. Antipus Nyanchwa.** Whereas the applicant is entitled to be given statements made by witnesses against her as well as documentary evidence intended to be used against him, that does not encompass compelling the respondent or the said director to exercise its discretion in a certain manner. It is not in doubt that the discretion on what documents to rely on in the prosecution of a criminal case lies on the prosecutor and the court cannot direct it on what evidence to rely on as opposed to availing copies of the same to the accused. In **Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR** it was held by the Court of Appeal that:

"The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way."

ORDER

38. Accordingly, I allow the Notice of Motion dated 9th January 2012 and order:

1. **That an order of certiorari be and is hereby issued quashing all the proceedings in the Nairobi Chief Magistrate's Court in Criminal Case Number 1429 of 2011.**
2. **That an order of prohibition be and is hereby issued restraining Respondents from proceeding with the hearing of Nairobi Chief Magistrate's Court Criminal case Number 1429 of 2011 and/or prosecuting the Applicant herein.**
3. **That the costs of this application are awarded to the applicant.**

Dated at Nairobi this 5th day of July 2013

G V ODUNGA

JUDGE

Delivered in the absence of the parties