Tratoria Limited v Maina & 3 others (Civil Appeal 151 of 2018)
[2022] KECA 693 (KLR) (22 July 2022) (Judgment)

Neutral citation: [2022] KECA 693 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 151 OF 2018

MA WARSAME, HA OMONDI & JW LESSIT, JJA

JULY 22, 2022

BETWEEN

TRATORIA LIMITED ..... APPELLANT

AND

JOANINAH WANJIKU MAINA ..... 1ST RESPONDENT

COUNTY GOVERNMENT OF NAIROBI ..... 2ND RESPONDENT

DPP ..... 3RD RESPONDENT

INSPECTOR GENERAL OF POLICE ..... 4TH RESPONDENT

(An appeal against the Judgment and order of the High Court Constitutional & Human Rights Division at Nairobi (Mativo, J.) delivered on 21st July, 2017)

JUDGMENT

1. This case is about striking a balance: a balance between a citizen's right to access information relating to the workings and decisions of government and government's discretion to make deliberations behind closed doors. It also relates to the citizen's right to security and liberty on the one hand, and the ability of the National Police Service to investigate and summon citizens for questioning and the DPP's decision to prosecute on the other.

2. The appellant, Tratoria Limited, has appealed against the decision of the High Court (Mativo J.) delivered on 21st July 2017, allowing the 1st respondent's consolidated petitions, being Petitions No. 129 of 2014 and 132 of 2014 in the following terms:

    a. An order of prohibition be and is hereby issued permanently prohibiting the Director of Public Prosecutions and or the Inspector General of Police from summoning, interrogating, arresting, investigating, instituting or continuing

with any criminal prosecution against the petitioner or her agents in connection with or relating to Complaints lodged by Trattoria Limited or its Director or Agent or managing Director, of one Gaetano Ruffo touching on or Relating to any offences allegedly arising from or connected with the alleged malicious damage to the interested party's property at Land Reference Number 209/2362, Town House, Nairobi.

b. A Declaration be and is hereby issued declaring that the County Government of Nairobi has violated the petitioner's rights under article 35 of *the constitution*.

c. An order of Mandamus be and is hereby issued compelling the County Government of Nairobi to produce to the court and serve the petitioner with copies of all the documents relating to the application for approval and the approval for the installation of commercial L.P.G. gas cylinder, cold room storage, water tanks and smoke extractor including all building plans, approvals and minutes of meetings relating to the approval process for the fire exit and fire assembly points for Town House located at L.R. No. 209/2362, Nairobi, within 30 days from the date of this judgement.

d. An Order of certiorari be and is hereby issued to bring to this court to be quashed the approvals granted by the County Government of Nairobi for installation of water tanks, smoke extractor, L.P.G Gas cylinder and cold storage installed at the fire exit and fire assembly point at Town House, Nairobi on L.R. No. 209/2362, Nairobi.

3. A proper understanding of the positions of the parties and issues in this appeal require setting out, in some detail, the background facts leading to the litigation in the Constitutional and Human Rights Division of the High Court.

4. The 1st respondent is the owner of a commercial building in Nairobi CBD known as "Town House" erected on LR No. 209/2362. The building hosts more than forty tenants, including the appellant who owns a popular restaurant on the premises vide a lease dated 11th November 2005.

5. The 1st respondent's case is that contrary to the law and the terms of the lease, the appellant blocked the assembly points and the fire exit on the ground floor with a commercial LPG gas cylinder and a cold storage room. Further still, the appellant placed four water tanks and a fire extractor at the fire assembly point on the second floor. These alleged illicit acts and other breaches of contractual obligations prompted the 1st respondent to issue a notice dated 14th March 2008 intending to terminate the appellant's lease. In turn, the appellant filed HCCC No. 126 of 2008 challenging the 1st respondent's attempts to terminate its lease.

6. The matter was subsequently referred to arbitration and an award delivered on 31st January 2013, the terms of which included a permanent injunction restraining the 1st respondent from interfering with the appellant's quiet possession and enjoyment of the premises or doing any acts contrary to the declarations granted and an award that the appellant pays additional rent for the disputed space.

