REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. APPL. NO. 73 OF 2017

IN THE MATTER OF ARTICLE 23 OF THE CONSTITUTION OF KENYA, SECTIONS 60, 70, 72, 76, 77, 123(1) & (8) OF THE CRIMINAL PROCEDURE CODE.

AND

IN THE MATTER OF THE DIRECTOR OF CRIMINAL INVESTIGATIONS DECISION MADE IN FEBRUARY 2017 TO ARREST, INVESTIGATE OR CHARGE THE APPLICANT

BETWEEN

REPUBLIC……..……APPLICANT

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS…..….RESPONDENT

EXPARTE: PAUL NGUNYI NYOTA

JUDGEMENT

Introduction

1. By a Notice of Motion dated 21st February, 2017, the applicant herein, **Paul Ngunyi Nyota,** seeks the following orders:

> **1) THAT the Honourable Court be pleased to certify this application urgent and to hear the same exparte in the first instance due to the said urgency.**
>
> **2) THAT the Honourable Court be pleased to issue an order of prohibition directed against the Respondent prohibiting him from arresting, detaining or prosecuting Paul Ngunyi Nyota in respect of motor vehicle numbers KBM 044Z, KBZ 970S, KBR 343L and KBD 885U which the Applicant bought from Jack J.M. Gakuru.**
>
> **3) THAT the Honourable Court be pleased to issue an order of mandamus directed against the Respondent compelling the Respondent not to act on the decision of the Respondent made in February 2017 to, arrest, investigate, detain, or prosecute Paul Ngunyi Nyota in respect of the said motor vehicles.**

4) THAT the Honourable Court be pleased to issue an order of certiorari in respect of the decision by the Respondent, made in February 2017 to investigate, arrest, detain and charge Paul Ngunyi Nyota with regard to his purchase of motor vehicles numbers KBM 044Z, KBZ 970S, KBR 343L and KBD 885U and to remove the said decision to the High Court for the purposes of quashing the decision.

5) THAT the costs of this application be provided for.

Applicant's Case

2. According to the applicant, he is a businessman engaged in the business of buying and selling motor vehicles. The applicant averred that one **Jack J.M. Gakuru** whom he knows is also a businessman and his lawyer is one **Timothy Parantai Ntayia**.

3. According to the applicant, sometime in the year 2015, he bought motor vehicle numbers KBM 044Z, KBZ 970S, KBR 343L and KBD 885U from the said **Jack J.M. Gakuru** through his lawyer and agent **Timothy Parantai Ntayia** and that the said **Jack J.M. Gakuru** delivered to the applicant copies of the logbooks of the said motor vehicles and promised to hand over the original logbooks once the said vehicles had been fully paid for. During the said transaction, the said **Jack J.M. Gakuru** confirmed that **Timothy Parantai Ntayia** was his agent and that the purchase price could be paid through the said lawyer.

4. It was the applicant's case that he fully paid the said purchase price and the said **Timothy Parantai Ntayia** duly acknowledged full payment. However, the said **Jack J.M. Gakuru** claims that **Timothy Parantai Ntayia** has not settled the accounts with him despite acknowledging that the applicant fully paid for the vehicles.

5. It was deposed by the applicant that sometime in July 2016 he was called by a C.I.D. officer from Flying Squad Headquarters about the said motor vehicles and that after he recorded his statement the matter was brought to a rest. They later agreed with both **Timothy Parantai Ntayia** and **Jack J.M. Gakuru** that the applicant could sell the said motor vehicles to a third party as he awaited the original logbooks from the said **Jack J.M. Gakuru** and that the applicant proceeded to do so. However sometime in February 2017, C.I.D. officers from Kitengela police station and Isinya police Station called him and demanded that he delivers the said motor vehicles to them for delivery to **Jack J.M. Gakuru**. According to the applicant the said officers informed him that they wanted to assist **Jack J.M. Gakuru** to recover his motor vehicles. The applicant was therefore apprehensive that the police wanted to unlawfully arrest, and detain him and charge him with a criminal offence, which charge is clearly unlawful and unconstitutional in violation or threat of violation of his rights.

Respondent's Case

6. The application was opposed by the Respondent.

7. According to the Respondent, on or about the 12th day of April 2016 , a complainant by the name **Kibochi Murei Gakuru** reported at the Flying Squad office that an advocate by the name **Timothy Parantai Ntaiya** had defrauded him twenty six motor vehicles through false pretence indicating that he was in a position to sell him 210 acres of land in Kisaju Kajiado County. Pursuant thereto, on 31st October 2016, the said **Timothy Parantai Ntaiya** was arrested and arraigned in Milimani Chief Magistrate's court vide criminal case number 1717/2016 which was scheduled for hearing on 18th April 2017 in Court number 6.

