IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, ASIKE-MAKHANDIA & SICHALE, JJ.A)

CIVIL APPEAL NO. 113 OF 2017

BETWEEN

PATRICK NGUNJIRI MAINA……..……...APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE CHIEF MAGISTRATE'S COURT AT KIAMBU..2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....…..3RD RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Kiambu, (J. Ngugi, J.) dated 23rd February, 2017

in

JUDICIAL REVIEW NO. 11 OF 2016)

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JUDGMENT OF THE COURT

Patrick Ngunjiri Maina "*the appellant*" is an advocate of the High Court of Kenya and at the material time leading to this appeal was practising in the name and style of Muriuki Ngunjiri & Co. Advocates. On 28th November 2016, the appellant was arraigned before the **Chief Magistrate's Court** at Kiambu "*the 2nd respondent*" in **Criminal Case No. 2556 of 2016; Republic v Patrick Ngunjiri Maina**. He was charged with making a false document contrary to section **347 (d) (i)** as read together with section **349** of the Penal Code; obtaining registration of land by false pretence contrary to section **320** of the Penal Code; making a document without authority contrary to section **357 (a)** of the penal Code and uttering a document with intent to deceive contrary to section **357 (b)** of the Penal Code.

On the day of plea, the appellant's advocate, **Mr. Mwangi Wahome,** learned counsel raised objection to the taking of the plea on grounds that the charges were as a consequence of the appellant discharging his professional duties as an advocate and were therefore in contravention of Article 157 (11) of the Constitution. He also alleged that his intended prosecution was a breach of his fundamental rights and freedoms, that the same dispute was before the Environment and Land Court and lastly that the 2nd respondent had no jurisdiction to entertain the charges.

The 2nd respondent then directed that the objection be canvassed inter partes on 19th December, 2016. It further directed the 1st respondent do supply the appellant with copies of witness statements, charge sheet and any other documentary evidence it intended to use in the case. As a consequence of the aforesaid order, the appellant received a copy of a letter dated 3rd November, 2016 from the 1st respondent to the Directorate of Criminal Investigations represented in this appeal by the 3rd respondent. That letter contained the decision and recommendation of the 1st respondent to prosecute the appellant on the aforementioned charges.

Upon perusal of the said letter, it became apparent to the appellant that the 1st respondent's decision to prosecute him was unfounded, irrational as it was premised on mis-information. That the decision failed to take into account relevant considerations and was not connected at all to the information laid before the 1st respondent thereby making the decision to prosecute him unfounded and irrational. It was on this basis that the appellant opted to take out judicial review proceedings whose decision this appeal emanates from, seeking to quash the decision of the 1st respondent to prosecute him and prohibit his further prosecution by the other respondents.

In the judicial review proceedings, the apellant reiterated that the charges levelled against him emanated from discharging his duties as an advocate which violated his legitimate expectation that he would not be charged for carrying out his professional duties. He underscored the importance of protecting advocates when they are acting within the scope of their duties as advocates. He further urged that prosecuting him put the independence of the legal profession in jeopardy since advocates would run the risk of being prosecuted for performing their duties. According to the appellant, such an act would in turn impact negatively on Article **50 (2)** of the Constitution which provides for the right to legal representation since advocates would be cautious in the cases they take on so as to avoid prosecution.

The background facts informing this appeal were as follows: sometimes in 2008, the appellant was approached by the directors of Mapema Holdings Ltd to wit; **Viktar Maina Ngunjiri** "*Viktar* "and **James Kamau Nyambura** "*James*" to act for them in a transaction in which the said company was purchasing a parcel of land known as LR No. 4953/2414 "*the property*" situate in Thika. According to the appellant, he conducted due diligence through an official search of the property at the Lands registry which disclosed that the property belonged to Thika Dairies Ltd and was free from any encumbrances.

