IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
REVENUE DIVISION
JUDICIAL REVIEW CASE NO. 4 OF 2022

BETWEEN:

THE STATE (ON APPLICATION OF QUALITY INDUSTRIES LIMITED)	1ST CLAIMANT
KADAPA MADHUKAR REDDY	2ND CLAIMANT
BATLA SUMANI	3RD CLAIMANT
KANDUKURI LAXMIPATHI	4TH CLAIMANT
PAVAN KUMAR REDDY	5TH CLAIMANT
-AND-	
PUBLIC PROSECUTOR	DEFENDANT

CORAM: HON. JUSTICE JOSEPH CHIGONA

MR. KHUMBO SOKO, OF COUNSEL FOR THE CLAIMANTS
MRS. LONESS MICONGWE, OF COUNSEL FOR THE DEFENDANT
MR. FELIX KAMCHIPUTU, LAW CLERK

JUDGMENT

INTRODUCTION:

1. The Claimant appealed to the Chief Resident Magistrate Court against the Decision of the Commissioner General dated 20th February, 2020. The Respondent filed their response on 31st March, 2020, with the Response, the Respondent filed a notice of preliminary objection to the appeal on the ground that the Claimant had not yet paid the claimed taxes nor obtained a waiver. The matter was set down for hearing on 2nd June, 2020 but was adjourned. Thereafter, the matter stalled until the 21st of March, 2022 when the Applicants filed an application for a waiver after an embargo was placed on their properties by the defendant.

2. The waiver was granted on 31st March, 2022. On 17th May, 2022, the Respondent instituted criminal proceedings against the Claimants for tax fraud on the same facts as in the VAT appeal. The Claimants applied for a judicial review against the decision of Respondents to institute criminal proceedings against them in respect of factual matters which are already the subject matter of an ongoing proceedings before the Chief Resident Magistrate in a VAT Appeal.

CLAIMANTS' CASE

3. The Claimants are contesting the decision of the Defendant to commence criminal proceedings against the past and current directors of the 1st Claimant arising out of the same facts that are subject of legal proceedings between the 1st Claimant and the Defendant in VAT Appeal Number 198 of 2020.

(a) The Claimants contend that the decision of the Defendant constitutes a flagrant abuse of the process of this court for the following reasons:

- It amounts to a litigation over the same subject matter in two different courts of concurrent jurisdiction with the effect that there is a risk of the two courts coming to different conclusions and thereby bringing the administration of justice into disrepute and public scandal
- The said proceedings have been brought for a collateral purpose of frustrating the appeal of the 1st Claimant currently pending before the Resident Magistrate Court.
- The said proceedings have been brought for the collateral purpose of coercing the 1st Claimant into paying the disputed tax to the Defendant without having to insist on its statutory right to seek an appeal before the Resident Magistrate Court.

(b) By reason of the foregoing matters, the decision of the Defendant is oppressive and unfair.

(c) The Defendant's decision to commence criminal proceedings against the 2nd and 4th Claimants after a delay of more than four years is in itself evidence of *mala fides* (bad faith) and a violation of Claimant's constitutional right under section 42(2)(f)(i) to be tried within a reasonable time.

(d) The Defendant's decision is so unreasonable, in the *Wednesbury* sense, in that no reasonable public prosecutor, properly guiding herself on the facts and the law which ought to have controlled her decision on the occasion, could have arrived at it.

4. The Claimant now seeks the following reliefs:

- A declaration that the decision of the Defendant to commence criminal proceedings against 2nd to 4th Claimants in respect of the same facts that are subject of legal proceedings between the 1st Claimant and the Defendant in VAT Appeal Number 198 of 2020 amounts to an abuse of court process.

- A declaration that the decision of the Defendant to commence criminal proceedings against 2nd to 4th Claimants after a delay of more than four years is evidence of *mala fides* (bad faith)
- A declaration that the decision of the Defendant to commence criminal proceedings against 2nd to 4th Claimants after a delay of more than four years violates their right to be tried within a reasonable time as guaranteed to them under section 42(2)(f)(i) of the Constitution
- A declaration that the decision of the Defendant to commence criminal proceedings against 2nd to 4th Claimants in respect of the same facts which form the basis of the 1st Claimant's appeal against the tax assessment of the Malawi Revenue Authority, now pending before the Senior Resident Magistrate sitting at Lilongwe as VAT appeal Case No. 198 of 2020, is unreasonable in the *Wednesbury* sense
- An Order quashing the impugned decision *in toto*
- An Order of permanent stay of the criminal proceedings before the Resident Magistrate Court at sitting at Lilongwe against the 2nd, 3rd and 4th Claimants in Criminal Case No. 580 of 2022.
- An Order for costs of these proceedings on an indemnity basis.

