



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
IN THE ENVIRONMENT AND LAND COURT
MISCELLANEOUS CIVIL APPLICATION NUMBER 125 OF 2013
BONIFACE NJIRU
T/A NJIRU BONIFACE & CO ADVOCATES.....APPLICANT
VERSUS
INSPECTOR GENERAL OF POLICE.....RESPONDENT
KENLINE AGENCIES LIMITED.....1ST INTERESTED PARTY
ISAAC MWANGI WAINAINA.....2ND INTERESTED PARTY
JUDGMENT

Introduction

1. By a Notice of Motion dated 24th April, 2013, the ex parte applicant herein, seeks the following orders:
 1. **This Honourable Court be pleased to issue an Order of Prohibition stopping the Inspector of General Police by himself or any police officer acting through or under him from investigating, arresting, charging or detaining or institution any criminal prosecution against the Applicant arising out of the complaint lodged by Isaac Mwangi Wainaina from the sale of land parcel LR 1160/773 from Kenline Agencies to Isaac Mwangi Wainaina.**
 2. **Costs of this Application be provided for.**

Applicant's Case

2. The Applicant herein is an Advocate of the High Court of Kenya practising in Nairobi in the name and style of Njiru Boniface & Company Advocates.
3. His case was that he was engaged in a conveyance where he acted on behalf of both the Vendor and the Purchaser in the sale and purchase of LR 1160/773 measuring half an acre for the price of Kenya Shillings Six Million Five Hundred Thousand (Kshs. 6,500,00/=). The half-acre plot number 773 is one of the plots sub-divided by the Vendor from LR 1160/740 and which the Vendor sold separately to 11 purchasers including the 2nd Interested Party; and this was after one of the purchasers a Mr. James Kimani Horeria withdrew from the sale.
4. According to him, all the purchasers agreed on one common counsel, John Mburu & Company Advocates, who was to hold all conveyancing documents including the main title, all 11