It was then agreed that Viktar and James would execute the sale agreement on behalf of the company and also affix the company's seal on the sale agreement and other related documents. According to the appellant the directors of Thika Dairies Ltd, Mr. **Patrick Kariuki Muiruri** "*Patrick*" and **John Sebastian Muiruri** "*John*" later called upon on in his offices and informed him that they did not intend to engage a different lawyer to act for them in the transaction. It was then agreed that the appellant would act for both Mapema holdings Ltd and Thika Dairies Ltd in the transaction. Thereafter Patrick and John furnished the appellant with a company certificate in respect of Thika Dairies Ltd which showed that Patrick was the majority shareholder with 60,001 shares and John held 5,000 shares against a total of 100,000 shares in the company.

The terms of the sale were subsequently agreed upon and on 10th March 2008, the respective parties appeared before the appellant and executed the sale agreement. A deposit of Kshs. 2 million was then paid upon execution of the agreement and the balance of Kshs. 7 million was to be paid within 90 days of the execution of the agreement. The deposit of Kshs. 2 milllion was paid by way of two bankers' cheques drawn in favour of Patrick. It had been agreed according to the appellant that the purchase price was to be paid to or received by Patrick on behalf of Thika Dairies Ltd. The balance of the purchase price was subsequently paid via 3 bankers' cheques made in favour of Patrick on 31st March 2009. After the receipt of the full purchase price, Patrick furnished the appellant with the completion documents which included the original certificate of title, deed of transfer, rates clearance certificate, land rent clearance certificate, consent to transfer by the Commissioner of Lands, copy of certificate of incorporation of Thika Dairies Ltd, copies of National identity cards for Patrick and John and their passport size photographs. A deed of transfer was subsequently prepared by the appellant, executed by the respective parties, attested and registered. Mapema Holdings Ltd thereafter took possession of the property and began developing it.

Subsequent to the transaction, the appellant came to learn that there were internal wrangles within Thika Dairies Ltd with one of the directors **Mr. Prudenzio Nicholas Gitara** *"Prudenzio"* complaining that there had been various, illegal, unauthorized and irregular entries in the register of companies thereby altering the shareholding structure and directorship Thika Dairies Ltd. The effect of those illegal alterations were that Patrick who initially had one share had now become the majority shareholder with 60,001 shares. Upon this discovery Prudenzio conducted a search on the properties owned by the Thika Dairies Ltd. To his utter dismay he discovered for the first time that the property had been sold and transferred to Mapema Holdings Ltd. He maintained that he did not have any idea about the sale to Mapema Holdings and that Thika Dairies Ltd had nevner approved the sale. He thereafter lodged a complaint with the police and also iinstituted **ELC Civil Suit No. 1400 of 2013;** against Patrick, Thika Dairies Ltd and Mapema Holdings Ltd seeking a temporary injunction to restrain them from transacting or dealing with the property. Following police investigations, it emerged that the passport-size photos appended on the deed of transfer did not belong to Patrick and John. The details also filled in the transfer form with regared to identity card numbers as well as pin numbers were erroneous and did not belong to Patrick and John.

The appellant's explanation however, was that the errors were inadvertent and were attributable to his court clerk who had mistakenly appended to the deed of transfer photos of other parties whom he had acted for in another transaction which allegedly also involved Viktar and James. The appellant further explained that rather than filling in the directors' national identity numbers, his clerk had instead filled in the directors national identity card serial numbers. He conceded that the directors of Mapema Holdings Ltd were not privy to the mistakes in the deed of transfer. The appellant maintained that he discharged his professional duties as per the parties' intentions and denied any involvement in fraud or forgery. However, on 25th November 2006 he was arrested and charged as already stated at the commencement of this judgment.

This is what sparred the appellant on 15th December, 2016 to file judicial review proceedings seeking an order of certiorari to remove into the High Court for purposes of being quashed the decision of the 1st respondent to charge him and an order of prohibition to restrain the respondents from arresting and prosecuting him over the charges. In the proceedings, the appellant maintained that parties to the transaction duly executed and sealed the documents relevant to the transaction in his presence. That the full purchase price was paid and received by Patrick in terms of the agreement and the property was duly transferred and registered in favour of Mapema Holdings. He complained that he was never summoned to shed light on what transpired by those investigating the complaint. In his view, the decision to charge him was based on unfounded and irrational facts, falsehoods, misinformation and bad faith. He took the view that the 1st respondent failed to take into account relevant considerations such as Article **157 (11)** of the Constitution which behooves the 1st respondent to have regard to the public interest, the interests of administration of justice and the need to prevent abuse of the legal process in exercising its mandate to prosecute a party. He averred that his prosecution violated his legitimate expectation not to be prosecuted for performing his professional duties. He stated that the legitimate expectation emanates from principle **16 (c)** of the Basic Principles of the Role of Lawyers, 1990 which mandates governments to ensure that lawyers do not suffer, or are threatened with prosecution or administrative, economic or any sanctions from actions taken in accordance with their recognized professional duties. He cited further principle 18 which provides that lawyers are not to be identified with their clients or their client's causes.