DEFENDANT'S CASE

5. The application for permission to apply for judicial review is not unopposed. The defendant filed a sworn statement in opposition dated 21st July 2022, sworn by Andrew Mulauzi, a Senior Tax Investigations Officer in the employ of the Malawi Revenue Authority. He informed the Court that his department received a tip from an informant that the Claimants were not really exporting the goods as alleged in a bid to avoid paying Value Added Tax which is not applicable on export, but in actual sense, the goods were being sold in Malawi. They were getting the documents stamped but not physically exporting the goods. They carried out a tax investigation and confirmed the reports. Specifically, they found the following-

i. The 1st Claimant was found with original export documents which in normal circumstances are supposed to accompany the goods.
ii. The 1st Claimant failed to provide the in-transit documents nor goods received notes to prove that the goods were indeed received by the customer.
iii. The investigations at the Mozambique border revealed that the motor vehicles provided by the Claimants did not cross their border and that Mozambique banned importation of such goods a long time ago.
iv. The motor vehicles could not be traced in the Road Traffic Directorate system.

6. Mr. Mulauzi further informed the Court that MRA communicated its findings to the Claimants who sought further information through Mr. Kaluluma, whom the 1st Claimant appointed as their representative. The 1st Claimant appealed against the re-assessment, but after considering the grounds of appeal, it was the defendant's observation that the said Claimant did not have concrete evidence that the goods were exported. The appeal was

thus dismissed by the Commissioner General. Further, it was also their observation that the issue had an element of fraud. He further averred that without first paying the taxes or obtaining a waiver of the payment of taxes as required by the law, the 1st Claimant then appealed to the Resident Magistrate Court in Lilongwe against the assessment and they responded. Alongside the sworn statement in response to the appeal, the defendant also filed for a notice of preliminary objection on the basis that the 1st Claimant did not pay taxes nor obtain a waiver before the filing of the appeal.

7. Mr. Mulauzi avers the Court that the matter then stalled until the 15th March, 2022 when the defendant executed a warrant of distress for the assessed sum of MK 2,048,224,386. Following the warrant of distress, the 1st Claimant then filed for a waiver and the same was granted on 24th March, 2022. He avers that although the 1st Claimant filed a VAT appeal with the Resident Magistrate Court, considering the issues raised above, the facts revealed actions that are criminal in nature perpetuated by the Directors and Officers of the 1st Claimant. It is on this basis that the defendant proceeded to institute criminal proceedings against the Directors and Officers of the 1st Claimant.

8. Mr. Mulauzi deponed that the VAT appeal and the criminal proceedings are different as the VAT appeal is on tax liability while the criminal prosecution relate to commission of an offence. He avers that there was no bad faith on the part of the defendant when instituting criminal proceedings. The prosecution is based solely on the facts and findings in the investigations report. He avers that the defendant acted in accordance with the law in instituting the criminal proceedings.

ANALYSIS AND DETERMINATION

9. The first contentious issue advanced by the Claimants is that the decision of the Defendant constitutes a flagrant abuse of the court process for the following reasons:

- It amounts to a litigation over the same subject matter in two different courts of concurrent jurisdiction with the effect that there is a risk of the two courts coming to different conclusions and thereby bringing the administration of justice into disrepute and public scandal
- The said proceedings have been brought for a collateral purpose of frustrating the appeal of the 1st Claimant currently pending before the Resident Magistrate Court.
- The said proceedings have been brought for the collateral purpose of coercing the 1st Claimant into paying the disputed tax to the Defendant without having to insist on its statutory right to seek an appeal before the Resident Magistrate Court.

10. It must be highlighted that the civil proceedings in this matter were commenced by the Claimants. It is not the defendant that commenced the civil matter through an appeal that is before Resident Magistrate Court. Thus, in this case the defendant did not commence the civil proceedings before the lower court. In terms of the law as provided under the Customs and Excise Act, nothing precludes the defendant to commence criminal proceedings

against customs law. In other words, the fact that there is an appeal before the Resident Magistrate Court does not act as estoppel for the defendant to indict the Claimants as such. In an Article titled '**Unjust Justice in Parallel Proceedings: Preventing Circumvention of Criminal Discovery Rules**[1], the author, Randy S. Eckers, defines concurrent proceedings as independent, simultaneous investigations and prosecutions involving substantially the same matter and parties. In the above article, the author argues that a determination to either stay or allow the continuation of parallel proceedings depends on existence of certain requirements. He observes:

> "The Courts only block parallel proceedings in special circumstances. A defendant may move for a stay to block parallel proceedings, which will be granted only if the defendant can prove either that the government is acting in bad faith and using malicious tactics to circumvent the strict criminal discovery rules, or that there is a due process violation....
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> Even if a defendant meets one of these requirements, a stay is not guaranteed. The Court takes many other factors into account in deciding whether a stay is appropriate in a specific situation. These factors include the commonality of the transaction or issues, the timing of the motion, judicial efficiency, the public interest, and whether or not the movant is intentionally creating an impediment."

11. The Claimants' argument however, is that the criminal proceedings have just been instituted to frustrate the appeal of the 1st Claimant currently pending before the Resident Magistrate Court and have been brought for the collateral purpose of coercing the 1st Claimant into paying the disputed tax to the Defendant without having to insist on its statutory right to seek an appeal before the Resident Magistrate Court.

12. As I have pointed out already, the law allows the defendant to commence criminal proceedings irrespective of the fact that there is already a civil proceedings of the same facts before another court. Therefore, if the law allows or gives such power to the defendant, the only way such power can be challenged is through judicial review. And this Court as the reviewing court can only review the decision if it is made *ultra vires* or as alleged by the Claimants, that the decision of the defendant was *mala fide* (bad faith). On the other hand, the defendant submits or cautions the Court against interfering with the prosecutorial discretion of the defendant. Further to that, the defendant submits that under section 155 of the Customs and Excise Act, the defendant is allowed to institute criminal prosecution at any time within 5 years. The defendant argues that the section does not put any conditions on the institution of proceedings. To them, putting conditions would be importing into the Act a text which is not there.

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[1] Hofstra La Review, Volume 27, Issue 1, Article 6 available at http://scholarlycommons.law.hofstra.edu/hlr/vol27/iss1/6

13. I begin by stating that it is not disputed that indeed under section 155 of the Customs and Excise Act, the defendant is given prosecutorial powers to institute proceedings within 5 years. However, just like any other prosecutorial powers, although the defendant is thus not bound by any directions, control or recommendations made by any institution or body, being an independent public office, where it is shown that the expectations of the Constitution have not been met, then the High Court under section 108 (2) of the Constitution can properly interrogate any question arising therefrom and make appropriate orders. In that regard, that is where we find many cases, some cited by the Claimants. These cases include **The State and the Director of the Anti-Corruption Bureau ex-parte Shiraz Ferreira**[2], and **The State and the Director of the Anti-Corruption Bureau ex-parte Frank Farouk Mbeta**[3]. In these cases, among others, it was held that if it comes to the attention of the Court that there has been a serious abuse of power, the Court should express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution. See also **Githunguri v Republic**[4].

14. It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See **Ndarua v. R**[5]. See also **Kuria & 3 Others V. Attorney General**[6].

15. Reverting to the present case, though in different ways, both the Claimants and defendant agree that the Court may review prosecutorial powers. Where they differ is that the defendant submits that the Court should be slow to interfere with prosecutorial discretion. The Claimants, on the other hand, submit that the defendant cannot in all reasonableness suggest that this matter raises the issue of prosecutorial discretion. I must state that I agree with the defendant that as long as the Claimants challenge the institution of the criminal proceedings before the Resident Magistrate Court, that in my view, raises the issue of prosecutorial discretion. Whether to prosecute 2nd – 4th Claimants is within the discretion of the defendant as the law allows. As such to challenge that decision, a question of whether such discretion was properly exercised arises.

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[2] Judicial Review Cause Number 82 of 2015
[3] Judicial Review Cause Number 16 of 2015
[4] [1985] LLR 3090
[5] [2002] 1EA 205
[6] [2002] 2 KLR

16. Furthermore, the Supreme Court of India in **R.P. Kapur v State of Punjab**[7], laid down guidelines to be considered by the Court before embarking on the review of prosecutorial powers. These include:

(i) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice; or (Emphasis supplied)

(ii) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction; or

(iii) Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; or

(iv) Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.

17. It is clear in this case, that the Claimants are challenging the prosecution of both civil and criminal matters on the ground that this action may amount to abuse of the process of the court. The Claimants contend that the decision of the defendant constitutes a flagrant abuse of the court process.

18. This Court is surprised to hear the Claimants' Counsel vehemently arguing that the matter does not raise the issue of prosecutorial discretion, when clearly in the grounds for judicial review, he questions how the same prosecutorial discretion was exercised. In **Regina v. Director of Public Prosecutions ex-parte Manning and Another**[8], the English High Court said partly at paragraph 23 page 344:

> "At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the tests were too exacting, an effective remedy could be denied.
>
> Although the standard of review is exceptionally high, the court's discretion should not be used to stultify the constitutional right of citizens to question the lawfulness of the decisions of DPP."

[7] AIR 1960 SC 866
[8] [2001] QB 330

19. It was also held in **Bernard Mwikya Mulinge v Director of Public Prosecutions & 3 others**[9] had the following to say about the role of the Director of Public Prosecutions in prosecuting criminal offences: -

> "It is therefore clear that the current prosecutorial regime does not grant to the DPP a carte blanche to run amok in the exercise of his prosecutorial powers. Where it is alleged that the standards set out in the Constitution and in the aforesaid Act have not been adhered to, this Court cannot shirk its constitutional mandate to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the Constitution itself."

20. It has also been well and rightly argued that, on the basis of public interest and upholding the rule of law, Courts ought to exercise restraint and accord state organs, state officers and public officers some latitude to discharge their constitutional mandates. The Court of Appeal in **Diamond Hasham Lalji & another v Attorney General & 4 others**[10]stated as follows:

> "The elements of public interest and the weight to be given to each element or aspect depends on the facts of each case and in some cases, State interest may outweigh societal interests. In the context of the interest of the administration of justice, it is in the public interest, inter alia, that persons reasonably 'suspected of committing a crime are prosecuted and convicted, punished in accordance with the law, that such a person is accorded a fair hearing and that court processes are used fairly by state and citizens".

21. The subject of abuse of Court process was discussed by the Court of Appeal in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others**[11]as follows:

> "The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it...The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are: -

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[9] [2019] eKLR
[10] [2018] eKLR
[11] [2009] KLR 229

i. Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.

ii. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.

iii. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.

iv. Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness".

22. I am persuaded that this is a good guide in the interrogation of alleged abuse of prosecutorial powers as well as a guide on examples of abuse of court process as applicable in this case as read with section 155 of the Customs and Excise Act. The question that I have to address is whether or not the institution of criminal proceedings by the Defendant amounts to abuse of court process to warrant an order prohibiting them. In **Jago v District Court (NSW)**[12] Brennan, J. said in part at p. 47-48:

> "An abuse of process occurs when the process of court is put in motion for purposes which in the eye of the law, it is not intended to serve. The purpose of criminal proceedings, generally speaking, is to hear and determine finally whether the accused has engaged in a conduct which amounts to an offence and on that account is deserving of punishment. When criminal process is used only for that purpose and is capable of serving that purpose, there is no abuse of process".

23. This Court is well aware that the categories of abuse of process are not limited. Whether or not an abuse of power of the criminal process has occurred ultimately depends on the circumstances of each case. One of the important factors at common law which underlie a prosecutorial decision is whether the available evidence discloses a realistic prospect of a conviction. In **Walton v Gardener**[13], the High Court of Australia said at para 23:

> "The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all categories of cases in which the process and procedures of the court which exist to administer justice with fairness and impartibility may be converted

[12] 168 LLR 23, 87 ALR 57
[13] [1993] 177 CLR 378

into instruments of injustice and unfairness. Thus, it has long been established that regardless of the person responsible for their institution and maintenance, proceedings will constitute an abuse of process if they can be seen clearly to be foredoomed to fail..., if that court is in all circumstances of the particular case a clearly inappropriate forum to entertain them..., if, notwithstanding that circumstances do not give rise to an estoppel their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate a case which has already been disposed of by earlier proceedings". (Emphasis supplied)

24. As already pointed out earlier, the civil proceedings before the Resident Magistrate Court were instituted by the Claimants and not the defendants. The law further allows for concurrent litigation of civil and criminal proceedings arising from the same issues. Thus, in this regard the mere fact that the defendant has power to institute criminal prosecution, this *ipso facto* does not mean that the Claimants would not get a fair trial because the principles of a fair trial are well ingrained in law and practice. Be that as it may, it is my duty to go further to infer the unique circumstances prevailing in this matter, and ascertain whether or not, if the prosecution were to proceed, it would amount to an abuse of process. On that note, I totally agree with the Claimants that if both the civil and the criminal proceedings, which are all centred on the same issue of exporting products the 1st Claimant was manufacturing, are to proceed for hearing in court, there is to some extent a likelihood of the two processes giving rise to two different outcomes. In other words, the claimants may be prejudiced. See **Mcdaphrain Chithuzeni Bango v Attorney General and Malawi Telecommunications Limited**[14].

25. The main issue in this matter, however, is whether the prosecution facing the 2nd to 4th Claimants herein should be stopped since there are civil proceedings already before the lower court and the criminal case amounts to an abuse of Court process. From the above discourse, it comes to the fore that there are instances where a Court ought to exercise its discretion and stop a prosecution. Such instances, well explained above in a litany of cases, include where it is demonstrated that institution of criminal proceedings against an accused may amount to the abuse of the process of the court; or the investigation and prosecution is in gross contravention of the Constitution and the law.

26. First, let me deal with the argument by the Claimants that the institution of the criminal proceedings is contrary to section 42 (2) (f) (i) of the Constitution. On this issue, I do not think the Claimants have really understood section 42 (2) (f) (i) on which they rely their

[14] Civil Cause Number 532 of 2012 (HC).

arguments that the prosecution is in gross contravention of the Constitution and the law. Section 42 (2) (f) (i) provides:

> "(f) as an accused person, to a fair trial, which shall include the right—
>
> (i) to public trial before an independent and impartial court of law within a reasonable time after having been charged". (emphasis supplied)

27. The section clearly states or qualifies on when does reasonable time start from. It state 'after having been charged'. If I have understood well the Claimants argument is that the defendant took so long to formally charge them. My interpretation and understanding of section 42 (2) (f) (i) of the Constitution is that it guarantees an accused person trial within a reasonable time after having been charged. In other words, the trial should not take years after having been formally charged. The argument of the Claimant that reasonable time should even include time for investigations, in my considered view, is not correct.

28. I am aware of instances where people have been placed on remand without charges/trial. However, in those circumstances, the law has provided safeguards. In this case, the Claimants were charged on 30th May 2022. The only reason the trial has not proceeded is as correctly submitted by the defendant that the Claimants obtained a stay of the criminal proceedings soon after being charged. The unreasonable delay in this context cannot be premised on section 42 (2) (f) (i) of the Constitution.

29. All in all, section 42 (2) (f) (i) of the Constitution is not providing for formal indictment. Rather, it only talks about trial within reasonable time. Section 42 (2) (f) (i) of the Constitution simply recognizes the right of an accused person to a fair trial which includes the right to have the trial begin and conclude without unreasonable delay. The Constitution does not define the period that would constitute unreasonable delay. Each case, has to be decided based on its facts. The Claimants are challenging:

> "The Respondent's decision, to commence criminal proceedings against the 2nd-4th Applicants after a delay of more than four years is in itself evidence of *mala fides* (bad faith) and a violation of these Applicant's constitutional right under section 42 (2) (f) (i) to be tried within a reasonable time." (My own emphasis)

30. It is therefore my finding that the argument by the Claimants is misconceived and without merit and the same cannot stand. As already alluded to, section 155 of the Customs and Excise Act has already provided for a limitation period within which the defendant is to prosecute cases. I even remind myself that in tax matters, there is strict interpretation of

the law as enunciated in **R v Commissioner of Taxes**[15]. The Claimants did not refer to this limitation period deliberately. It is therefore my conclusion that they do not have issues with the limitation period as provided for in section 155 of the Customs and Excise Act. I am of the considered view that the Claimants could have an issue had it been that the defendant is desirous to institute criminal proceedings after expiry of the limitation period. Unfortunately, that is not the case in the present application. In my considered view, tax matters being what they are, the framers of the law, decided to put a cap on the period for instituting criminal proceedings.

31. As to the second issue of whether institution of criminal proceedings against an accused amounted to the abuse of the process of the court, my finding is that the instituting of the criminal proceedings against the Claimants does not amount to abuse of Court process. The defendant has raised issues that require the Claimants to respond to. These include that the 1st Claimant was found with original export documents which in normal circumstances is supposed to accompany goods; the 1st Claimant failed to provide in-transit documents nor goods received notes to prove that the goods were indeed received by the customer; the investigations at the Mozambique border revealed that the motor vehicles provided by the Claimants did not cross their border and that Mozambique banned importation of such goods a long time ago. Further, the motor vehicles could not be traced in the Road Traffic Directorate system. The question to be resolved during the criminal proceedings is whether or not there is any reasonable and probable cause that the 2nd to 4th Claimants are linked with the commission of the offences.

32. In **Glinsk v Mclver** [1962] AC 726 Lord Devlin defined reasonable and probable cause as follows:

> "...reasonable and probable cause means that there must be sufficient ground for thinking that the accused was probably guilty but not that the prosecutor necessarily believes in the probability of conviction..."

33. In this case, the Claimants do not deny all the above facts. As to whether the 2nd to 4th Claimants are culpable of the offence, that will be decided by the criminal court. The decision to prosecute as a concept envisages two basic components, namely, that the evidence available is admissible and sufficient and that public interest requires a prosecution be conducted. This is what is commonly referred to as the Two-Stage Test in making the decision to prosecute. See **Communications Commission of Kenya -vs- Office of the Director of Public Prosecutions & another**[16]. Each aspect of the test must be separately considered and satisfied before the decision to charge is made. The Evidential Test must be satisfied before the Public Interest Test is considered.

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[15] (1968-70) ALR 286
[16] [2018] eKLR

34. The Claimants in this matter mainly holds to the belief that the criminal case is being used to settle a civil dispute. They, however, fall short of addressing the manner in which the alleged civil dispute arose. It, hence, remained the cardinal duty of the Claimants to demonstrate, that the criminal process is being used oppressively or on a charge of an offence not known to law, or for purposes of obtaining collateral or other advantages other than bringing the applicant to justice. I am afraid the Claimants have not so established. Meanwhile, the Claimants have also not shown how the prosecution of the criminal case is not in public interest or is not in the interests of the administration of justice or that the prosecution is in itself an abuse of the legal process.

35. The offences against the Claimants are well codified under the Customs and Excise Act. The decision to charge and prosecute the Claimants rests with the defendant as long as it is exercised within the law. The defendant has shown the basis of making the decision to charge and prosecute the Claimants. Whereas the Claimants have a right not to be subjected to an illegal or unwarranted criminal process, the defendant is also under a public duty to ensure that offences are prosecuted and those culpable attended to as law requires. That is the balance created by the law and which this Court is called upon to serious undertake.

36. It is clear that the termination of the criminal proceedings, in the circumstances of this case, will frustrate, instead of advancing, the rule of law. I am of the considered view that, as a court, only in exceptional circumstances, should prosecutorial powers be gagged. Courts should not be in the habit of gagging prosecutorial powers without valid and justifiable reasons, as enunciated above. I remind myself that, as courts, we administer justice according to law and principles of fairness. The law itself, in this regard, the Constitution and different pieces of legislation, guarantee fair trial to accused persons, unless it is proved to the satisfaction of the court that the criminal proceedings are a sham.

37. Reverting to the present case, the Claimants still have constitutional safeguards in respect of their rights even when undergoing the criminal trial. The Claimants will, at the trial, also be accorded an opportunity to challenge the veracity of the evidence including whether the evidence was properly obtained. Based on the foregoing, this Court finds and hold that the Claimants have failed to show how the criminal case is an abuse of the criminal justice system. I therefore dismiss the application for judicial review in its entirety.

Reliefs

38. This Court hereby makes the following final orders: -

(a) The judicial review application dated 15th June 2022 is hereby dismissed.

(b) The conservatory orders issued on 06th June 2022 are hereby discharged and set aside forthwith.

(c) The civil proceedings in the Resident Magistrate Court are hereby stayed pending conclusion and determination of the Criminal Case No. 580 of 2022. I have arrived at this decision to avoid prejudice to the Claimants in the criminal proceedings if the civil proceedings are concluded before the criminal proceedings. See **Mcdaphrain Chithuzeni Bango v Attorney General and Malawi Telecommunications Limited**[17]**; Chiumia v Southern Bottlers Limited**[18]**; Jefferson v Betcha**[19]**.**

39. The Claimants are condemned to pay costs of the present application.

MADE IN OPEN COURT THIS 15TH DAY OF FEBRUARY 2023 AT HIGH COURT, REVENUE DIVISION, LILONGWE DISTRICT REGISTRY.

JOSEPH CHIGONA

JUDGE

[17] supra
[18] [1990] 13 MLR 114 (HC)
[19] [1979] 1 WLR 898