- discharges of charge, all deed plans, all transfers, letter of indemnity and sub-division maps. The Applicant being the Advocate who was holding all original conveyance documents on behalf of the Vendor, duly surrendered all original documents to John Mburu & Company Advocates.
5. It was his case that the sale agreement dated the 27th November 2008 pertaining to the sale to the 2nd Interested Party did not have a completion date but it was subject to the Law Society Conditions of Sale (1989) which sets out the completion procedure and issuances of notices in the event of non-completion. Clause 2 of this sale agreement provided expressly that the Applicant was to hold Kenya shillings Four Million (Kshs. 4,000,000/=) as stakeholder but the sum of Kenya Shillings Two Million Five Hundred Thousand (Kshs. 2,500,000/=) was to be paid direct to the Vendor or his Nominee. Clause 3 thereof granted the Purchaser immediate possession upon payment of the full purchase price while Clause 5 provided that the purchase price held by the Applicant was to be released upon providing a duly executed discharge of charge, sub-division certificate, duly executed transfer and original deed plan. The Applicant alleges that all these documents were available and had already been surrendered to the common counsel and as such there was no reason for the Applicant to remain as stakeholder for the sum of Kshs. 4,000,000.
 6. However, it was the Applicant's case that the 2nd Interested Party did not take possession of his plot 773 as provided for in the sale agreement and the said plot remained vacant and has continued to remain vacant to date.
 7. The applicant contended that sometime in the month of November 2010 the vendor informed the Applicant that there were difficulties emanating from City Hall which were hindering the registration of the sub-divisions and as the matter delayed and anxiety mounted, the Vendor offered to provide an alternative plot to the 2nd Interested Party. Pursuant thereto, a critical meeting was held at the farm on the 14th of November 2011 where both parties were represented and it was agreed that the 2nd Interested Party be provided with an alternative plot or by ensuring that Plot 773 was availed to him. However, while this matter was being resolved by the Vendor, 2 CID Police Officers called on the applicant and informed him that they were investigating a complaint lodged by the 2nd Interested Party against the Applicant concerning the transaction involving the sale of LR 1160/773 between the 1st Interested Party and the 2nd Interested Party.
 8. Notwithstanding the police intervention, the applicant averred that the Vendor met with the Purchaser on the 1st of August 2012 and it was agreed that the Vendor would avail a half an acre plot to the purchaser by 15th October 2012 and as a consequence of this the Vendor availed two alternative plots to the purchaser one being LR No. 12495/25 in Karen Plain and another one situated next to Banda School. The Applicant further avers that the Vendor instructed the Applicant to prepare a sale agreement involving LR No. 12495/25 so that the same could be conveyed to the purchaser. However, the purchaser declined to take the plot known as LR No. 12495/25 and instead opted for the plot next to Banda School. The Applicant added that the Vendor identified the plot to be given to the Purchaser but unfortunately there was a long delay in obtaining the conveyance documents from the owner so as to facilitate transfer to the Purchaser. The Applicant contended that as a result of harassment by the Purchaser and the police on the 17th January 2013, the Vendor offered to refund the purchase price plus interest of Kenya Shillings Three Million Five Hundred Thousand (Kshs. 3,500,000/=) in full and final settlement of all claims and a settlement agreement to that effect was prepared and forwarded to the purchaser but the purchaser was yet to execute the offer.
 9. The Applicant disclosed that on the 4th of April 2012 the investigating officers **Mr. Sanga** and **Mr. Sangoro** called the Applicant and insisted that they must take him to court. The Applicant was apprehensive that the 2 CID Officers intended to arrest him and prosecute him over the matter and deny him the statutory protection he is entitled to under the Advocates Act Cap 16 under Section 85 (sic). The Applicant believed that the Police were unnecessarily harassing him, intimidating him and pressurizing him and interfering with his professional duties and judgment. It was his case that the police were acting illegally, in violation of the law and in excess of their jurisdiction by summoning him to record a statement before the complainant had reported the matter to the Law Society of Kenya and a report is forwarded to the Director of Public Prosecutions.
 10. In his submissions, the applicant referred to Section 80 of the *Advocates Act* which provides that:

“Any person who, being an advocate, is entrusted in his professional capacity with any money, valuable security or other property to retain it in safe custody with instructions to pay or apply it for any purpose in connection with his duty as an advocate fails to pay, apply or account for the same after due completion of the purpose for which it was given, shall be guilty of an offence: Provided that no prosecution for an offence under this section shall be instituted unless a report has been made to the Attorney-General by the Tribunal under subsection (3) of section 61.”

11. It was the submission of the Applicant that the Respondents admitted that this matter involves the sale of LR No. 1160/773 hence was the type of transaction covered by the foregoing provision hence prosecution of an Advocate should not be conducted without first a report being made by the LSK Disciplinary Tribunal to the Attorney General. In support of this submission, the applicant cited **Githunguri vs. the Republic (1981) KLR 91** for the holding that:

“It is recognized that one reason for selection of offences requiring the consent of the Director is to protect members of the public from oppressive prosecution, but the basic issue in all cases is where in the whole of the circumstances public interest requires that the proceedings should be taken in a particular case.”

12. It was the applicant’s submission that public interest requires that prosecutorial powers be limited by statute so as to protect Advocates from arbitrariness and unnecessary intrusion in the performance of their professional duties hence it was erroneous for the State to say that public interest only favours investigations and prosecutions of offences. The Applicant added that public interest may also favour non-prosecution or investigations where there is a violation of the law or an abuse of the criminal justice system and relied on **Kuria & Others vs. The Attorney general (2002) 2 KLR 69** where the Court stated that the High Court has power and the duty to prohibit criminal proceedings where there is an abuse of court process.