In response to those assertions, it was contended on behalf of the respondents that a complaint was lodged by Prudenzio, a director of Thika Dairies Ltd, that the property belonging to the company had been fraudulently transferred to Mapema Holdings Ltd. In statements made to the investigators, both Patrick and John as directors of Thika Dairies Ltd did not deny the sale of the property to Mapema Holdings Ltd for a consideration of Kshs. 9 million. They conceded that a sale agreement was indeed executed on 10th March 2008 and the deposit of Kshs. 2

million paid to Patrick. They however denied having executed the deed of transfer dated 5th March 2011 with regard to the property. They also confirmed that neither the passport photos affixed to the transfer nor their particulars belonged to any of them. It was asserted that a documents examiner had confirmed that the transfer documents were not executed by Patrick and John nor any other directors of Thika Dairies Ltd. According to the respondents, the issues regarding the mix up of photos was better reserved to be resolved by the trial court which was best placed to properly evaluate the evidence as presented and arrive at a finding of law and fact. It was the case of the respondents again that pursuant to Article 157 (6) (a) of the Constitution, the 1st respondent independently analyzed the evidence gathered by the Directorate of Criminal Investigations and concluded that the said

evidence was sufficient to prefer criminal charges against the appellant. It maintained that the decision to charge the appellant was based on sufficient evidence and that the public interest under Article **157 (11)** had been satisfied. It was denied that the decision to charge the appellant was actuated by malice and that it had not been demonstrated that the criminal process was being undertaken in bad faith. The respondent was also of the view that Judicial Review proceedings were not suited for ascertaining the admissibility, correctness or otherwise of documents presented as evidence and that a trial court was better placed to do so and deal with the issues raised in the application.

In his determination dismissing the application with costs the learned Judge **(J. Ngugi, J.)** found that there were certain troubling aspects of the case. These were that the appellant chose to act for both parties without warning himself of the dangers inherent therein; he compounded the risk by accepting to act for vendor, Thika Dairies Ltd without asking for or seeking any resolution or other authority by the company to instruct him to act for it, and to sell the property; allowed the purchase price to be paid not to the compay but to Patrick; it was even doubtful whether the full purchase price had been paid; it was questionable the period it took from execution of the sale agreement in March 2008 to the registration of the transfer in March 2012 despite the full purchase having been paid by 31st March 2008 as alleged. The issue of the passport size photos and directors details mix up on the transfer deed and claims that the signatures on the transfer document were forgeries presented more queries than answers and finally, and perhaps, most importantly according to the Judge, there was the claim that the signatures in the deed of transfer were forged. All these matters led the Judge to hold that based on the facts, it was reasonable for a rational actor to conclude that there was sufficient evidence to prefer charges against the appellant.

Dissatisfied with the Judge's conclusions, the appellant filed the present appeal. In his memorandum of appeal and in his written submissions in support thereof, the appellant complained that the learned Judge erred in imputing elements of criminality in his actions while discharging his professional duties. He contended that the Judge failed to take into account an advocate's role in attending to legal documents. For instance, he faulted the Judge for his observations that he found it irregular that he failed to obtain resolutions from the respective companies to ascertain instructions to act on their behalf and also to ascertain whether those companies board of directors had passed resolutions to buy or sell the property as the case would be. He countered that by submitting that the law did not impose criminal sanctions on an advocate where he fails to do so. With regard to the Judge's remarks that it would have been more prudent to pay the purchase price to Thika Dairies Ltd account, he submitted that there was an express provision in the agreement that the purchase price would be paid to Patrick on behalf of Thika Dairies Ltd. As such he denied any criminal element in the payments. In respect of the Judges reservations regarding whether the full purchase price was paid, the appellant contended that Patrick did not deny receiving the sale proceeds. He further faulted the Judge for imputing criminal liability on the fact that the deed of transfer was registered 4 years after the sale agreement. He maintained that the passport photos mix up was a genuine mistake by his clerk. The appellant contended that the criminal justice system was being abused in seeking to prosecute him for merely discharging his professional duty. He maintained that his prosecution was an abuse of the 1st respondent's powers under Article 157 (6).

