REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW DIVISION CASE NO. 298 OF 2018

IN THE MATTER OF AN APPLICATION FOR ORDERS OF *CERTIORARI* AND *PROHIBITION*

AND

IN THE MATER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE CRIMINAL PROCEDURE CODE, CAP 75, LAWS OF KENYA

AND

IN THE MATTER OF THE PENAL CODE, CAP 63, LAWS OF KENYA

AND

IN THE MATER OF CRIMINAL CASE NO. 773 OF 2018

CONSOLIDATED WITH CRIMINAL NO. 773 OF 2018,

IN THE CHIEF MAGISTRATES COURT AT KIBERA LAW COURTS.

REPUBLIC...APPLICANT

VS

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

INSPECTOR GENERAL OF POLICE..........................2ND RESPONDENT

CHIEF MAGISTRATE'S COURT,

KIBERA LAW COURTS...3RD RESPONDENT

AND

EVANSON MURIUKI KARIUKI.............................INTERESTED PARTY

AND

JAMES M. KAHUMBURA....................................*EX PARTE* APPLICANT

JUDGMENT

The prayers sought.

1. Pursuant to the leave granted on the **19th** day of November 2018, the *ex parte* applicant by way of a Notice of Motion dated **22nd** November 2018, seeks the following orders: -

> *a. An order of certiorari to remove into the honourable court and quash the decision of the first and second Respondents to charge and prosecute the ex parte applicant in Kibera Chief Magistrate's Court Criminal Case No.* ***773*** *of 2018 consolidated with criminal case number* ***764*** *of 2018.*
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> *b.An order of prohibition directed to the Respondents, prohibiting further proceedings in Kibera Chief Magistrates Court Criminal Case No.* ***773*** *of 2018 consolidated with Criminal Case No.* ***764*** *of 2018 and further prohibiting the first and second Respondents from instituting any future charges against the ex parte applicant in respect to the subject.*
>
> *c. That the costs of this application be awarded to the applicant in any event.*
>
> *d. Any other relief as this honourable court may deem fit and expedient to grant.*

Factual basis of the application.

2. In his supporting Affidavit dated **23rd** July 2018, **Mr. James M. Kahumbura**, the *ex parte* applicant avers that he is the proprietor of business premises known as Uchumi House located along Naivasha Road in Kawangware within Nairobi County. He averred that on **30th** May 2018, in Miscellaneous Civil App No. **484** of 2018, he obtained a court order directing the OCS Riruta Police Station to supervise Wiskam Auctioneers as they levied distress against the Interested Party in the said premises. He deposed that the purpose of the said order was to enforce orders issued by the Business Premises Rent Tribunal in Business Premises Rent Tribunal Case No.**637** of 2017.

3. **Mr. Kahumbura** also averred that on **14th** June 2018, the auctioneers in the company of police officers from Riruta Police Station went to the premises and executed the court order as evidenced by the documents annexed to his affidavit. He averred that the same day in the evening, Police Officers from Muthangari Police Station stormed into the premises and arrested his security guards guarding the premises and detained them at Muthangari Police Station alleging that Muthangari Police were not involved in the execution of the court order yet the area fell within their jurisdiction. He further averred that efforts to have them released were futile as the investigating officers adamantly refused to release them stating that he was under instructions from the DCIO Kabete.

4. Additionally, he averred that on **17th** June 2018, he received a phone call from a man claiming to be the Officer Commanding Muthangari Police Station who accused him of disrespect and engaging Riruta Police Station instead of Muthangari Police Station. He deposed that the caller threatened to arrest him prompting him to obtain anticipatory Bail in High Court Criminal Misc. App No. **229** of 2018. Further, he averred that on **20th** June 2018, the first and second Respondents instituted criminal proceedings against him being criminal case No. **773** of 2018.

5. **Mr. Kahumbura** averred that the goods purported to have been stolen the subject of the criminal case number **773** of 2018 are the same goods carried by the auctioneers. He averred that the proclamation, attachment and subsequent auction of the Interested Party's goods has never been successfully challenged in court, and, that, the issuance of the said summons and the continued prosecution of criminal case No. **773** of 2018 is an abuse of the court process. Additionally, he averred that the decision to charge him with stealing knowing that the purported stolen goods were legally proclaimed, attached and subsequently auctioned is an abuse of power and lack of good faith, hence, the decision is flawed, malicious and unconstitutional.

6. Additionally, in his affidavit in support of the substantive application, the *ex parte* applicant exhibited a Notice of Motion filed by the Interested Party in the Environment and Land Court against him seeking *inter alia* to stay the decision of the Business Premises Tribunal pending the hearing and determination of the appeal against the said orders and or seeking to set aside the said orders.

First Respondent's Replying Affidavit.

7. **Police Constable Peter Ojwang** attached the Muthangari Police Station swore the Replying Affidavit dated **27th** September 2018. He averred that a complaint was made by the Interested Party of stealing and malicious damage to property against the *ex parte* applicant vide O.B. No. 47/14/6/2018 which gave birth to court file No. **773** of 2018. He also averred that on **14th** June 2018 auctioneers under the supervision of police officers from Riruta Police Station went to the Interested Party's business premises to enforce a court order which turned out to be forged. He further averred that later in the evening the *ex parte* applicant hired people who are his co-accused persons and they destroyed properties, stole items and loaded them into a lorry.

8. Additionally, he averred that the anticipatory bail orders were subsequently vacated and the *ex parte* applicant was ordered to take the plea. He averred that the police acted within their mandate under section **28** of the National Police Service Act,[1] and, that the *ex parte* applicant has not demonstrated that the Respondents acted outside their powers or contravened the law. Lastly, he averred that the accuracy of the evidence can only be tested by the trial court.

The Third Respondent's grounds of opposition

9. The third Respondent filed grounds of opposition on **19th** November 2018 stating *inter alia* that it has jurisdiction to try any matter lodged in court pursuant to the provisions of the Magistrates Courts Act,[2]and, that, there is no allegation of incompetence or impartiality

on its part to merit prohibiting it from exercising its adjudicatory mandate over the matter. Further, the application does not meet the threshold for issuing the orders of prohibition.

Interested Party's Replying Affidavit.

10. **Evanson Muriuki Kariuku**, the Interested Party, in his Replying Affidavit filed on **6th** December 2018 averred that the application is without lawful basis. He deposed that the *ex parte* applicant's actions and those of his "goons" on **14th** June 2018 were unlawful and inexcusable. He averred that they forcefully entered into his premises, destroyed his property and "took other properties as security for rent arrears threatening to auction the same." He deposed that this prompted him to report at Muthangari Police Station as a result of which the police instituted the charges against the ex *parte* applicant.

11. He further averred that the actions complained of were in violation of orders issued by the Business Premises Rent Tribunal, and, despite the pendency of an appeal the *ex parte* applicant secretly obtained court orders from the Magistrate's court premised on the tribunals orders which are the subject of the appeal.

Issues for determination.

12. From the opposing positions presented by the parties as enumerated above, I find that only one issue distils itself for determination are: - **(a)** whether or not the intended prosecution is unfair, malicious and or is without any factual basis.

13. **Mr. Murangasia**, the *ex parte* applicant's counsel submitted that section **4** of the Office of the Director of Public Prosecutions[3] provides that in fulfilling its mandate, the Office Public Prosecutions shall be guided by the Constitution and fundamental principles among them **(c)** Natural Justice & **(f)** the need to serve the cause of Justice, prevent abuse of the legal process and public interest. He argued that the first Respondent violated the above provision by preferring the charges without questioning the *ex parte* applicant first. Additionally, he argued that the Interested Party is on record an the application pending in the court of appeal averring that the *ex parte* applicant took the goods in question as security for rent, hence, his complaint in the criminal cases is an abuse of court process.

14. To buttress his argument, **Mr. Murangasia** cited *Republic v Director of Public Prosecutions & 2 Others ex parte Pius Kiprop*[4] where the court stated that a person cannot be arraigned in court after which the investigators and prosecutors set out to gather evidence on the basis of which the already preferred charges will be supported. He contended that the action of charging the *ex parte* applicant and proceeding to interrogate him later was improper. Also, he argued that the impugned proceedings are in violation of Article **47** of the Constitution and reiterated that the allegedly stolen goods were distrained by auctioneers.

15. **M/s Mwenda,** counsel for the first and second Respondents argued that under Article **157(6) (10)** of the Constitution, the DPP does not require the consent of any person or authority and does not act under the direction or control of any person or authority. She argued that the DPP is empowered by the said provisions to institute, undertake and take over prosecutions of all criminal proceedings, and, that, the *ex parte* applicant has failed to demonstrate that the DPP lacked the requisite authority, or acted in excess of jurisdiction or departed from the rules of natural justice in undertaking the prosecution.

16. **M/s Mwenda** further submitted that the *ex parte* applicant is not entitled to the orders sought,[5] and, that, he will have the opportunity to present his defence in the lower court. She argued that the writ of prohibition is a discretionary remedy and is only tenable where a public body or official has acted in excess of its powers. Additionally, she argued that the *ex parte* applicant has not established that the prosecution is an abuse of court process nor did he established the tests to justify staying the proceedings.

17. To buttress her argument, she cited *Nicholas Mwaniki Wawere & Another v AG & DPP*[6] where the court citing *Bennet v Horseferry Magistrates Court & Another* defined abuse *"as something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case...and that abuse of the stay of a prosecution could arise in the following circumstances (i) where it would be impossible to give an accused a fair trial, (ii) where it would amount to a misuse/manipulation of process because it offends the courts sense of justice and propriety to be asked to try the accused in the circumstances of the particular case."*

18. **Mr. Munene**, counsel for the third Respondent submitted that the orders sought cannot be issued against the third Respondent for two reasons, first, that the third Respondent has a statutory duty to hear and determine matters brought before it, and, second, the suit offends section **6** of the Judicature Act.[7]

19. The interested Party's Advocates submissions are simply factual. Counsel reiterated the Interested Party's Replying Affidavit. He however stated that the *ex parte* applicant will be afforded an opportunity to defend himself at the lower court. He never cited a single authority or a simple proposition of the law nor did he identify any issue or issues for consideration.

20. The submissions presented by counsel for the interested party remind me of the following quotation: -

> *"It is more probable that a well tried case will be lost due to a week, poorly organized final argument than it is that a poorly tried case will be won by an effective argument."*[8]

21. Perhaps I should add that a closing argument is the concluding statement of each party's advocate, or the party himself, reiterating the important arguments for the court. Simply put, submissions can be said to be arguments at the close of the trial or on specific issues that arise during the trial on what a party believes to be the correct legal or factual approach in the circumstances. Closing speeches allow one to firmly deal with the legal sufficiency of the case. In that regard, the party or his advocate is required to formulate precise and sound general propositions of the law which the court is invited to accept. It is important to use cases that enunciate principles for the court is not concerned

with the facts of the cases however similar except where they throw light on principles. It is imperative to offer an array of all relevant authorities and where necessary distinguish them on principles. In absence of decided cases, a trial litigator may employ analogies or illustrations to drive his or her point home, then reiterate the appropriate burden and standard of proof.

22. I now address the issue distilled above. It is common ground that the parties had a rent dispute at the Business Premises Rent Tribunal. It is uncontested that the Interested Party appealed against the orders of the Business Premises Rent Tribunal. It is evident that as at the time the *ex parte* applicant moved to the Magistrate's Court to obtain the orders seeking police supervision to enforce the orders of the Business Premises Tribunal, the Tribunals orders had not been stayed, varied or over turned. They were in force. Differently stated, there was no legal bar to the *ex parte* applicant stopping him from executing the said orders.

23. Simply put, the *ex parte* applicant levied distress against the Interested Party, a process recognized by the law and took caution to obtain orders providing police supervision. Curiously, the Interested Party seems to accept or contradict himself. He states that the distrained goods were "carried away as security for rent." To me this is an admission of a rent dispute. The foregoing being the undisputed facts of the case one wonders how the Interested Party could make a complaint of "stealing" at the police station and police officers addressing their minds to the same facts and the law could arrive at a conclusion that the facts disclose an offence of stealing and malicious damage to property.

24. The process of establishing whether or not to prosecute usually starts when the police present a docket to the prosecutor. The DPP must consider whether to— request the police to investigate the case further; or, whether to institute a prosecution; or, whether to decline to prosecute; or terminate a criminal trial.

25. The decision whether or not to prosecute must be taken with care, because it may have profound consequences for victims, witnesses, accused persons and their families. A wrong decision may also undermine the community's confidence in the prosecution system and the criminal justice system as a whole. The prosecutor should remain fiercely independent, fair and courageous. The responsibilities entrusted to the DPP and police demand nothing less. D.A. Bellemare, M.S.M, Q.C put best the often difficult course for the prosecutor in his often quoted passage when he said: -

> "*It is not easy to be a prosecutor. It is often a lonely journey. It tests character. It requires inner strength and self-confidence. It requires personal integrity and solid moral compass. It requires humility and willingness, where to appropriate, to recognize mistakes and take appropriate steps to correct them. Prosecutors must be passionate about issues, but compassionate in their approach, always guided by fairness and common sense."*[9]

26. In order to advance the rule of law, and in particular to protect the principle that all are equally subject to the law, the DPP (and the Police) must be independent. The constitutional provision in Article **157 (10)** of the Constitution ensures that the DPP has complete independence in his decision making processes. This is vital to protect the integrity of the criminal justice system because it guarantees that any decision to prosecute a person is made free of any external influences. In the words of John Kelly TD, the prosecution system *"should not only be impartial but should be seen to be so and that it should not only be free from outside influence but should be manifestly so."*[10]The following observations are useful to bear in mind:-

> "*...the use of prosecutorial discretion should be exercised independently and free from ANY interference. Prosecutors are required to carry out their duties without fear, favour or prejudice–impartially, with objectivity, unaffected by individual or sectional interests and public or media pressures, fairly, having regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect and make all necessary and reasonable enquiries and disclose the results of those enquiries, regardless of whether they point to the guilt or innocence of the suspect ...That is a role which, I fear, is not well understood in the community. It may not be a popular position but it is a very valuable and important one."*[11]

27. The role of the prosecutor excludes any notion of winning or losing or pleasing a complainant; it is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.[12]It is said that the prosecutor acts in the general public interest and so it must be. That is where the prosecutor's ultimate loyalty and responsibility lie. It does not lie in acting at the behest of an overzealous complainant. Mere or reasonable suspicion that the DPP did not act independently, would be sufficient to taint the criminal proceedings.

28. Also, one key consideration to guide the DPP in instituting court proceedings is to advance or protect public interest as opposed to private interest. The decision to prosecute or not to prosecute is of great importance. It can have the most far-reaching consequences for an individual. Even where an accused person is acquitted, the consequences resulting from a prosecution can include loss of reputation, disruption of personal relations, loss of employment and financial expense, in addition to the anxiety and trauma caused by being charged with a criminal offence.

29. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system. For victims and their families, a decision not to prosecute can be distressing. The victim, having made what is often a very difficult and occasionally traumatic decision to report a crime, may feel rejected and disbelieved. It is therefore essential that the prosecution decision receives careful consideration.

30. The discretion vested upon the DPP by the law must be properly exercised. But the *grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed*. Exercise of the discretion will be clearly unlawful *if the DPP knowingly invokes the power to arrest and prosecute for a purpose not contemplated by the law*. The decision to prosecute must be *based on the intention to bring the arrested person to justice*. The decision to terminate pending proceedings must be undertaken in order to advance the administration of justice.

31. The constitutional approach to the nature of a discretion and how it should be exercised must of necessity take cognizance of the

provisions of the fundamental right to the freedom and the dignity of the individual.[13] This includes the rights of the accused and the complainant. It must be borne in mind that the Bill of Rights is a cornerstone of democracy in Kenya.[14] It enshrines the rights of all people in our country and affirms the democratic values of *human dignity*, equality and *freedom*. The constitution directs the State and all persons to "*… respect, protect, promote and fulfill the rights in the Bill of Rights*; *"The Bill of Rights applies to all law, and binds …. all organs of state."*[15]

32. A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motives or improper purpose.[16] Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.

33. Prosecutors shall perform their duties fairly, consistently and expeditiously. In the institution of criminal proceedings, the DPP will proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence.[17] Throughout the course of the proceedings, the case will be firmly but fairly prosecuted; and not beyond what is indicated by the evidence.[18]

34. It has never been the rule in this country that suspected criminal offences must automatically be the subject of prosecution. There must be sufficient evidence to mount a prosecution. The initial consideration in the exercise of this discretion is whether the evidence is sufficient to justify the institution or continuation of a prosecution. It is for the DPP to determine that the evidence presented is sufficient to justify a prosecution. A prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the accused.

35. It is also true that the decision as to whether there is a reasonable prospect of conviction requires an evaluation of how strong the case is likely to be when presented in court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact, and the admissibility of any alleged confession or other evidence.

36. The prosecutor should also have regard to any lines of defence which are plainly open to, or have been indicated by, the accused and any other factors which in the view of the prosecutor could affect the likelihood or otherwise of a conviction. This assessment may be a difficult one to make, and of course, there can never be an assurance that a prosecution will succeed. Indeed, it is inevitable that some will fail. However, application of this test dispassionately, after due deliberation by a person experienced in weighing the available evidence, is the best way of seeking to avoid the risk of prosecuting an innocent person and pursuing a futile prosecution resulting in the unnecessary expenditure of public funds.

37. Resources should not be wasted pursuing inappropriate cases, but must be used to act vigorously in those cases worthy of prosecution. In deciding whether or not to institute criminal proceedings against an accused person, prosecutors must assess whether there is sufficient and admissible evidence to provide **a reasonable prospect of a successful prosecution**.[19]There must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced or continued. This assessment may be difficult, because it is never certain whether or not a prosecution will succeed. This test of a reasonable prospect must be applied objectively after careful deliberation, to avoid an unjustified prosecution. The review of a case is a continuing process.[20] Prosecutors must take into account changing circumstances and fresh facts, which may come to light after an initial decision to prosecute or not to prosecute has been made.[21] This may occur after having heard and considered the version of the accused person and representations made on his or her behalf. Prosecutors may therefore withdraw charges before the accused person has pleaded or in the course of the trial in spite of an initial decision to institute a prosecution.[22]

38. When evaluating the evidence regard should be had to the following matters:- **(a)** *Are there grounds for believing the evidence may be excluded bearing in mind the principles of admissibility at common law and under statute?* ***(b)*** *If the case depends in part on admissions by the accused, are there any grounds for believing that they are of doubtful reliability having regard to the age, intelligence and apparent understanding of the accused?* ***(c)*** *Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the accused, or may be otherwise unreliable?* ***(d)*** *Does a witness have a motive for telling less than the whole truth?* ***(e)****Whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute*. ***(f).*** *whether the alleged offence is of considerable public concern and* ***(g)*** *the necessity to maintain public confidence.* As a matter of practical reality the proper decision in most cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution.

39. I am alive to the fact that it is not for this court to assess the sufficiency of the evidence. That is a function of the trial court. However, I find myself in agreement with the decision in *Republic vs Attorney General ex-parte Arap Ngeny*[23]where the court stated that *"a criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motives or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable."*

40. The courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to 'stay' an indictment (or stop a prosecution) if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court or infringement of a citizens fundamental rights.

41. Abuse of process has been defined as something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case.[24] Whether a prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case. I am aware that the inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.[25] The essential focus of the doctrine is on preventing unfairness at trial through which the accused is prejudiced in the presentation of his or her case or where there is clear breach of fundamental rights to a fair trial. Courts should first consider whether or not there is anything in the trial to prevent 'a fair trial' and if there is, then the court ought to stop the prosecution.

42. The high court should prohibit or quash prosecutions in cases where it would be impossible to give the accused a fair trial**; or where it would amount to a** misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.[26] These categories are not mutually exclusive and the facts of a particular case ought to determine whether to allow the orders sought or not.[27]The power to stay or stop a prosecution should only be exercised if exceptional circumstances exist which would result in prejudice to the accused which cannot be remedied in other ways

43. Additionally, a criminal prosecution or police investigations can also be stopped if it was commenced in the absence of proper factual foundation. The Constitution contains, in material respects, a fundamental commitment to human rights. The enquiry is whether there has been an irregularity or an illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted. [28] The prosecution of an accused person must be conducted with due regard to traditional considerations of candour, fairness, and justice. Where a trial is conducted in a manner different from what is prescribed under the law, the trial is bad.[29]

44. Fundamentally, a fair and impartial trial or investigation has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial or an investigation is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favouritism. And again decidedly, there has to be a fair investigation process and a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused.[30]

45. The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. It is guaranteed under Article **14** of the International Covenant on Civil and Political Rights (ICCPR).[31]The fundamental importance of this right is illustrated not only by the extensive body of interpretation it has generated worldwide but, by the fact that under article **25 (c)** of our constitution, it is among the fundamental rights and freedoms that may not be limited. A criminal trial premised on unfair and questionable partisan investigations or a decision to charge arrived at unfairly and without any reasonable basis would in my view open the door to an unfair trial.

46. The provisions of the Constitution conferring powers upon the High Court to grant such remedies as certiorari, prohibition, mandamus or permanent stay of proceedings are a device to advance justice and not to frustrate it. 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 Court or that the ends of justice require that the proceeding ought to be quashed.

47. 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 proceedings in the interest of justice.

48. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realization of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects it would be impossible to appreciate the width and contours of that salient jurisdiction.[32]The inherent power is to be exercised *ex debito justitiae,* to do real and substantial justice, for administration of which alone courts exist. Wherever any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent the abuse. It is, however, not necessary that at this stage there should be a meticulous analysis of the case before the trial to find out whether the case ends in conviction or acquittal.[33]

49. Perhaps, the position I am advancing was best expressed in *Kuria & 3 Others vs Attorney General*[34] where the High Court stated:-

> “*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 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…The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped…It would be a travesty to justice, a sad day for justice should the procedures or the process of the 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 utilize the procedure has been made. It has never been argued that because a decision has already been made to charge the accused person, 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 one of them because there is nothing, in terms of decisions to prohibit …The intrusion of judicial review proceedings 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 not only 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 process 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 utilized. 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 order that the continued implementation of that decision be stayed… There is nothing which can stop the Court 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….""

50. The High Court has inherent powers to quash, stay or prohibit criminal proceedings. These powers are wide as they imply the exoneration of the accused even before the proceedings have been culminated by way of trial. Noting the amplitude of these powers and the consequences which they carry, the Supreme Court of India[35] revisited the law on the issue and held that *'these powers should be exercised sparingly and should not carry an effect of frustrating the judicial process.'* The said court delineated the law in the following terms: -

> "*The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and in the rarest of rare cases and the Court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at uncalled for stage nor can it 'soft-pedal the course of justice' at a crucial stage of proceedings…The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of the power of the court, but the more the power, the more due care and caution is to be exercised in invoking these powers"*[36]

51. The leading case on the application of abuse of process remains *Bennet vs Horseferry Magistrates Court & another*.[37]The court confirmed that an abuse of process justifying the stay of a prosecution could arise in the following circumstances:-

> *i. Where it would be impossible to give the accused a fair trial; or;*
>
> ii. *Where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.*

52. The above categories are not mutually exclusive and the facts of a particular case may give rise to an application to stay involving more than one alleged form of abuse, and that staying a proceeding is a discretionary remedy and each case will depend on its set of facts and circumstances. **Chris Corns**[38]argues that the grounds upon which a stay will be granted have been variously expressed in the cases. These grounds can be classified under three categories:

> *i. When the continuation of the proceedings would constitute an 'abuse of process,'*
>
> *ii. When any resultant trial would be 'unfair' to the accused, and*
>
> *iii. When the continuation of the proceedings would tend to undermine the integrity of the criminal justice system.*

53. The latter ground is not limited to abuse of the trial court procedures and processes but extends more generally to abuse of the administration of criminal justice process as a whole. Clearly, there can be significant overlap between these various grounds for the stay; an unfair trial, for example would tend to bring the administration of justice into disrepute. Conversely, in some circumstances the holding of a trial may not be technically unfair to the accused yet still undermine the integrity of the legal system because of some impropriety in the investigation or prosecution of the case. The justification for granting a stay extends beyond any abuse of process and includes circumstances where it would be *'unfair'* to the accused for the proceedings to continue. [39]

54. Also relevant to this case is the holding in *Republic vs Chief Magistrate's Court at Mombasa ex-parte Ganjee& Another*[40]that:-

> "*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 be allowed to stand if there predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in 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 a criminal proceeding 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…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 desire of 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 the ulterior motive and that is when the High Court steps in..."*

55. 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.

56. I now proceed to apply the law enunciated above to the facts of this case. It is common ground that there existed a tenant/landlord dispute at the Business Premises Rent Tribunal. It is clear that in absence of a stay order or an appellate decision setting aside or varying the said orders, the *ex parte* applicant moved to the Magistrate's Court and obtained orders providing police supervision to enforce the orders of the Business Premises Rent Tribunal. On the strength of the said orders, auctioneers raided the premises and levied distress. It is a trite principle of law that the mere filing or pendency of an appeal is not a stay of execution. Thus, there was nothing to bar the *ex parte* applicant from executing the orders. Worse still, the Interested Party states that the goods were carried as security for rent arrears. This is a clear admission of the existence of the dispute. One wonders how a charge of stealing can arise in such circumstances. Equally suspect is the alleged charge of malicious damage to property. Had the police cared to interrogate all the parties and scrutinize the various court papers, they would have concluded that the complaint had no basis. Earlier in this judgment I evaluated the steps the DPP is required to take while evaluating evidence so as to make a decision whether to prosecute or not. Had the DPP carefully followed the steps enumerated earlier and applied his mind properly to the facts and the law, he would have certainly arrived at the firm conclusion that the prosecution lacked proper factual basis.

57. In view of my analysis and conclusions arrived herein above, the outcome becomes irresistible that the prosecution in the two criminal cases lacks a proper factual basis. It is an abuse of the law and the criminal process. It cannot be allowed to stand. Consequently, I find and hold that the *ex parte* applicant's application dated **22nd** November 2018 succeeds. Accordingly, I make the following orders: -

> *a. An order of certiorari be and is hereby issued quashing the decision of the first and second Respondents' to charge and prosecute the ex parte applicant in Kibera Chief Magistrates Court Criminal Case No.* ***773*** *of 2018 consolidated with criminal case number* ***764*** *of 2018.*
>
> *b. An order of prohibition be and is hereby issued directed to the Respondents prohibiting any further proceedings in Kibera Chief Magistrates Court Criminal Case No.* ***773*** *of 2018 consolidated with Criminal Case No.* ***764*** *of 2018 and prohibiting them from instituting any further or future charges against the ex parte applicant based on the same complaint or facts the subject of the criminal charges in the said cases.*
>
> *c. No orders as to costs..*

Signed, Delivered and Dated at Nairobi this 25th day of March 2019

John M. Mativo

Judge

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[1] Act No. 11A of 2011.

[2] Act No. 26 of 2015.

[3] Act No. 2 of 2013.

[4] {2017} eKLR.

[5] Citing *Eunice Khalwali Miima v DPP & 2 Others*, HCC JR No. 521 of 2016 & *Thuita Mwangi & Another v The Ethics and Anti-Corruption Commission & 3 Others,* HC Pet No. 153 of 2013.

[6] High Court Pet No. 394 of 2016

[7] Cap 8, Laws of Kenya.

[8]Joseph V. Guestaferr: Obtained from *<http://docs.google.com/gview?a=v&q=cachey:Ypu+F12EDIJ:www.wisspd.org/html/publications/Wdefall2005/ClosingArgument.pgf+aim+closing+arguments&hl=&gl=ke>*, accessed on 16th March 2019.

[9] Infra.

[10] http://www.paclii.org/fj/other/prosecutors-handbook.pdf.

[11]Extract from a Speech by Anna Katzmann, SC at a dinner of the NSW Law Society's Government Lawyers CLE Conference on 30 October 2007. (Now the Hon. Anna Katzmann, Judge of the Federal Court of Australia).

[12] (see *Boucher v the Queen* (1954) 110 CCC 263, 270).

[13] Article 19 (2)

[14] Article 19 (1)

[15] Article 20(1)

[16]*Republic vs Attorney General ex-parte Arap Ngeny* HCC APP NO. 406 of 2001

[17] *Van der Westhuizen v S* (266/10) [2011] ZASCA 36; 2011 (2) SACR 26 (SCA) (28 March 2011).

[18] Ibid.

[19] Prosecution Policy, (Revised June 2013), available at https://www.npa.gov.za/sites/default/files/Library/Prosecution Policy.

[20] Ibid.

[21] Ibid.

[22] Ibid.

[23]HCC APP NO. 406 of 2001.

[24] *Hui Chi-Ming v R [1992] 1 A.C. 34, PC*

[25] See Attorney General's Reference (No 1 of 1990) [1992] Q.B. 630, CA; Attorney General's Reference (No 2 of 2001) [2004] 2 A.C. 72, HL.

[26] *See Bennett v Horseferry Road Magistrates' Court and Another [1993] 3 All E.R. 138, 151, HL; see also R v Methyr Tydfil Magistrates' Court and Day ex parte* DPP *[1989] Crim. L. R. 148.*

[27] *R v Birmingham and Others [1992] Crim. L.R. 117*

[28] Interpreting similar provisions in the constitution of South Africa, the South African Constitutional court (Nicholas AJA), *Shabalala & 5 others vs A.G of Transvaal & Another* CCT/23/94

[29] Indian Case *of Pulukiri Kotayya vs Emperor* L.R. 74 Ind App 65

[30]The Supreme Court of India in *Rattiram v. State of M.P*.[30], a three-Judge Bench

[31] International Covenant on Civil and Political Rights, UN General Assembly resolution 2200A (XXI), December 16, 1966, entered into force March 23, 1976 [hereinafter ICCPR].

[32] See *Kafrnatakavs L. Muniswamy & Others* SAIR 1977 SC 21489.

[33] *Mrs.Dhanalakshmivs R. Prasanna Kumar & Others* AIR 1990 SC 494.

[34] {2002} 2KLR 69.

[35] See *Maharashtra vs Arun Gulab Gawali*

[36] See *State of West Bengal & Others vs Swapan Kumar Guha& Others*, AIR, 1982, SC 949, *Pepsi Foods Ltd & Another vs Special Judicial Magistrate & Others* AIR 1998, SC 128 & *G. ugar Suri & Ano vs State of U.P & Others*, AIR 2000 Sc 754

[37] {1993} All E.R 138, 151, House of Lords.

[38] Chris Corns, Judicial Termination of Defective Criminal Prosecutions: Stay Applications, 76 University of Tasmania Law Review, Vol 16 No. 1, 1977

[39] Ibid

[40] {200} 2KLR 703.