13. It was averred that the High Court enjoys supervisory jurisdiction whether by inherency or by the Constitution over individuals, authorities and tribunals who exercise legal authority to determine matters that affect people’s rights including the Director of Public Prosecutions and cited **Maraga, J’s** decision (as he then was) in **Republic vs. Ministry of Lands & Settlement and Others Miscellaneous Civil Application Number 1091 of 2006** where the Honourable Judge held that:

“ It is common knowledge that over the years the judicial review jurisdiction was extended to cover initially executive and administrative acts of public bodies and public officers who were under duty to act judicially – The much quoted passage from the judgment of Atkin LJ in *R vs. Electricity Commissioner (1923) ALL ER 161* makes this clear. In *Ridge vs. Baldwin (1964) ALL ER 40*, the jurisdiction was extended to cover all acts of public bodies and public officers and not necessarily those performed in judicial or quasi-judicial capacities.”

14. Further reliance was placed by the applicant on **Kadamas vs. Municipality of Kisumu (1982 – 88) KAR 841** in which the court held that:

“I would start with an up to date restatement of Lord Diplock’s paraphrase of Lord Atkin’s seminal statement in the *Electricity Commissioner* case. It only needs a few additions and so would read: Wherever any person or body of persons has legal authority conferred by legislation to make decisions in public law which affect the common law or statutory rights of other persons as individuals it is amenable to the remedy of judicial review of its decision either for error of law in so acting or for failure to act fairly towards the person who will be adversely affected...”

15. Not to be contented with the foregoing, the applicant also relied on the holding of **Majanja, J** in the case of **Investments & Mortgages Bank Ltd vs. Commissioner of Police and Criminal Investigations Department, DPP & Others** where he held that:

“I agree with the Respondents that it is within their mandate to investigate crimes where there is reasonable basis of commission of offence and that in performance of their duties

they are independent institutions. The office of the Director of Public Prosecutions established under Article 157 is an independent office which is empowered to conduct its duties free from any influence or control by any authority. Its actions must be within the law and in accordance with what the constitution dictates. One such dictate is that in the exercise of their powers, it is to have regard to the public interest, the interests of process. Article 244 of the Constitution enjoins the National Police Service to amongst other things comply with constitutional standards of human rights and fundamental freedoms.”

16. The Applicant submits that judicial review is about the decision making process and not about the actual decision and that 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. In support of these submissions the applicant relied on **Republic vs. Director of Public Prosecutions Ex Parte Victory Wielding Works [2013] eKLR.**

17. The Applicant contended that it was erroneous for the Respondent and the 2nd Interested Party to submit that the Director of Public Prosecutions enjoys unfettered discretion in matters of prosecution and relied on to Article 157 (11) of the Constitution which provides that:

“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.”

18. The Applicants also relied on an Article authored by **Professor Daniel D Ntanda Nsereko** where the author states:

19. **“Although the courts in the common law countries thus do not control the prosecution process, they do nonetheless play some limited role, albeit ex post facto, in protecting accused persons from the consequences of its abuse. They do so through the application of the abuse of process doctrine. In justifying the application of this doctrine to criminal proceedings, Lord Griffiths of the House of Lords opined that the courts must “accept a responsibility for the maintenance of the rule of law that embraces willingness to averse executive action and to refuse countenance behaviour that threatens either basic human rights or the rule of law. Lord Griffiths also asserted that is the same way as the courts have power to review executive action in administrative law, (so) also should it be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should (.....) express its disapproval by refusing to act upon it.”**

20. The Applicant also rely on the holding in **George Joshua Okungu & another vs. Chief Magistrate’s Court Anti-Corruption Court At Nairobi & another [2014] eKLR** and **Republic vs. Hon Attorney General & Others Ex-Parte Kenneth Kariuki Githii Misc Application No. 151 of 2013.**

Respondent’s Case

21. The Respondents filed a replying affidavit sworn in Nairobi on the 11th of June 2013 by **PC Johnstone Sanga**, the Investigating Officer in the complaint lodged by **Isaac Wainaina** against Kenline Agencies and Boniface Njiru T/A Njiru Boniface & Company Advocates.