In response to the appellant's case, the 1st respondent pointed out in its written submission that judicial review was concerned with the decision making process rather than the merits or otherwise of a decision. It contended that courts ought not to usurp its constitutional mandate under Article 157 of the Constitution to initiate and prosecute criminal proceedings. The respondent submitted that the order of prohibition as prayed for by the appellant could not issue to quash a decision which has already been made but can only prevent the making of a contemplated decision. It contended further that where a decision has already been made, whether in excess or lack of jurisdiction or whether it was in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. The case of **Republic v KNEC *ex parte* Gathenji & Ors Civil Appeal No. 266 of 1996** was relied upon for the proposition that prohibition looks only to the future and where a decision is yet to be taken. On the same authority the respondent denied that the order of *certiorari* could issue since in its view, the order can only issue if a decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with.

Having carefully considered the record of appeal and respective submissions and the law, we would straightaway observe that judicial review remedies which the appellant sought in the High Court are discretionary. Being discretionary, a court may refuse to grant them even where the requisite grounds for their issuance exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must of course be exercised not whimsically or arbitrarily but on the basis of evidence and sound legal principles. Judicial review being concerned with the decision making process rather than the merit of a decision, the High Court's mandate is to take into account the nature of the process against which judicial review was sought and satisfy itself that there were reasonable basis to justify the orders sought. In this case, there was no demonstration that in reaching a decison to charge the appellant with the offences aforesaid, the 1st and 3rd respondents acted without jurisdiction, or in excess of jurisdiction or that in so doing, there was breach of rules of natural justice. See **Republic v. Kenya National Examinations Council** (supra). On that score alone the orders of certiorari and prohibition sought were not available to the appellant. The decision of the 1st respondent to charge the appellant was not excess of jurisdiction to warrant the court to grant an order of certiorari. The fact that the appellant was an advocate did not bar the 1st respondent from commencing criminal proceedings based on the evidence gathered during the investigations and the applicable law. In **Joram Mwenda Guantai v The Chief Magistrate[2007] 2 EA 120**, this Court held that:

> **" The High Court has inherent jurisdiction to grant an order of prohibition to a person on a trial before a subordinate court 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 inherent power and duty to secure fair treatment for all persons who are brought before the court or subordinate court and to prevent an abuse of the process of the court…"**

From the record, the appellant has been unable to demonstrate that his prosecution was oppressive, an abuse of the process of the court or vexatious.

The decision taken by the 1st respondent to charge and prosecute the appellant was pursuant to the discretion granted to its office by Article 157 of the Constitution. That Article provides in pertinent paragraphs:-

> (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may--
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> > (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;
> >
> > (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
> >
> > (c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).
>
> (10) 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.
>
> (11) 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.

The said provision is couched in terms similar to section 26 of the repealed Constitution which the Court in **Meixner & Another v Attorney General (2005) 2 KLR 189**, commented as follows,

> **"The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26 (3) 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……..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.** "

It therefore follows that the discretion to prosecute criminal offences must be exercised properly as the court may halt criminal proceedings where it is of the opinion that the discretion is being abused or as submitted by the 1st respondent, where it is being used to achieve some collateral purposes inimical to the objects of the criminal justice system. See also **Republic V. Director of Public Prosecution & 2 others** Exparte Pravidis; **Naomi Saisi [2016] eKLR;** and **Kuria & 3 others V. Attorney General [2001] 2 KLR 69**. Indeed Odunga, J. was emphatic in Pravidis Naomi Saisi ***(supra)*** that:

> **"…where it is clear that the proscecutorial discretion is being exercised with a view to achieving certain extraneous goals other than those recognized under the Constitution and the office of the Director of Public Prosecutions Act, that ….. constitutes an abuse of the legal process and would entitle the court to intervene and bring to an end such wrongful exercise of discretion…"**

We entirely agree with these observations. We do not discern such misgiving in the manner the 1st respondent initiated the proceedings nor can we blame the court below in its decision on that account. There was factual basis for the 1st respondent to lay the charges. Courts have inferred that a criminal prosecution which is commenced in the absence of a proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Largely in his submission, the appellant has faulted the learned Judge for allegedly imputing criminal elements in the discharge of his professional duties. With respect, the appellant's criminal culpability had already been imputed by the 1st respondent and hence its decision to charge the appellant. **PC Emmanuel Kanyungu** one of the investigators swore an affidavit to the effect that it had been established following investigations that the property was fraudulently transferred to Mapema Holdings Ltd and that the appellant was involved in the alleged fraud. He deposed that the 1st respondent analyzed and reviewed the evidence gathered by the Directorate of Criminal Investigations and concluded that the evidence disclosed a criminal case and that is when it took the decision to prosecute the appellant.

The appellant has endeavored to show how his actions were in accordance with the law and has sought to bring out facts and evidence to negate such imputed criminal elements. In our view those facts and evidence would be better reserved and canvassed in a trial court where the veracity would be best tested through the rigours of a trial rather than in a judicial review court. As stated in the **Meixner** case, the criminal trial process is well safe guarded and regulated through statutes and the Constitution in respect of both criminal prosecutions and during trials. As such, the court is the best equipped court to deal with the facts and evidence gathered to support a charge. To our mind, all the complaints raised by the appellant in support of the application had nothing to do with the decision making process of the 1st respondent. Rather they go to the root of the merits of the decision of the 1st respondent. This cannot be the basis upon which an order of certiorari can issue.

The Judge in determining the appellant's application rightly deduced the issue upon which to dispose it. The Judges had to decide whether

based on the facts and evidence before him, there was any sense in which the decision of the 1st respondent to charge the appellant could be termed as irrational, an abuse of discretion granted to it by law, a failure to act fairly in the exercise of discretion, malice or other irrelevant considerations, against public interests or does not cohere with the interests of justice, was oppressive , irrational or an abuse of the due process. These were all the grounds upon which the appellant based his judicial review. From the record, it is very easy to discern that the appellant failed to demonstrate how the decision to prosecute him fell in any of the above considerations. He also failed to show how his prosecution was in breach of his fundamental rights and freedoms. It was not up to the Judge to consider whether the evidence gathered by the prosecution was sufficient to support the criminal charges against the appellant. Indeed that would be the preserve of the trial court and as observed in **Meixner & Another v Attorney General** (supra) and as we have already stated, it would be a subversion of the law relating to criminal trials if the judicial review court was to usurp the function of a trial court. The Judge took the view, and rightly so in our consideration, that:

> **"To be sure the Applicant has a seemingly plausible come-back to each of the seven points above. Indeed, it is entirely possible that those explanations might be benign and persuasive and might when considered against the prosecution theory prevail. But that is exactly the point. There are readily obvious factual disputes in this case - enough for a ratinal actor to conclude that there is sufficient evidence to take the case to trial in a criminal case. It is hard to say that a Prosectutor who looks at all the factors in this case and makes the charging decision is acting irrationally or oppressively. It is equally difficult to say that such a Prosecutor is acting solely out of extraneous or other improper considerations."**

We entirely agree and endose those sentiments. Faced with what was presented or placed before it was not unreasonable for the 1st respondent to have concluded that there was sufficient evidence to prefer the charges against the appellant.

The upshot is that the Judge was persuaded that based on the material before him, it was probable that the appellant was criminally culpable and hence his decision to allow his prosecution where such culpability will be best determined. The Judge's decision was judicious, based on sound legal principles and does not warrant this Court's interference.

This appeal is bereft of merit and is accordingly dismissed with no order as to costs.

Dated and Delivered at Nairobi this 6th Day of August, 2019.

P. WAKI

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR