



**Republic v Director of Public Prosecutions & 2 others; Realtime Company Limited & another (Interested Parties); Davetronic Company Ltd & another (Exparte) (Judicial Review Miscellaneous Application E190 of 2021) [2023] KEHC 228 (KLR) (Judicial Review) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 228 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E190 OF 2021  
AK NDUNG’U, J  
JANUARY 26, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> RESPONDENT**

**THE INSPECTOR OF GENERAL POLICE ..... 2<sup>ND</sup> RESPONDENT**

**ANTI-COUNTERFEIT AUTHORITY ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**REALTIME COMPANY LIMITED ..... INTERESTED PARTY**

**AGA KHAN UNIVERSITY HOSPITAL ..... INTERESTED PARTY**

**AND**

**DAVETRONIC COMPANY LTD ..... EXPARTE**

**WILLIAM MUTHEE ..... EXPARTE**

**JUDGMENT**

1. Pursuant to leave granted on December 9, 2021, the ex-parte Applicants moved this court by a Notice of Motion Application dated December 17, 2021 premised under Order 53 Rules 1, 2, 3 and 4 of the Civil Procedure Rules, 2010; Section 3A of the *Civil Procedure Act* (Cap 21) Laws of Kenya; Articles 22, 23, 27, 28 and 47 of the *Constitution of Kenya*; and Sections 25, 26, 32 and 33 of the Anti-Counterfeit Act No. 13 of 2008 Laws of Kenya seeking for orders:



- i. That this Honourable Court be pleased to issue an Order Of Certiorari against the Directorate of Criminal Investigations, the Office of the Director of Public Prosecutions and the Anti-Counterfeit Authority, stopping any or continuing the criminal proceedings in Criminal Case No. E876 of 2021- Republic Vs. JohnGray Communications Limited & Others against the Ex-Parte Applicant as far as the dispute is concerned.
  - ii. That this Honourable Court be pleased to issue an Order Of Prohibition against the Directorate of Criminal Investigations, the Office of the Director of Public Prosecutions and the Anti-Counterfeit Authority, forbidding the further prosecution of Criminal Case No. E876 of 2021- Republic Vs. JohnGray Communications Limited & Others against the Ex parte Applicants as far this dispute is concerned.
  - iii. That the Honourable Court be. pleased to grant any other and/ or further relief under terms that it may find fair and just in the circumstances.
  - iv. That the costs of these proceedings be borne by the 1st Interested Party.
2. The Application was supported by a Statement of Facts dated December 8, 2021, and a Verifying Affidavit dated December 2, 2021, sworn by William Muthee, the Managing Director of the 1<sup>st</sup> ex-parte Applicant. In sum, the ex-parte Applicants case was that they are aggrieved by the decision of the Respondents to undertake criminal proceedings against them [ex-parte Applicants]. The ex-parte Applicants claim that the said decisions/proceedings are: ultra-vires, in excess of powers, contrary to the law and rules of procedure, are illegal, and against public policy. That thus should be declared as null and void.

### **The Responses**

3. The Application is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, 3<sup>rd</sup> Respondent, and the 2<sup>nd</sup> Interested Party.
4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents, in opposition to the Application, filed their Grounds of Opposition dated February 16, 2022, on the grounds that:
  1. The Prayers sought by the Applicant are unconstitutional as they seek to prevent the Director of Public Prosecutions from exercising its mandate as provided under Article 157 of the [Constitution](#). The prayers if granted would result to a greater injustice in the criminal justice system and public interest.
  2. Under Article 157(10) of the [Constitution](#) and Section 6 of the Office of the Director of Public Prosecution Act (2013) the 3<sup>rd</sup> Respondent does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of the powers or functions, shall not be under the direction or control of any person or authority.
  3. Section 24 of the [National Police Service Act](#) mandates the police to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed.
  4. The Applicant has not adduced reasonable evidence to show that the criminal proceedings are mounted for an ulterior purpose.
  5. The Applicant must demonstrate that substantial injustice would otherwise result if the criminal proceedings proceed. The cases are determined on merit.



6. It is in the public interest that complaints made to the police are investigated and the perpetrators of crimes are charged and prosecuted.
7. The Application is without merit and should be dismissed with cost to the 1<sup>st</sup> Respondents.
5. The 3<sup>rd</sup> Respondent, in opposing the Application, through their Replying Affidavit dated February 22, 2022, in summary, averred that the instant Application fails to disclose and/or establish any of the well settled principles for the award of prerogative orders. Also that there is failure by the ex-parte Applicants in demonstrating and establishing illegality, irrationality or irregularity, or even unconstitutionality in the initiation of the criminal charges/proceedings.
6. Additionally, that in particular, the ex-parte Applicants have admitted to taking part in the allegations of criminality subsisting before the trial court. That consequently, in the face of that admission, that they [ex-parte Applicants] supplied to the 2<sup>nd</sup> Interested Party goods now deemed counterfeit and the subject matter of proceedings before the trial court, these instant Application/proceedings lack merit, as they are clearly an abuse of the process of this Court.
7. Further, that the ex-parte Applicants are seeking, through the backdoor, to offer a defence or defences to the criminal charges they are facing before the trial court; and that this Honourable Court must decline an invitation to determine matters pending before the trial court.
8. The 2<sup>nd</sup> Interested Party, in further opposition to the Application, through their Replying Affidavit dated February 21, 2022, in the main, stated that the ex-parte Applicant partly profited from the purchase price it [2<sup>nd</sup> Interested party] paid to Johngray Communications Limited. To the 2<sup>nd</sup> Interested Party, there is a nexus between the ex-parte Applicants and all the accused persons, in the criminal activities on one hand, and the causation of the subject matter transaction on the other hand, that eventually culminated in the institution of the criminal proceedings against them.
9. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the 3<sup>rd</sup> Respondent, and the 2<sup>nd</sup> Interested Party, each prayed that the Application to be dismissed with cost.

### **Parties' Submissions**

10. Parties filed their respective written submissions in advancing their cases. The ex-parte Applicants, in supporting the Application, through their written submissions dated September 30, 2022, submitted that they [ex-parte Applicants] were charged for crimes they allege to have been committed by the Interested Party; and which particulars of the business transactions were not within their [ex-parte Applicants] personal knowledge nor within their dealings.
11. The ex-parte Applicants reiterated that they were the middlemen who were awarded a tender. That an agent cannot be held liable in instances where there is a disclosed principal, more so where deceit or fraud has not been intimated on a party. That instances where an agent can be held personally liable have been established and the same is said to arise in very peculiar circumstances. For such circumstances to arise, it must be established that the agent was acting outside his original/apparent authority so as to incur personal responsibility. The case of Anthony Francis Wareheim T/A Wareheim & 2 Others V Kenya Post Office Savings Bank, Civil Application Nos. Nai 5 & 48 Of 2002; and National Social Security Fund Board of Trustee V Ankhani Holding Limited & 2 Others [2006] eKLR were relied on.
12. That in the instant matter, the decision to charge the ex-parte Applicants with a criminal offence, arising out of an alleged offence committed by his employer, does not confer any liability, to warrant him being put under a criminal trial. That the charges are being brought for ulterior motives, or



for achievement of some collateral purposes, notwithstanding the constitutional and legal powers conferred upon the Office of the Director of Public Prosecutions and the Police. That this court ought to bring to a halt the lower court criminal proceedings. Reliance was placed on the cases of Hannah Wambui Githire V Director of Public Prosecutions & 3 Others [2018] eKLR; Joram Mwenda Guantai Vs the Chief Magistrate. Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170, and R Vs. Attorney General Exp Kipngeno Arap Ngeny High Court Civil Application No. 406 Of 2001.

13. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents, in opposing the Application, filed their written submissions dated 19<sup>th</sup> October 2022, It is contended that to sustain the instant Application, the ex-parte Applicants must prove that the 1<sup>st</sup> Respondent exercised his discretion arbitrarily, oppressively, contrary to public policy, or bad in law. Milimani Miscellaneous Cr. Application No. 20 Of 2017, Republic Versus Director Public Prosecutions & 2 others case was relied upon.
14. It is not for the court to direct the 1<sup>st</sup> Respondent on how to exercise his constitutional powers. However, that the courts can intervene in cases where that power is proved to have been unfairly, improperly, or unjustly exercised. The courts should check the abuse of prosecutorial powers where evidence is presented to the court. The merits of the Respondents decision are not a concern for the Judicial Review court. Reliance was placed on the cases of Douglas Maina Mwangi vs Kenya Revenue Authority and Another High Court Constitutional Petition No. 528 of 2013, and Miscellaneous Application No. 658 of 2004, David Njogu vs. The Director of Criminal Investigations Department.
15. That in the instant matter, the police are only performing a statutory function to determine whether a criminal offence has been committed. The Applicants should therefore not seek to bar the police from investigating. The case of Kenya National Examination Council -vs- Republic, Ex-parte Geoffrey Gathenji Njoroge & Others, C4 266 of 1996 was relied on in that regard.
16. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the Applicants have failed to prove the manner in which the actions of the Respondents amount to abuse of process. That abuse of process and the principles upon which the orders sought by the ex-parte Applicant would be issued by the court, were discussed in the High Court Petition No. 537 of 2017 Stephen Oyugi Okero -Vs - Milimani Chief Magistrate's Court & DCI, cited Bennet v Horseferry Magistrate's Court & Anor.
17. That the ex-parte Applicants are under a duty to demonstrate that in arriving at the decision, the Respondents acted irregularly, unfairly, unreasonably and irrationally; which they have miserably failed to establish or demonstrate. Also, that there is no evidence of misuse of power or contravention of rules of natural justice as alleged by the Applicants. Reliance was placed on the High Court J.R Application. No. 621 OF 2017 R V Inspector General, Director of Public Prosecutions & 3 others case.
18. The 3<sup>rd</sup> Respondent, in opposition to the Application, in their written submissions dated November 14, 2022, posited that the 2<sup>nd</sup> Interested Party lodged a complaint on suspected counterfeit respiratory masks with the 3<sup>rd</sup> Respondent. That it is the statutory duty of the 3<sup>rd</sup> Respondent to investigate fully, complaints lodged with powers to enter, search, seize, and investigate on any aspect of counterfeiting as provided under Section 23 (1) of the [Anti-Counterfeit Act](#). In the instant matter, upon gathering sufficient evidence, recommended to the 1<sup>st</sup> Respondent to prefer criminal charges against the ex-parte Applicants.
19. The 3<sup>rd</sup> Respondent maintained that it conducted itself within the provisions of the law, did not act arbitrarily or with ulterior motives; and the ex-parte Applicants cannot claim illegality with regards to its actions in conducting investigations of suspected counterfeits and establishing commission of an offence under the Anti Counterfeit Act against them. Reliance was on the case of Republic v Anti-Counterfeit Agency Exparte Caroline Mangala T/A Hair Works Saloon [2019] eKLR.



20. The power to institute and continue any criminal proceedings is vested in the Director of Public Prosecutions [1<sup>st</sup> Respondent] who exercised this constitutional mandate independently and without any direction or control by any person or authority. That the 1<sup>st</sup> Respondent acted within its powers by considering the evidence submitted by the 3<sup>rd</sup> Respondent, independently, without any influence; and made the decision to charge the ex-parte Applicants - alongside others involved in the commission of the offence - in the lower court trial case. That the prosecution of the ex-parte Applicants meets the procedural fairness required in making the decision to charge, stemming from credible investigations and sufficient evidence to support the commission of the offence by the ex-parte Applicants. Mohamed Ali Swaleh v Director of Public Prosecution & another Ex- parte Titus Musau Ndome [2017] eKLR case was relied on.
21. Further, the 3<sup>rd</sup> Respondent submitted that it conducted its investigations against the ex-parte Applicants and established their involvement in a counterfeiting offence, a purely criminal matter which falls under its statutory mandate to investigate notwithstanding the existence of a civil claim that would stem therefrom.
22. That it is fallacious for the ex-parte Applicants to allege that the 3<sup>rd</sup> Respondent's actions are towards achieving a collateral purpose and seeking to have them concede to a civil dispute. That civil and criminal proceedings can be heard and determined concurrently. Section 193A of the Criminal Procedure Code; the case of Chris Ochieng & 3 others v Director of Public Prosecutions & another; Jude Anyiko (Interested party) [2021] eKLR, were relied upon.
23. It was the 3<sup>rd</sup> Respondent's submissions that the ex-parte Applicants, in the instant Application, are seeking, through the backdoor to offer a defence or defences to the criminal charges they are facing before the Trial Court; and that this Court must decline an invitation to determine matters pending before the Trial Court. Reliance was placed on the case of Republic v Director of Public Prosecution & 2 others Ex-parte Azim Jiwa Rajwani & another [2022] eKLR.
24. That the Judicial review is concerned with the decision making process and not with the merit of the decision. Reliance was on the Court of Appeal case in Municipal Council of Mombasa -Vs- Republic & Another [2002] eKLR, as quoted with approval in Republic v Director of Public Prosecution & 2 others Ex-parte Azim Jiwa Rajwani & another [2022] eKLR; and Republic v Anti-Counterfeit Agency Exparte Caroline Mangala t/a Hair Works Saloon [2019] eKLR.
25. That the ex-parte Applicants are undeserving of the reliefs sought in the instant Application, as they have not proved aspect of illegality, irregularity and irrationality in the decision making process.
26. The 2<sup>nd</sup> Interested Party, in opposing the Application, in their written submissions dated November 9, 2022, contended that the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents, had the jurisdiction to investigate and institute criminal proceedings against the ex-parte Applicants. That the Respondents' actions were not ultra vires, but they acted within the scope of their powers and/or duties. The Respondents are a creation of the law and they are empowered to investigate and institute criminal proceedings against any person in respect to offences alleged to have been committed by them. Relied on Republic v Vice Chancellor of the University of Nairobi & another ex parte Meyo Victor Mandela [2020] eKLR case.
27. That it is the trial court in the criminal matter that can determine whether or not the ex-parte Applicants are guilty or not. The parameters of the exercise of the court's judicial review jurisdiction were stated in the case of Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300 at pages 303 to 304.



28. That the ex-parte Applicants have not demonstrated how the Respondents acted in excess of their powers. That no proof that the criminal proceedings were instituted against the ex-parte Applicants for ulterior motives or at all, was adduced. Notably, that the ex-parte Applicants have admitted being involved in the transaction which is the basis of the criminal proceedings; and hence, they cannot allude that the decision to investigate and charge them was arrived at arbitrarily. The case of Eunice Khalwali Miima v Director Public of Prosecutions & 2 others (2017] eKLR was relied on.

### Issues for Determination

29. I have considered the parties' pleadings and submissions, and the issues for determination are: first, whether the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' decisions to investigate and prosecute the Applicants was in abuse of their powers, and/or motivated by ulterior motives; and second, whether the Applicant is entitled to the relief sought.

### Analysis and Determination

30. Judicial review jurisdiction, was discussed in the Ugandan case of Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300, that:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876).”

31. Judicial review is now entrenched as a constitutional principle pursuant to the provisions of Article 47 of the Constitution, which provides for the right to fair administrative action, and Section 7 of the Fair Administrative Action Act in this regard provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision. In addition, it was emphasized by the Court of Appeal in Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that Article 47 of the Constitution as read with the grounds for review provided by Section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial



review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator.

32. Article 165(6) of the [Constitution](#) also provides that this Court has supervisory jurisdiction over any person, body or authority that exercises a quasi-judicial function or a function that is likely to affect a person's rights. The consideration and determination of the substantive issues raised in this instant application now follows.
33. On the first issue, on abuse of prosecutorial powers, it is important to first deal with the applicable principles and circumstances under which the Court will grant order prohibiting the commencement or continuation of a criminal trial process. In this respect, 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 merits of the case, and particularly whether the criminal proceedings have a likelihood of success, or that the Applicant has a good defence is also not a ground for halting criminal proceedings by way of judicial review, in light of the purpose and limits of judicial review explained in the foregoing.
34. However, if an Applicant demonstrates that the criminal proceedings constitute an illegality or abuse of process, this Court will not hesitate in putting a halt to such proceedings, as that fall squarely within its mandate as a judicial review Court. The cases of *Peter Ngunjiri Maina v DPP & 2 Others* (2017) eKLR, and *R v DPP & 2 Others Ex parte Nomoni Saisi* (2016) eKLR identified various scenarios that would require interrogation to warrant a review of the unfettered discretion of the Director of Public Prosecutions as follows:
  - a. Where there is an abuse of discretion;
  - b. Where the decision-maker exercises discretion for an improper purpose;
  - c. Whether decision-maker is in breach of the duty to act fairly;
  - d. Whether decision-maker has failed to exercise statutory discretion reasonably;
  - e. Where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;
  - f. Where the decision-maker fetters the discretion given;
  - g. Where the decision-maker fails to exercise discretion;
  - h. Where the decision-maker is irrational and unreasonable.
35. In this regard, the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court as recognised by Section 193A of the Criminal Procedure Code; 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.
36. These principles have been restated in various judicial decisions. The role of the different players in the criminal process was recognised in *Republic vs Commissioner of Police and Another ex parte Michael Monari & Another*, [2012] eKLR where it was held that:

“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. The predominant reason for the institution of the criminal case



cannot therefore be said to have been the vindication of the criminal justice. 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”.

37. In *Joram Mwenda Guantai vs The Chief Magistrate*, [2007] 2 EA 170, the Court of Appeal explained the applicable principles as follows:

“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 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.”

38. In *Johnson Kamau Njuguna & Another vs Director of Public Prosecutions* (2018) eKLR, the court also restated the said principles thus:

“It is settled law that the role of the court in a judicial review application of this nature is to ensure that an applicant is not dragged willy-nilly into court on criminal charges when there is no substantial evidence to sustain an indictment. The DPP has the authority and discretion to decide who, when and how to prosecute within the bounds of legal reasonableness. That role cannot be usurped by the court. If the DPP acts outside the bounds of legal reasonableness, however, he acts ultra vires and the court can intervene, because it is the court’s high responsibility and inherent power to secure fair treatment for all persons brought before the court, and to prevent an abuse of the court’s process.”

39. The Court of Appeal in *Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others*, [2013] eKLR also held as follows on concurrent criminal and civil proceedings on the same issues:

“While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings” It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely a civil dispute litigated in court. This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations”



40. The circumstances when a court can intervene in a criminal prosecution was also the subject of the decision in *R vs. Attorney General exp Kipngeno Arap Ngeny*, High Court Civil Application No. 406 of 2001 wherein it was held that:

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive 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”.

41. Likewise, it is also not the duty of the judicial review court to engage in an examination of the merit or otherwise of the charges to be preferred. The sufficiency or otherwise of the charges or evidence is left to the trial court.

42. Turning back to the instant matter, the question that therefore need to be answered by this court is whether the criminal proceedings against the ex parte Applicants were brought in abuse of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent’s powers, were unreasonable, or were motivated by improper motives. In the present matter, it is not in dispute that the ex-parte Applicants were parties in the transaction that now forms the basis of the criminal proceedings in the trial court. Also, there is no evidence before this court that there is a pending civil case between the parties - in regards to the business transaction -; and the argument that the criminal proceedings were meant to force the Applicant to submit to a civil claim cannot therefore lie.

43. This Court therefore finds that insufficient evidence has been brought by the Applicant to show any abuse of powers, bad faith, or ulterior motives on the part of the Respondents, in investigating and prosecuting the ex-parte Applicants for a criminal offence.

44. On the second issue as regards the relief sought, the Applicant has sought orders of certiorari and prohibition. The Court of Appeal held in *Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996* inter alia as follows as regards the nature of the said remedies:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...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 for 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... .... Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”



45. I find that as the Respondents have not been shown to have acted illegally, or in abuse of their powers, no grounds have been established for the orders of certiorari and prohibition - sought by the Applicants. In addition, the Respondents cannot be restrained from undertaking their constitutional and statutory duties.
46. In the premises, the Applicant's Notice of Motion dated December 17, 2021 is unmerited, and is accordingly dismissed. Each party to bear its own costs.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF JANUARY 2023**

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**A. K. NDUNG'U**

**JUDGE**

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