22. According to the Respondents, the 2nd Interested Party was desirous of purchasing a parcel of land in Karen and mandated a **Mr. Joseph Kahonge** as his agent who came across a parcel of land LR No. 1160/773 located along Ndege Road within Karen which was on sale. The Respondents aver that the agent sought the owners of the property who were the Directors of Kenline Agencies who confirmed that the property was on sale. The said Directors referred the 2nd Interested Party to the Applicant who confirmed that he had been appointed by the 2nd Interested Parties to sell on their behalf 11 plots subdivided by the Vendor from LR No. 1160/70.

23. The Respondents averred that the 2nd Interested Party was interested in LR No. 1160/773

measuring half an acre and which was being sold for Kenya Shillings Six Million Five Hundred Thousand (Kshs. 6,500,000) to which the 2nd Interested Party agreed to pay and the payments were to be made directly to the law firm and that the 2nd Interested Party paid the full purchase price through various bankers' cheques to the Applicant between 1st August 2008 and 11th April 2009. It is the Respondent's case that after the Applicant had received the full amount of the purchase price which is alleged he received and acknowledged on the 11th of April 2009, a sale agreement was attested by the Vendor and the Purchaser. The applicant was then expected a duly executed transfer document for registration. However the Respondents averred that the 2nd Interested Party was shocked to learn that the Applicant and 1st Interested Party had sold the said parcel of land to a third party and on inquiry from the Applicant, it appeared that the 2nd Interested Party was promised another parcel of land and/or refund of the purchase price, but that was not to be.

24. The Respondents contended that on numerous occasions they called the Applicant to go to Central Police Station to record a statement to enable them complete investigations however but the Applicant refused and/or neglected to do so.
25. In the Respondents view, the prayers sought by the Applicant are unavailable because they seek to prevent the police from exercising their statutory mandate as provided for under Section 24 of the National **Police Service Act** and if granted would will result in a great injustice in the criminal system and public interest. Based on their counsel's legal advice, respondents believed it is in public interest that a complaint made to the police is investigated and the perpetrator of the crime is arrested, charged and prosecuted in court. To them, the Applicant had not demonstrated that he would suffer substantial injustice if the criminal proceedings proceed as the case will be determined on merit. The Respondents however insisted that this application is premature because investigations are still ongoing and as such it is meant to be a cover up.

1st Interested Party's Case

26. The 1st Interested Party filed an affidavit sworn by one **Ephantus Maina Muturi**, the Manager of the 1st Interested Party on the 23rd of October 2013 in which the 1st Interested Party admitted that he was aware that there had been an intervention by the Kenya Police, Central Police Station in matter of the aborted sale of property known as LR No. 1160/773 measuring approximately half acre or thereabouts situated in Karen which property was sold at Kshs. 6.5 Million by the 1st Interested Party vide sale agreement dated the 27th of November 2008.
27. According to the 1st Interested Party admits that the mother land was sub-divided into 11 sub plots and that all lawyers for different purchasers nominated John Mburu & Company Advocates to carry out all the transactions. The 1st Interested Party added that the Applicant handed over all the transaction documents that he had received from Barclays bank to John Mburu & Co Advocates which documents included the original title deed, all discharges of charges and all deed plans. While admitting that the said plot was sold to the 2nd Interested Party and indeed the Agreement for Sale did not have a completion period but it was expressed that the same would be subject to the Law Society Conditions of Sale, the 1st Interested Party denied any knowledge of the sale of the property known as LR No. 1160/773 prior to the 27th of November 2008.
28. According to it, the delays were experienced at the City Council of Nairobi pertained to all the 11 sub-divided plots and not just LR No. 1160/773. It was however a stranger to the allegations made by the Applicant that as the aforesaid delay continued the Vendor offered to give the 2nd Interested Party an alternative plot of land to purchase and that there was a meeting held at the farm wherein it was agreed that the Vendor would provide an alternative plot or the transfer of LR 1160/773 be processed. The 1st Interested Party admitted that there was a meeting at Boulevard Hotel with the 2nd Interested Party and the Applicant on the 1st of August 2012 wherein it was agreed that the Vendor avail an alternative half acre plot on or before the 15th of October 2012, and a letter to this effect was drafted which letter was penned at the insistence of two police officers and the same was hand delivered to the Central Police Station by the Applicant's clerk. The 1st Interested Party believed that the 2nd Interested Party appeared to have leverage over the police officers as they

- alleged that he had directed all correspondence by the 1st Interested Party or the Applicants to be delivered to him through the Police Officers.
29. The 1st Interested Party averred that the 2nd Interested Party visited the two named plots together with the police officers and preferred the plot situated behind Banda School though the 1st Interested Party's position was that he was a stranger to the sale and/or settlement agreements allegedly prepared thereafter by the Applicant. The 1st Interested Party disclosed that on the 17th of January 2013, they wrote a letter to the 2nd Interested Party which was hand delivered to Central Police Station in which they stated that due to the anxiety mounting between the 1st Interested Party and the 2nd Interested Party in regard to the delay in the conveyance of the alternative property, the 1st Interested Party offered the 2nd Interested Party Kenya Shillings Ten Million (Kshs. 10,000,000) being a refund of the Kenya Shillings 6.5 Million purchase price and an interest of Kenya Shillings 3.5 Million. However, the 1st Interested Party did not reply to the said letter.
30. In the 1st Interested Party's view, the 2nd Interested Party and the Applicant have connived to use the powers of the police to corner the 1st Interested Party. The 1st Interested Party contended that the Agent Mr. **Kahonge** and the Applicant are long acquaintances and it is the Applicant who introduced the Agent to the 2nd Interested Party. The 1st Interested Party however denied a meeting being held between the Agent and the Directors of the 1st Interested Party. It was asserted that both the 2nd Interested Party and the Applicant purported in the Sale Agreement that the deposit of Kshs. 4 Million by the 2nd Interested Party to the Applicant was an event in the future whereas all along they both knew that such payment had been effected without any knowledge or participation of the 1st Interested Party.

The 2nd Interested Party's Case

31. The 2nd Interested Party swore a replying affidavit dated the 24th of May 2013. In it he prayed that the Notice of Motion be dismissed with costs as it lacked merit, was based on unfounded apprehension of arrest and if the orders sought were granted the same would be unjust to him considering the amount of time he had invested in the sale transaction. While admitting that he made a report to the police for their investigation against the Applicant, the 2nd Interested Party averred that he was aggrieved by the Applicant's conduct arising out of the sale of land transactions having tendered the purchase price to him in full by April 2009 but he was yet to obtain the land paid for.
32. According to the 2nd Interested Party, he was compelled to make a report to the Police based on the fact that the Applicant did not have anything to show that he had carried out his duty as his Advocate except for the receipt of the purchase price and drawing the Sale Agreement dated the 27th of November 2008. In his view, he made a bona fide general report to the police and gave all information to the police to investigate all parties and persons that were involved in the land transactions to establish if there was an element of criminal conduct and to decide whether charges would be preferred against any person after which he left the investigation bit to them as he has no powers to direct the police on how they carry their investigations or the decision on whom they may prefer charges against. To him, the matters that are extraneous to the Sale Agreement dated the 27th of November 2008 and which were being introduced by the Applicant were meant to cover up the Applicant's wilful neglect and/or refusal to perform his duties and/or to account for the monies paid to him as the purchase price.
33. He supported the view that the Applicant was avoiding meeting the police and to provide information as requested thereby hindering the efforts in investigating the complaint which conduct made the 2nd Interested Party believe that the Applicant had something to hide and intends to use the court to suppress the truth and the police from carrying out their investigations.
34. The 2nd Interested Party submitted that Section 80 of the Advocates Act was inapplicable to the Applicant's situation because the Applicant had not been charged or prosecuted for any offence and instead the section only applies where the prosecution is intended upon preparation of a

charge sheet.