7. The appellant alleges that after the arbitration award was published, it received letters from the 1st respondent's advocates and the management company of the Town House-Gatma Investments Limited, instructing it to remove the equipment blocking the various passages given that they had received notices from the 2nd respondent threatening prosecution and penalties for failure to clear the

installations blocking the fire exits and assembly points. The said notices were later withdrawn by the 2nd respondent vide a letter dated 1st August 2013.

8. Responding to the 1st respondent's instruction to clear the blocked passages, the appellant indicated that the installations had in fact been inspected and approved by the 2nd respondent and relevant approval certificates issued. Surprised by this development, the 1st respondent promptly requested the 2nd respondent to provide documentation of the application for approval, the building plans and the consent of the owner of the building (if any) when the approval was obtained; but none was forthcoming. It is significant to note that as a sequel, the 1st respondent commissioned several audit reports on the Town House including an audit report from the National Environment and Management Authority (NEMA) who recommended that they rid the walkways of all obstruction and relocate the tanks on the 2nd floor to the rooftop; an audit report by Britam Kenya who also raised concerns on the safety of the occupants of the building, and an audit report prepared by Pestavic Consultants who recommended the clearance of the respective passages.

9. The failure to receive a response from the 2nd respondent is what necessitated the filing of Constitutional Petition No. 132 of 2014 by the 1st respondent, seeking interalia, a declaration that the 2nd Respondent had violated its right to information under Article 35 of the Constitution; a declaration that the 2nd respondent acted in contravention of various laws; an order of mandamus compelling the 2nd respondent to produce all documents in connection with the fire exits and assembly points on the Town House and an order of certiorari quashing the approvals given by the 2nd respondent.

10. The appellant further alleges that on 16th November, 2013 goons, suspected to have been instructed by the 1st respondent, descended on its premises and extensively damaged its smoke extractor fan, disconnected storage water tanks and attempted to destroy the gas cylinder and cold room. The appellant reported the incident to the 4th respondent and lodged a criminal complaint against the 1st respondent and four of her family members, agents and/or servants.

11. In addition, the appellant filed an application dated 6th December 2013, in Miscellaneous Civil Application No 431 of 2013 seeking the execution and enforcement of the arbitration award which was adopted as a decree of the court on 8th November 2013. The application also brought contempt proceedings for failure to comply with the orders of the court and sought damages for the alleged destruction of its equipment.

12. In determining the said application, the court, in a ruling dated 11th December 2013 directed the appellant to repair and restore its damaged equipment in the backyard of the premises at the cost of the 1st respondent. The court further ordered that the appellant be at liberty to forcibly enter the premises under police supervision to enforce the orders.

13. On 21st March 2014, the 1st respondent filed Constitutional Petition No. 129 of 2014 alleging that she, her family and agents were being harassed, threatened and intimidated by the police in connection with the appellant's complaint of malicious damage to property. She consequently sought interalia, orders restraining and prohibiting the 1st and 2nd respondents from summoning, arresting and prosecuting her and her agents in connection with the Town House; a declaration that her right to security and liberty under Article 29 of *the Constitution* had been threatened and that the 4th respondent had violated her right to property under Article 40 of *the Constitution*.

14. The two petitions were consolidated and in a judgment dated 21st July 2017, Mativo, J. held as follows:

> "64. Criminal proceedings commenced to advance other gains other than promotion of public good are in my view vexatious and ought not to be

allowed to stand. The word "vexatious" means "harassment by the process of law," "lacking justification" or with "intention to harass." It signifies an action not having sufficient grounds, and which therefore, only seeks to annoy the adversary. The hallmark of a vexatious proceeding is that it has no basis in law (or at least no discernible basis); and that whatever the intention of the proceeding may be, its only effect is to subject the other party to inconvenience, harassment and expense, which is so great, that it is disproportionate to any gain likely to accrue to the claimant; and that it involves an abuse of process of the court.

