



Republic v Director of Criminal Investigations & 2 others; Bimenyimana (Interested Party); Elmi & another (Exparte Applicants) (Judicial Review Application E040 of 2023) [2023] KEHC 24950 (KLR) (Judicial Review) (26 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24950 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E040 OF 2023
JM CHIGITI, J
OCTOBER 26, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

THE DIRECTOR OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

DCIO KABETE POLICE STATION 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

AND

PHILIPPE BIMENYIMANA INTERESTED PARTY

AND

ALINOOR ABDI ELMI EXPARTE APPLICANT

SIMON MOGOI OKECHI EXPARTE APPLICANT

JUDGMENT

1. Pursuant to leave granted on 24th March, 2023 the Ex-parte Applicants filed a Notice of Motion dated 27th March, 2023. The Application is brought under Article 23(3)(F) and Article 47(1), (2) of *the Constitution* of Kenya, 2010, Sections 8 and 9 of the Land Reforms Act, Sections 3A of the *Civil Procedure Act*, and Order 53 Rule 1 of the Civil Procedure Rules, 2010. The Application is seeking for:

1. An order of Prohibition do issue to prohibit the Director of Criminal Investigations, the DCIO Kabete Police Station or any agencies or departments of the police from arresting,



detaining, summoning, or requisitioning the Ex parte applicants based on the complaint by the Interested Party regarding the vehicles KBG 632E and KAX 364L.

2. An order of Prohibition do issue to prohibit the Director of Public Prosecutions of the Republic of Kenya, the 3rd Respondent herein from charging the ex-parte applicants based on the complaint by the Interested Party regarding the vehicles KBG 632E and KAX 364L.
 3. An order of Mandamus do issue mandating the Respondents to return to the 2nd Applicant herein vehicles KBG 632E and KAX 364L.
 4. An order of Certiorari do issue to quash and quash the investigations and the charges against the Applicants based on the complaint by the Interested Party regarding the vehicles KBG 632E and KAX 364L.
 5. Costs of this Application.
2. The Application is based on the grounds: on the face of it, on the Statutory Statement, and on the Verifying Affidavits by Alinoor Abdi Elmi and Simon Mogoi Okechi, separately deponed. The Statutory Statement and the Affidavits are dated 22nd March, 2023. Contemporaneously with the filing of the Application, a Supporting Affidavit dated 27th March, 2023 was filed having been deponed by the 1st Ex-parte Applicant.

Applicant's Case

3. It is the Applicants' case that the 1st Ex-parte Applicant is the proprietor of all that property known as Dagoreti/Riruta/71xx, whereof he runs several businesses including a petrol station, restaurant, supermarket, and others and in doing so maintains parking slots/spaces for its clients.
4. That on 24th December, 2017 the Interested Party, through his agents towed and parked his (the Interested Party's) buses registration numbers KBG 632E, and KAX 364E. It was agreed between the 1st Ex-parte Applicant, and the Interested Party's agents that a parking/storage fee of Kes. 1000 for every 24 hours would be charged, but in any event, the vehicles would be collected within 7 days.
5. It is claimed, by the 1st Ex-parte Applicant, that the Interested Party did not collect the vehicles throughout the year 2018, and counsel for the 1st Ex-parte Applicant and the Interested Party engaged regarding the payment of the parking fees, and release of the vehicles. That the vehicles remained in the 1st Ex-parte Applicant's possession for six (6) years, until November and December, 2022 when the vehicles were advertised for sale as uncollected goods, and subsequently sold at a public auction to the 2nd Ex-parte Applicant. It is maintained that the sale and purchase of the vehicles were done procedurally and lawfully.
6. The Ex-parte Applicants stated that the Interested Party has now reported, the two (2) vehicles as stolen, to the 1st and 2nd Respondents causing the arrest of the Ex parte Applicants' and summons to the DCI Kabete Police Station on numerous occasions with intended charging on 27th March, 2023.
7. It is claimed that, the allegations of the vehicles being stolen is false and unlawful, as the Interested Party was always aware that the 1st Ex parte Applicant had the vehicles. Thus, that the complaint lodged by the Interested Party is malicious and an abuse of the criminal process, not in the criminal justice's interest, for the issue in contention is purely civil in nature, and should be addressed and resolved by the civil process rather than threatening to put the Ex-parte Applicants liberty at risk.
8. According to the Ex-parte Applicants, in an illegal manner, the 1st and 2nd Respondents have attempted to coerce them to pay the Interested Party for the vehicles, for the investigations, and the intended



prosecution to be abated. The request is an unlawful exercise of power, by the 1st and 2nd Respondents, prompted by the desire to intimidate and harass the Ex-parte Applicants, and unless the orders sought are granted, the Ex-parte Applicants stand to suffer substantial irreparable damage/loss to their freedom and property, and gross violation of their Constitutional and Statutory rights.

9. To the Applicants, the decision to invoke the criminal process against them is manifestly civil in nature, is not only unreasonable but also irrational, and an abuse of the criminal process. That the 1st Respondent did not observe the rules of Natural Justice, the provisions of the [Disposal of Uncollected Goods Act](#), and the general applicable laws.
10. Also that the 1st and 2nd Respondent did not exercise discretion properly, did not act reasonably, and did not act independently and in accordance with the law in discharging of their investigative powers. Accordingly, that the Respondents will not suffer any prejudice, if the orders sought are granted.

Respondent's Case

11. In response to the Application, the Respondents through the Office of the Director of Public Prosecutions filed their Replying Affidavit dated 13th April, 2023 which is sworn by PC Dennis Were, a police officer attached to Directorate of Criminal Investigations-Dagoretti Division.
12. It is averred that on 20th February, 2023 vide a letter [DCI/SEC/COMPL/4/2/20/A/VOL.XIII/58 from the Directorate of Criminal Investigations, Headquarters] they were required to investigate a complaint which had been made by the Interested Party.
13. The gist of the complaint, it was deponed, was that on or about 30th December, 2017 the Interested Party and the Ex-parte Applicants entered into an oral agreement for provision of parking services for two (2) motor vehicles registration number KBG 632E and KAX 364E, at Riruta Rehani Petrol Station, for a period of sixty (60) days.
14. It was a term of the agreement that the daily charge per vehicle would be Kenya Shillings Two Hundred only (Kes. 200.00) which translated to Kes. 24,000.00 for the entire period: and the Interested Party paid a deposit of Kenya Shillings Two Thousand only (Kes. 2,000.00) as the balance was to be paid at the point of collecting the buses.
15. However, that the 1st Ex-parte Applicant informed him (the Interested Party) to return on 7th March, 2018. When he returned to the petrol station as agreed, its stated, that he realised his buses had been removed from the petrol station to unknown location, without his consent.
16. That on raising the issue, the 1st Ex-parte Applicant reneged on the initial oral agreement, and asked the Interested Party to pay a daily charge of Kenya Shillings One Thousand only (Kes. 1,000.00) translating to Kenya Shillings One Hundred and Twenty Thousand only (Kes. 120, 000.00) for the entire period the bus was parked.
17. It is said that the 1st Ex-parte Applicant became violent, and assaulted the Interested Party causing him serious bodily injuries. The Interested Party was treated at Nairobi Women's hospital on 8th March, 2018; and a P3 Form was duly filled, the degree of injury was classified as harm. The incident reported the assault incident at Kabete Police Station vide OB 34/8/3/18.
18. Further, that on 14th April, 2018 the Interested Party instructed the firm of James Nyakundi & Company Advocates to write to the 1st Ex-parte Applicant demanding the immediate release of his buses. That the 1st Ex-parte Applicant stated that he would only release the vehicle upon payment of Kenya Shillings Three Hundred Thousand only (Kes. 300,000.00), in utter disregard to the initial plan.



19. To avoid conflict, that the Interested Party offered to pay a lump sum of Kenya Shillings Fifty Thousand only (Kes. 50,000.00) as a final settlement to enable him access his buses. However, he received no formal response from the 1st Applicant.
20. That on or about March 2022, the 1st Ex-parte Applicant contacted the Interested Party requesting him to sell the said buses to him, an offer which the Interested Party flatly declined, while still having no idea as to the whereabouts of the buses.
21. As per the Respondents, on 15th February 2023, the Interested Party received a phone call from an officer from DCI Thika Police Station who informed him that there was an attempt to forcefully transfer his buses. It is stated that the said officer forwarded to him the following documents: an ABSA cash deposit receipt of Kshs. 400,000.00; a Certificate of sale dated 14th December, 2022; a Certificate of registration; a KRA PIN Certificate; Auctioneer's license belonging to Waireri Solomon Njoroge t/a Freeman Auctioneers; a notice of Auction dated 6th December, 2022; and a tape lift dated 15th February, 2023.
22. Thereafter, that the said DCI officer connected him to one Peter Kiriru, a police officer stationed at Kasarani police station, who alleged that the said buses had been sold to him by the 1st Ex-parte Applicant in a public auction conducted on 14th December, 2022. Later, that the Interested Party was summoned, by PC Cyrus Wambua to record his statement and his witnesses' statements. The Ex-parte Applicants were also summoned to record their version of events and respond to the allegations made by the Interested Party.
23. That following the successful questioning of the Applicants, the police recovered one bus KAX 364E, and a Chassis number JAAN1R66P8710013 for Motor vehicle KBG 632E which were towed to Kabete Police Station. The bus was kept at Kabete Police station as an exhibit. That further, the suspects recorded their statements where it was established that the vehicles had been sold through auction at Kenya Shillings Four Hundred Thousand (Kes. 400,000.00) only to the 2nd Applicant.
24. That it was also established that the 2nd Applicant had already changed the colour of the Motor vehicle Reg no. KAX 364E and the body of KBG 632E sold to David Macharia Kariuki leaving behind a skeleton of the chassis/frame. The engine was fitted on Motor Vehicle KAS 402D.
25. Notably, it was stated that preliminary investigations disclosed that the 1st Applicant removed the motor vehicles from the petrol station, where they were parked and refused to disclose to the Interested Party where he had transferred the motor vehicles to. He then sold the Motor vehicle as unclaimed property without notifying the Interested Party.
26. Following the investigations, that it was established that there was reasonable suspicion that a criminal offence had been committed. The agreement for sale between the 2nd Applicant and the purported buyer was entered into even before the alleged public auction was conducted.
27. Consequently, that the Applicants were placed in police custody to be availed before court for the offence of stealing of motor vehicles contrary to section 278 A of the Penal Code. The suspects were later released on police cash bail of Kenya Shillings Fifty Thousand only (Kes. 50,000.00).
28. That contrary to the assertion by the Applicants, Section 193(A) of the Criminal Procedure Code, Chapter 75 Laws of Kenya provides that notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any civil proceedings shall not be a ground for any stay, prohibition or delay in criminal cases.



29. Accordingly, that the Applicants have not demonstrated the 1st and 2nd Respondents acted without or in excess of the power conferred upon them by the law or have infringed, violated, contravened, or in any other manner failed to comply or respect and observe the foregoing provisions of *the Constitution* of Kenya, 2010 or any other provisions thereof or any other provisions of the law in undertaking the said investigations.
30. The Respondent averred that the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed, and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support of the charges. To the Respondent, the Applicant has failed to demonstrate that the actions of the Respondents are tainted with illegality, irrationality, or procedural impropriety to warrant the intervention of this honourable court.
31. Also, that the Applicants presumption of innocence and their fundamental rights and freedoms are guaranteed and jealously guarded by *the Constitution* and do not vanish by their prosecution, if at all, before a competent court of law. Therefore, that the Application dated 22nd March, 2023 be dismissed with costs.