8. It was averred that among the motor vehicles listed as exhibits in Criminal case number 1717/2016 are motor vehicle registration numbers KBM 044Z Toyota Prado,KBD 885U Toyota VX and KBR 343L Toyota Isis which vehicles are registered in the names of **Kibochi Murei Gakuru**. In efforts to recover the motor vehicles the applicant was summoned and recorded statement on 2nd of February 2017 in which

he stated that he bought the motor vehicles from **Timothy Parantai Ntaiya** but refused to disclose the whereabouts of the three vehicles.

9. It was averred that the Isinya and Kitengela CID were requested to assist in the recovery of these motor vehicles which were believed to be within their areas of jurisdiction upon receipt of the information that motor vehicle registration number KBM 044Z was with a person by the name **Carlos** who resides in Isinya. However, when the said person was summoned him to the Respondent's office he did not honour the summons but later called and stated that he had already reported a case at Isinya CID against the applicant who had sold him the said motor vehicle but had failed to furnish him with a log book.

10. According to the Respondent, the applicant is in unlawful possession of these vehicles that were unlawfully obtained from **Kibochi Murei Gakuru** which are now part of the exhibits in Criminal case number 1717/2016 and the police are still looking for these vehicles to be used as exhibits in the case.

11. It was therefore the applicant's case that this application has been filed in bad faith, misconceived and is an abuse of the court process and is meant to defeat the cause of justice. In their view, the applicant has not demonstrated that in undertaking investigations in the complaint lodged with the National Police Service by **Kibochi Murei Gakuru** and in making the decision to investigate and recover the exhibits in criminal case number 1717/2016 the National Police Service is acting without or in excess of the power conferred upon it by the law or has infringed, violated, contravened or in any other manner failed to comply or respect and observe the foregoing provisions of the Constitution of Kenya 2010 or any other provisions thereof or any other provisions of the law.

12. It was the Respondent's case that the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support charges.

13. It was reiterated that this application has been filed in bad faith and is an attempt to defeat justice hence ought to be dismissed with costs so as to allow the investigations to recover the motor vehicles to continue to their logical conclusion.

Determination

14. I have considered the material presented before the court in the instant application.

15. The circumstances under which the Court will grant stay of a criminal process in these kinds of proceedings is now well settled. The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim.

16. However as was held in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**:

"Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and

ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds."

17. In **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170,** the Court of Appeal held:

"It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings... Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court."

18. 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."

19. In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69,** the High Court held:

"The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer...In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute. It is further alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The fact that it has not been argued before however does not mean that the law stops dead at its tracks. An order of prohibition looks to the future and not to the past; it is concerned with the happenings of future events and little, if any, of past events. Where a decision has been made, there is little that the court can do by an order of prohibition to actually stop the decision from being made, because simply that which is sought to stop has already been done. However in such circumstances, the power of judicial review is not limited to the other orders of judicial review other than prohibition. With respect to civil proceedings prohibition lies not only for the excess of jurisdiction but also from a departure of the rules of natural justice...So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine

questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another. However, it does not mean that a civil suit and a criminal case cannot co-exist at any one particular time. This is because the section envisages the re-prosecution of a criminal case substantially dealt with either in fact or law, a case in which issues have been laid to rest. There is no mention in the section that the simultaneous existence of a civil and criminal case is constituting double jeopardy. The courts have, however stated that the power to issue an order of prohibition to stop a criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related facts, or to say that a person should never be prosecuted in criminal proceedings when he has a civil suit against him relating to matters in the criminal proceedings...The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution....”

20. In **Republic vs. Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703**, it was held:

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the

interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth... When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in... In this case it is asked to step in to grant an order of prohibition. Prohibition looks into the future and can only stop what has not been done. It is certiorari that would be efficacious in quashing that which has been done but it is not prayed for in this matter. There was no order granted for stay of further proceedings when leave was granted and it is possible that the private prosecution has proceeded either to its conclusion or to some extent. In the former event an order of prohibition has no efficacy and the court would be acting in vain to grant one. What is done will have been done. If there is anything that remains to be done in those proceedings, however, the order of prohibition will issue to stop further proceedings."

21. In **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR**, 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...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".

22. Proceedings of this nature, ordinarily, do not deal with the merits of the case but only with the process. In other words these proceedings determine, *inter alia*, whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made, whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters, whether the decision to commence the criminal charges go contrary to the applicant's legitimate expectation, whether the respondents' decision to charge the applicant is irrational. It follows that where an applicant brings such proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction to determine such a matter and will leave the parties to resort to the usual forums where such matters ought to be resolved. In other words, such proceedings are not the proper forum in which the innocence or otherwise of the applicants is to be determined and a party ought not to institute such proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in these kinds of proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and whether such proceedings amount to a violation of his rights and fundamental freedoms and once the Court is satisfied that that is not the case, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.

23. Whereas an applicant may well be correct that there are several factors which go to show his innocence, these are not the proper proceedings in which the correctness of the evidence or the truthfulness of the witnesses is to be gauged. That task is solely reserved for the trial Court which is constitutionally bound to determine the proceedings in accordance with the law. Accordingly, the mere fact that the applicants view the evidence to be presented against them as patently false, concocted and/or misleading does not warrant this Court in interfering with the criminal process since that is an allegation which goes to the sufficiency and veracity of the evidence and the innocence of the Applicants, matters which are not within the province of this Court.

24. In **Thuita Mwangi & Anor vs. The Ethics and Anti-Corruption Commission & 3 Others Petition No. 153 & 369 of 2013**, it was held:

> **" … I am afraid that the High Court at this point is not the right forum to tender justifications concerning the subject transaction let alone test the nature and veracity of these allegations. In… the Court held that "It is the trial Court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court". Similarly…Lenaola J., captured this balance as follows; "(22). The point being made above is that the DPP though not subject to control in exercise of his powers to prosecute criminal offences, must exercise that power on reasonable grounds. Reasonable grounds, it must be noted, cannot amount to the DPP being asked to prove the charge against an accused person at the commencement of the trial but merely show a prima facie case before mounting a prosecution. The proof of the charge is made at trial."**

25.As was held by **Mumbi Ngugi, J** in **Kipoki Oreu Tasur vs. Inspector General of Police & 5 Ors (2014) eKLR:**

> **"The criminal justice system is a critical pillar of our society. It is underpinned by the Constitution, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated".**

26. In this case the applicant's case is that he bought the subject vehicles from one **Jack J.M. Gakuru** whom he knows is also a businessman through the latter's lawyer, one **Timothy Parantai Ntayia**. However the applicant did not exhibit the purported sale agreement. Instead he purported to have exhibited a copy of acknowledgement of full payment but there was no such exhibit.

27. On their part the Respondents have contended that they are only aware of **Kibochi Murei Gakuru** who is the complainant in the criminal case and not **Jack. J.M. Gakuru**. According to the Respondent the complainant was defrauded by the said **Timothy Parantai Ntayia** who cheated him that he would sell him land in exchange for the said vehicles. In his submissions the applicant seems to have altered his version that the vehicles were sold to him by the said **Jack. J.M. Gakuru** and alluded to the sale transaction referred to by the Respondent.

28. The law in these kind of matters is that it is upon the applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute is being abused and ought to be interfered with and this burden and standard was expounded in **Kuria & 3 Others vs. Attorney General** (supra) where it was held:

> **"A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of**

the prosecution...In the instant case there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under section 77 of the Constitution..”

29. As is stated in ***Halsbury’s Laws of England*** **4th Edn. Vol. 1(1) para 12 page 270:**

“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. *The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief*.”

30. In this case the issues raised by the applicant ought to be raised before the trial Court. It is therefore my view that it is premature at this stage to make findings that the criminal proceedings ought to be quashed. The applicant has simply failed to make out a case that would warrant the serious orders sought herein.

31. As was held by **Lenaola, J** (as he then was) in the case of **Daniel Ndungu vs. Director of Public Prosecutions & Another (2013) eKLR**:

“In conclusion, the Petitioner ought to face his accusers, prove his innocence or otherwise and submit to the consequences of the Law should he be found culpable”.

32. Apart from the foregoing, there is no evidence on record that the complainants were served with the application. To grant the orders sought herein would have the effect of adversely affecting the interests of the said complainants. As is stated in ***Halsbury’s Laws of England*** (supra):

“*Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include…the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment*.”

33. In **Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707,** it was held that where the decision being impugned has been implemented and third parties have come onto the scene the court should not intervene because speed and promptness are the hallmarks of judicial review hence hardship to third parties should keep the court away. See also **Birmingham City Council –v- Qasim [2009] EWCA Civ 1080; [2010] BGLR 253.**

34. As was expressed in **Kuria & 3 Others vs. Attorney General** (supra):

“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.”

35. In the premises I am not satisfied that this is a proper case in which the court ought to bring the criminal proceedings to a halt. The applicant will be afforded an opportunity to defend himself, cross-examine witnesses and adduce evidence in support of his case and that in my view is the proper course to take in the circumstances of this case.

Order

36. Accordingly, I find that the Notice of Motion dated 21st February, 2017 is unmerited, the same fails and is hereby dismissed with costs to the Respondents.

37. Orders accordingly.

Dated at Nairobi this 3rd day of October, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Motabori for the applicant

CA Ooko