65. It is my view that the petitioner has demonstrated that her rights to a fair trial have been or will be infringed if the prosecution proceeds and that the intended prosecution is an abuse of court process and it will inherently violate the petitioner's rights to a fair trial as enshrined in *the constitution*...

74. Upon due consideration of the law on granting prerogative orders and upon considering the facts of this case and in particular the law relating to granting of development approvals, I am satisfied that that the petitioner has raised pertinent issues which go to the core of the manner in which the approvals in question were granted and in absence of cogent explanation by the County Government of Nairobi and in particular the omission to avail the relevant documents, I find that the petitioner has demonstrated a case for granting of the judicial review orders sought.

74. In view of my analysis of the facts and the law enumerated above, I find that the consolidated petitions have merits. Consequently, I allow the two petitions."

15. The appellant, dissatisfied with the decision of the High Court has appealed to this court citing 17 grounds of appeal. For expediency, the grounds can be coalesced into the following:

a. The learned judge erred in fact and law by holding that the recommendations by Britam Kenya, Pestavic Consultants and NEMA (which report did not exist) were not disputed.

b. The learned judge erred in law by failing to consider that the arbitral award adopted by the court issued a permanent injunction restraining the 1st respondent from interfering with the appellant's tenancy.

c. The learned judge failed to fully appreciate that the jurisdiction to enforce county government by-laws is distinct from the mandate of the Director of Public Prosecution.

d. The learned judge erred in fact and in law by finding that the criminal prosecution was oppressive and aimed to achieve a collateral purpose to aid a civil matter, while the investigations had not been concluded.

e. The learned judge erred in fact and law by issuing an order of mandamus compelling the County Government of Nairobi to serve the 1st respondent with all documents relating to the application for approval and the approval and thereafter issuing an order of certiorari to quash the approvals granted

which included the approvals to the terrace to the restaurant for which the 1st respondent collects rent

16. Hearing of the appeal proceeded through written submissions that were duly filed and exchanged between the parties, and the same were briefly highlighted before the court. Mr. Khaseke, who appeared for the appellant submitted that the gravamen of the appeal was whether the High Court issued contradictory prerogative orders. In his view, the court, by issuing an order of mandamus against the 2nd respondent to produce the documents relating to the application for approval and the approval for the installation of the disputed equipment was acknowledging that the said documents were not before court. Consequently, the superior court could not issue an order of certiorari unless the impugned decision was availed and was before court similar to the requirement of Order 53 Rule 7(1) of the Civil Procedure Rules, where in seeking the writ of certiorari, a copy of the impugned decision must be lodged in court. Citing the decision of this court in *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others* [2017] eKLR it was emphasized that compliance with the said provision was a precondition to seeking an order of certiorari and renders the proceedings a nullity.

17. On whether the allegations of violation of fundamental rights and freedoms in the two petitions had been substantiated, counsel for the appellant emphasized that it had not. He intimated that the learned judge erroneously proceeded as though the 1st respondent was facing prosecution or intended prosecution while she and her agents had only been summoned to assist with investigations. Relying on the High Court decision in *Bill Kipsang Rotich v The Inspector General National Police Service & 2 Others* [2013] eKLR, it was stated that summons issued under Section 52(1) of the *National Police Service Act* 2011 for purposes of giving information to assist in the investigations do not indicate intention to charge and/or prosecute the person summoned.

18. Lastly, the trial court was accused of perpetuating the abuse of the process of the court by failing to acknowledge the existence and impact of the ruling of 11th December 2013 by Lady Justice Kamau which affirmed that the exits were not blocked, permitted the appellant to restore its water tanks and smoke extractor and further adopted arbitral award which deemed the appellant's equipment to have been proper on the premises.

19. Opposing the appeal, the 1st respondent represented by Miss Kethi Kilonzo submitted that the question before the court was whether the 2nd respondent could approve the placement of 1000kg liquefied gas cylinder and tanks to block the fire exit and fire assembly points in a building that hosts at least 40 other tenants and serves numerous people daily.

20. Counsel sought to persuade us that, if any approvals were given by the 2nd respondent they were and continue to be a nullity as the impugned approvals implied a death trap to the public, the occupants of the building and pedestrians in the event of a fire and were against clear provisions of the *Occupational Safety and Health Act* and the Factories & Other Places of Work (Repealed) Act.

21. As a final point, it was asserted that the 1st respondent had been placed in a precarious position. She was damned for obeying the law and condemned by the risk of prosecution by relevant government agencies for violating the law at the behest of the appellant. To fortify this point, respondent relied on the decision in *Commissioner of Police & The Director of Criminal Investigation Department & Another v Kenya Commercial Bank Limited & 4 Others* [2013] eKLR where the court concluded that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification.

22. Associating himself with the submissions of the appellant, Mr. Omoti for the 2nd respondent stressed that the approvals were properly granted and that before issuing approvals to the appellant, the 2nd respondent was satisfied that the appellant had complied with the standards under the County by-laws and the various applicable laws.

23. Further, it was argued that section 125(1) of the *Occupational Safety and Health Act*, 2007 empowered the 2nd Respondent to grant approvals on application for structural alterations to workplace premises but that the process to be followed was at the discretion of the 2nd respondent and upon their own deliberations after extensive compliance checks.

24. Citing the case of *Republic v Principal Secretary, Ministry of Internal Security & another Ex-Parte Schon Noorani & Another* [2018] eKLR where the High Court held that the purpose of the writ of mandamus was not to direct the exercise of judgment or discretion in a particular way, nor to direct the retraction or reversal of action already taken in the exercise of either, counsel posited that the trial court had erred in issuing the order of mandamus and that its mandate was to ascertain whether the 2nd respondent had granted the approvals in excess of its discretion or by flaunting the process, if any, set down for granting approvals.

25. Lastly, it was argued that the 1st respondent failed to demonstrate that her rights were violated or the manner of violation to the required standard given that the rights claimed are not absolute. In counsel's view the 1st respondent was guilty of successfully circumventing the wheels of justice as the petitions in the High Court were precipitated by the institution of contempt proceedings against her by the appellant.

26. Similarly supporting the appeal, Mr. Njeru for the 3rd and 4th respondents categorically stated that any person was at liberty to lodge a complaint with the police who are statutorily obligated to investigate the truth or otherwise of such allegations. Nonetheless, the High Court had erroneously proceeded on the unjustified basis that the 1st respondent was facing intended prosecution without citing any evidence. There was also no proof that in investigating the complaint the 3rd and 4th respondents acted without candour, fairness and justice.

27. Relying on the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others,* [2013] eKLR it was contended that a mere citing of the articles of *the Constitution* were not enough to warrant a finding that a petitioner's rights had been violated.

28. Having carefully perused the record, the pleadings, the judgment, the grounds of appeal and the parties' respective submissions thereon, we distil that the main issue falling for determination is whether the 1st respondent has made out a case for violation of her rights, and whether the court was justified in issuing the impugned orders.

29. The bedrock of the 1st respondent's claim is that the government should be accountable for its actions, a principle implicit in the democratic process which is the cornerstone of Article 35(1) that deals with the right to access to information. It reads:

> " 35 Access to information
>
> 1. Everyone has the right of access to-
>
> (a) any information held by the state; and
>
> (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

30. This provision was the basis of the 1st respondent's letter to the County Government of Nairobi dated 19th February 2014 and to the appellant dated 16th January 2014 and 19th January 2014 seeking; the minutes of the meeting(s) at which its predecessor, the County Council of Nairobi approved the plans of Tratoria Ltd to place a fire extractor, LPG gas cylinder and cold room at the emergency fire assembly and exit points; copies of the plans submitted by Tratoria Ltd and the consent of the previous owner of the building to the plans submitted; to which there were no responses.

31. The central argument advanced by the 2nd respondent is that the procedure to be followed in granting approvals for structural alterations to workplace premises is discretionary the court cannot command how this duty is to be performed. Furthermore, there is no evidence that it had abused its discretion or that it had not followed the law.

32. Section 125 of the *Occupational Safety and Health Act* which empowers the 2nd respondent to approve alterations of workplace premises provides as follows:

> 125. Approval of plans of workplace premises
>
> (1) No building shall be erected or converted for use as a workplace and no structural alteration and no extension shall be made to any existing workplace except in accordance with plans showing details of the proposed construction, conversion, alteration or extension, approved by the Director.
>
> (2) Upon receipt of a written application supported by such particulars as may be prescribed for the approval of any plan described in subsection (1), the Director shall—
>
> (a) if he is satisfied that the plans provide for suitable premises for use of a workplace of the type proposed, issue a certificate of approval for such plans; or
>
> (b) if he is not satisfied, refuse to issue a certificate of approval and shall state in writing to the applicant the reasons for such refusal.

33. With respect, we do not discern from the above section that the 2nd respondent has free reign to create conditions for approval as it pleases at any time or in a manner that it deems fit. The law is clear that a written application is prerequisite to an approval/refusal and the application must be supported with certain particulars prescribed for the approval of such a plan to the satisfaction of the Director.

34. Lack of procedure notwithstanding, the provision lays down standards that must be met when exercising this discretion. We cannot accept the 2nd respondent's argument that "the approvals were given in accordance with the relevant law after all the set out conditions had been satisfied". Proceeding from this premise, any reasonable citizen would be minded to ask the specific laws and by-laws that were considered and the exact set of conditions prerequisite to an approval.

35. We reiterate with approval the sentiments in *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 Others* [2013] that public-sector information should be made available on a 'right to know basis', which means that members of the public are entitled to it, unless there are good reasons for withholding it.

36. The trouble with the 2nd respondent's approach is that it is vague, opaque, conceals the decisional processes of the county government and gives little guidance for future applications. It must be remembered that good decisions are decisions for which good reasons can be given and discerned and that giving reasons is, in relation to integrity of conduct, a test, a standard and a security against arbitrariness and abuse of power and discretion.

37. In our view, the procedures and system of a government body must be transparent and open to public scrutiny unless there are compelling reasons why the information should be denied. When a public body makes decisions, especially such as the one before us which affects the safety and wellbeing of tenants, pedestrians, restaurant staff and clients and can result the imposition of criminal sanctions on a landlord, the information concerning the application procedure, rules and practices and relevant laws and conditions to be met and the decision must be generally available.

38. This, to a large extent, ensures public confidence in government approval procedures and promotes openness and accountability on the part of the public entity. It similarly encourages good decision making, serves to combat allegations of corruption, and eliminates decisions that are arbitrary, procedurally unfair, capricious, unlawful, and lacking in evidentiary support which are some of the tenets of abuse of discretion. On our part we cannot, by any stretch of the imagination conjure the conditions or relevant laws and by-laws that the appellant satisfied in the face of the glaring provisions of the laws regarding safety of occupied buildings. Again, the appellant has not given any reasons why the information should be restricted. In any event, such limitations must be few and tightly drawn. They must be clearly identified and the basis upon which such a request for information might be refused, must be clearly stated.

39. *The Constitution* outlines national values and principles of governance including good governance, integrity, transparency and accountability which bind all state organs, state officers and public officers. In addition, Principle 10 of the *Rio Declaration on Environment and Development* [1992[states that "each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision making process..."

40. We have already intimated above that the basis of the approvals given to the appellant in the face of the provisions of *The Factories and Other Places of Work* (Repealed) Act and the *Occupational Safety and Health Act* which mandates interalia, every work place to provide adequate means of escape in the event of a fire, to keep such escape free from obstruction and the conditions for stocking highly inflammable substance, is unknown.

41. Be that as it may, the import, findings and recommendations of the health and safety risk assessment for the year 2014 by Pestavic EHS Services Consultant Experts in Environment, Health and safety dated 14th January 2014; the Environmental Audit Report for Town House for January 2014 conducted by NEMA lead expert, one Dr. Benson Kamau Mburu and dated 21st January 2014, and the Risk report recommendations by Britam dated 14th January 2014 cannot be wished away. The essence of these reports with regard to the fire exits is the same: that the fire exits do not meet the standards espoused in our Kenyan laws. This is why the Ministry of Labour impressed upon the 1st respondent to comply immediately given the weighty issues of safety raised in the reports. In fact, a fire inspection report carried out on 27th March 2015 by the 2nd respondent reiterates some of the issues raised in the earlier reports. This report manifestly states that the water tanks are blocking the fire exits and that the LPG tank elevated along the emergency escape route is a safety hazard. We find it strange that the County Council of Nairobi conducted a similar inspection in 2014 on the same premises, on the same passages and on the same equipment but the findings were that the appellant had fully complied with the

required standards and was issued with a clearance certificate for the year 2014. Logic therefore dictates that in the absence of reason or explanation of how the decision was arrived at by the 2nd respondent, and in view of the obvious contradiction of the various laws, one can only conclude there was a patent error in the decision, and it was unlawful and disregarded the clear provisions of the law.

42. The Supreme Court of India in *T. C. Basappa V. T. Nagappa & Anr,Air* 1954 Sc 440 held:

> " An error in the decision or determination itself may also be amenable to a writ of 'certiorari' but it must be a manifest error apparent on the face of the proceedings, e.g., when it is based on clear ignorance or disregard of the provisions of law."

43. Similarly, in *Kenya Anti-Corruption Commission v Republic & 4 Others* [2013] eKLR it was observed that:

> " Certiorari lies to bring a decision of an inferior Court, Public Tribunal, Public Authority or any other body of persons before the High Court for review, so that the Court may determine whether they should be quashed or to quash such a decision.... Certiorari is concerned with decisions in the past....Certiorari will issue to quash a determination for excess or lack of Jurisdiction, error of law on the face of the record, breach of the rules of Natural Justice or where the determination was procured by fraud, collusion or perjury."

44. Consequently, we find that the trial court was entitled to quash the approvals and compel the County Government of Nairobi to produce to the court and serve the petitioner with copies of all the documents relating to the application for approval and that the learned Judge exercised his discretion correctly. He considered the law on granting prerogative orders, the facts of the case, the law relating to the granting of development approvals, the absence of cogent explanation by the County Government of Nairobi and their omission to avail the relevant documents, and was satisfied that that 1st respondent had raised pertinent issues which go to the core of the manner in which the approvals in question were granted.

45. We also find no basis in the appellant's allegation that the Court failed to consider its own previous orders pertaining to the matter, specifically the adopted arbitral award restraining the 1st respondent from interfering with the appellant's quiet possession and the ruling of 11th December 2013 in in Miscellaneous Civil Application No 431 of 2013, where the learned Judge stated that the fire exit was not blocked.

46. It is obvious that the terms of the award were not a perpetual cloak shielding the appellant from lawful interference. The award and the subsequent decree clearly restrain the 1st respondent from interfering with the appellant's quiet possession and enjoyment of the premises or doing any acts contrary to the declarations granted in the award. Furthermore, the court in the aforementioned ruling was not privy to the expert reports submitted in the High Court Petitions by the various agencies and the relevant standards of passage obstruction taken into consideration.

47. As for the dispute concerning the validity of the prohibition orders issued against the 3rd and 4th respondents by the trial court we reiterate the Others SAIR 1977 SC 21489 as did the learned judge:

> " In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding

ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice...."

48. In our view, the picture that emerges from the entirety of the record is of an abuse of the court process and flagrant harassment of the 1st respondent. The evidence on record clearly shows that the 1st respondent received notices from the 2nd respondent to clear all items from the fire exits and assembly points or face imminent prosecution. Upon taking steps to comply with the said directions, the notices were unceremoniously withdrawn and the 1st respondent was informed that the offending items had been sanctioned by the 2nd respondent.

49. After the alleged destruction of its property on 16th November 2013, the appellant filed an application in court seeking damages for its losses from the 1st respondent which were quantified at Kshs.1,002,228.80 and access to the premises to carry out repairs with the assistance of the police. These orders were granted by the Court on 11th December 2013.

50. In addition, the 1st respondent and her agents were persistently sought by police and were eventually summoned for questioning on the alleged offence of malicious damage to property. Apprehensive, the 1st respondent's advocate wrote to the 4th respondent to confirm attendance, and to seek clarification on whether its clients were suspects or were simply appearing to record statements but received no response. Without a doubt, police summons and interrogations in this country are risky events justly feared by free men everywhere for their uncertain conclusions. Indeed, history bears witness of individuals in this country who have gone in for questioning, and have only been released into a court of law to be charged. Consequently, the 1st respondent obtained interim orders from the court on 21st March 2014, restraining and prohibiting the 3rd and 4th respondents from summoning, arresting and prosecuting the 1st respondent and her agents in connection with Town House.

51. Despite the orders of the court, the 2nd respondent on 11th May 2015 charged Gatma Investments with interalia, obstructing /blocking emergency fire escape routes with water tanks and locating fire hazards, namely highly flammable LPG tank and petrol powered generators on emergency escape route. This resulted in Criminal Case No. M 6728/15.

52. The management company of the townhouse, Gatma Investments, was also charged on 28th February, 2014 the in Case No. 447A/14 by the County Council of Nairobi for failing to comply with their notice issued on 12th February, 2014 to interalia, remove the smoke extractor and water tanks from the fire escape route. The manager and Landlord of Town House were subsequently charged in Criminal Case N. 447A/14.

53. In our view, the conclusion is inescapable that allowing the police investigation and court proceedings to continue would be an affront to the process of the Court and defeat the ends of justice. Further, it would put the 1st respondent and her agents to great oppression and prejudice.

54. Indeed, there is truth in the submission that the 3rd and 4th respondent are mandated to investigate the truth or otherwise of complaints lodged with them and to prosecute where they find cause. It is also trite that even where a civil suit is pending between two parties, criminal proceedings may be instituted against one of the parties arising from the same facts.

55. However, given the circumstances and history of this case, which the 3 and 4th respondents were clearly appraised with and bearing in mind that the dispute which was at its core a civil dispute and the court accordingly awarded the appellant the cost of repairs against the alleged damage; we cannot help

but agree with the trial Court that to proceed with the investigations and the prosecution would be oppressive and unfair, a grave miscarriage of justice and tantamount to harassment in proceedings that are prima facie a non-starter.

In *Gian Singh v State Of Punjab & Another* [2012] SC 544 the court held:

> " Criminal cases having overwhelmingly and pre- dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding".

56. In *Mitesh Kumar J. Shah v State of Karnataka LL* [2021] SC 592 it was observed that :

> " This Court has at innumerable instances expressed its disapproval for imparting criminal color to a civil dispute, made merely to take advantage of a relatively quick relief granted in a criminal case in contrast to a civil dispute. Such an exercise is nothing but an abuse of the process of law which must be discouraged in its entirety."

57. The facts in this case are so telling that it would seem wholly improper to 'wait and see' how the investigations and the criminal cases progress in view of the cat and mouse situation at play. Furthermore, it is a pertinent and cardinal requirement of the rule of law that citizens must know with certainty where lawful conduct ends and unlawful conduct begins. It is unjust to be put in a position where to comply with the law results in punitive measures.

58. In view of our sentiments above, the appeal lacks merit and is accordingly dismissed with costs to the 1st Respondent.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2022.

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M. WARSAME

JUDGE OF APPEAL

.....

H. OMONDI

JUDGE OF APPEAL

.....

J.W LESIIT

JUDGE OF APPEAL

I certify that this is a true Copy of the original.

Signed

DEPUTY REGISTRAR