35. To the 2nd Interested Party, the Applicant and the 1st Interested Party had an opportunity to disclose who is in possession of the purchase price but none came forward. It was his case that the Applicant had not shown that the Respondent acted in bad faith or in excess of its powers and that Article 245 (4) of the Constitution of Kenya donated to Kenya Police full powers to investigate any offence and Section 80 if it was to apply would limit the constitutional duty of the police.
36. To the 2nd Interested Party Article 157 (10) 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.*” They also submitted that Article 157 (6) of the Constitution provides that *the Director of Public Prosecutions shall exercise State powers of prosecution and may—(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.* The 2nd Interested Party therefore asserted that Section 80 of the Act is in conflict with the above provisions and the same cannot prevail.
37. It was the 2nd interested party’s case that the Applicant and the 1st interested party failed to disclose necessary information such as who is in possession of the disputed property, who is in possession of the purchase price, why it had taken over 5 years to complete a transaction that ordinarily takes 90 days to complete.

Determination

38. 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**.
39. The applicant is seeking an order of prohibition to prohibit the Inspector General of Police by himself or any police officer acting through or under him from investigating, arresting, charging or detaining or instituting any criminal prosecution against the Applicant arising out of the complaint lodged by **Isaac Mwangi Wainaina** from the sale of land parcel LR 1160/773 from Kenline Agencies to **Isaac Mwangi Wainaina**. If the Court were to grant the order in the manner sought it would mean that the applicant would in effect be granted permanent immunity from being arrested and prosecuted with any criminal offence under the sun in respect of the said transaction notwithstanding the outcome of the investigation and the merit thereof. Such an order cannot be granted by any Court of law as the same would be an illegal order.
40. The Respondents on their part allege that they are investigating complaints made to them and are in the course of taking statements from all concerned.
41. Section 24 of the **National Police Service Act No 11 A of 2011** sets out functions of the Kenya Police Service as being the—

(a) Provision of assistance to the public when in need;

(b) Maintenance of law and order;

- (c) *Preservation of peace;*
- (d) *Protection of life and property;*
- (e) *Investigation of crimes;*
- (f) *Collection of criminal intelligence;*
- (g) *Prevention and detection of crime;*
- (h) *Apprehension of offenders;*
- (i) *Enforcement of all laws and regulations with which it is charged; and*
- (j) *Performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.*

42. The word “investigate” is defined in the *Black’s Law Dictionary* 9th Edition as: “*To inquire into a matter systematically; to make an official inquiry.*”

43. In Republic vs. Chief Magistrate Milimani & another Ex-parte Tusker Mattresses Ltd & 3 others [2013] eKLR this Court expressed itself as follows:

“The Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial. That this Court has power to quash impugned warrants cannot be doubted. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the police to investigate allegations of commission of a criminal offence ought to be interfered with. It is not enough to simply inform the Court that the intended trial is bound to fail or that the complaints constitute both criminal offence as well civil liability. The High Court ought not to interfere with the investigative powers conferred upon the police or the Director of Public Prosecution unless cogent reasons are given for doing so... The warrants were issued to enable the allegations be investigated. Whether or not the investigations will unearth material which will be a basis upon which a decision will be made to commence prosecution of the ex parte applicants or any of them is a matter which is premature at this stage to dwell on.”

44. 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...”

45. 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 is 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.”

46. The duty and mandate of the police was appreciated in Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR where it was held:

“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”.

47. It is trite that the Court ought not to usurp the Constitutional mandate of the Respondent to investigate any matter that, in the Respondent’s view raises suspicion of the occurrence or imminent occurrence of a crime. Just like in cases of prosecution, the mere fact that the allegations made are likely to be found worthless, is not a ground for halting investigations into the complaints made or brought to the attention of the Respondent since the purpose of a criminal investigations conducted *bona fide* is to consider both incriminating and exculpatory material and not just to collect evidence on the basis of which a criminal charge may be laid.

48. It must always be noted that judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence to the complaint 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 to bring to the attention of the investigators in the course of the conduct of the investigations.

49. However, if the applicant demonstrates that the investigations that the Respondent intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such investigations since investigations must be carried out independently and must be carried out in good faith without malice or for the purpose of achieving some collateral goal divorced from the purpose for which the investigatory powers are given to the Respondent.

50. It is therefore clear that whereas the discretion given to the respondent to investigate criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence, the Court will not hesitate to bring such proceedings to a halt. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant in the institution

- and continuation of the criminal proceedings and once the Court is satisfied that the same are *bona fides* and that the same are being conducted in a fair manner, the High Court ought not to usurp the powers of the police by halting otherwise proper complaints made before them.
51. It is therefore clear that the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers *inter alia* to take statements. The Respondent has enumerated the facts which led him to undertake the investigations in question and to seek statements from the applicants. It is not the mandate of this Court in these proceedings to make a finding as to the merit of the decision.
52. In this case the applicant relies on section 80 of the *Advocates Act* which provision I have set out elsewhere in this judgement. That provision, however only prohibits **prosecution** of an advocate in respect of matters covered by the section unless a report has been made to the Attorney-General by the Tribunal under subsection (3) of section 61. In other words the section is not an absolute bar to prosecution but merely provides for pre-requisite to be met before a prosecution can lawfully be undertaken thereunder. It is therefore my view that the provision is not unconstitutional as contended by the Respondent.
53. It is however clear that what is prohibited is prosecution rather than investigation. Accordingly, in the circumstances of this case, the invocation of the said provision is with due respect premature.
54. In order for the applicant to succeed he must show that not only are the investigations which were being done by the police are being carried out with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. It was disclosed that there exists civil proceedings in the ELC in respect of the same transaction. However, the concurrent existence of the criminal investigations and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal investigations 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. Section 193A of the *Criminal Procedure Code* on this issue provides:

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.

55. 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... 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...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.”

56. However caution ought to be exercised and as was held by the Court of Appeal in Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR:

“While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely a dispute litigated in court. This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations”

57. 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..."

58. The applicant alleged that the criminal investigations have been commenced with a view to achieving collateral and extraneous purposes in that the police who are carrying out the investigations are conduits for the complainant. It is contended that the police have become so engrossed in the transaction that they have been roped in as agents of the complainants in the whole saga.

59. As already held hereinabove, the Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings. Where it is contended and there is prima facie evidence that the people entrusted with the investigations have involved themselves in the matter in such a manner that their independent judgement is likely to be compromised whether consciously or otherwise, the Court would be well entitled to grant appropriate remedies to avoid the probability of bias on the part of the investigators.

60. Accordingly, it is my view and I so hold that the police officers who have been involved in the matter, **PC Johnstone Sanga** and **Mr Sangoro** ought to step aside from the investigatory process.

Order

61. Accordingly whereas I decline to grant the orders of prohibition in the manner sought in this Motion I hereby prohibit police officers, **PC Johnstone Sanga** and **Mr Sangoro** from continuing with the investigation of the complaint lodged by **Isaac Mwangi Wainaina** in respect of the sale of land parcel LR 1160/773 from Kenline Agencies to **Isaac Mwangi Wainaina**.

62. In the circumstances of this case and as the investigations are still ongoing, there will be no order as to costs.

Dated at Nairobi this 5th day of June, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mohammed for Mr Nyamweya for the Applicant

Mr Gathaara for the Interested Party

Cc Patricia