Interested Party's Case

32. In further opposition to the Application, the Interested Party, Philippe Bimenyimana filed his deponed Replying Affidavit dated 2nd May, 2023. It is averred that he is the owner of KBG 632E and KAX 364L, the subject motor vehicles in the prosecution proceedings. That he (Interested Party) agreed with the 1st Ex-parte Applicant, who was then running a petrol station on LR.NO Dagoretti/Riruta/71xx, to park to be the holding bay for the two (2) units of the motor vehicles; with the only condition precedent being that the vehicles were to attract storage of Kes. 200 per day for the period parked.
33. Interested Party stated that he engaged his then lawyer, James Thomson Nyakundi (now deceased) of James Nyakundi & Company Advocates to correspond with the Ex-parte Applicants then lawyer vide the firm of J. Okerosi & Co Advocates regarding the vehicles that had been parked with them; but the negotiations were in vain, which has resulted in him being deprived usage of his vehicles.
34. As per the Interested Party, in mid-year 2018, he offered to pay a gross sum of Kes. 50,000/- from the Kes. 22,000/- that he had initially offered so as to reach an amicable settlement; however, that offer was ignored That instead, the Ex-parte Applicant moved the Interested Party's vehicles from the parking to unknown destination, and insisted on the buses being sold to him, as opposed to releasing the vehicles. That in March 2023, they reached an agreement of Kes. 2,300,000 per unit, but the agreement was never implemented.
35. Further, that as late as the 9th March, 2023 the 1st Ex-parte Applicant engaged the services of Chepkemboi Milka & Co Advocates who did a letter of even date, in which they were demanding for the balance of Kes. 634,000/- after an alleged auction to recover Kes. 1,434,000/- over the storage of the two buses. That what is most striking in the letter is the shift from the Kes. 1000/- per day storage charge that the Ex-parte Applicant had stated was owing to the Kes. 500/-that the second set of advocates were now demanding. That in itself shows the wavy sums as claimed to be accruing per day, and it is a classic case of cover ups to deny me the enjoyment and usage of my property.
36. It is stated that he (Interested Party) has had quite frosty relationship with the 1st Ex-parte Applicant, which led to assaulting him on the 8th March, 2018 resulting in bodily harm. The same was reported to Kabete Police Station vide OB NO 34/8/3/2018, thereby being issued with a P3 form.



37. Additionally, that unbeknown to him, the 1st Ex-parte Applicant unlawfully engaged the services of the 2nd Ex-parte Applicant, and in a bid to sanitize their underhand dealings purported to sell in a choreographed auction to hoodwink everybody that the vehicles had been sold away whereas it is the 1st Ex -parte Applicant who purportedly bought the same.
38. That on 16th January, 2023 the 2nd Ex-parte Applicant did refund to the 1st Applicant, the cash that he was given to place as auction price money to his Account, now that the falsified auction had taken place. The cash was deposited by the 2nd Applicant to Account No 20296XXXXXX in the name of Rehyan Petroleum Limited at 12:39:37 hours.
39. To the Interested Party, this is the conspiracy that the 1st and 2nd Respondents are investigating and pursuing over the eventual fraud that was orchestrated by the Applicants in depriving him of his property. It was maintained that the sale by public auction was therefore, not procedurally done as alleged in the Applicants suit papers.
40. That in as much as the cash bail receipts (which is not a charge sheet) so annexed, to the application by the Ex-parte Applicants, show that investigations are pegged on a charge of stealing of the motor vehicles; indeed, the eventual effect of the dispossession of the buses from him (Interested Party) is an act of deprivation of the subject motor vehicles, and it amounts to stealing the same.
41. It is conceded that the engagements between the Interested Party and 1st Ex-parte Applicant was of civil nature, but the same transposed to being criminal in nature, which led the 1st and 2nd Respondents to investigations.
42. The Interested Party, in the month of February 2023, he alleges that he learnt of the deprivation of the vehicles when a prompt happened on his phone from the National Transport Safety Authority via TIMS, that, there was an attempted forced transfer of ownership of the vehicles together with a call from a person unknown to him on 0719XXXXXXX informing him that there was indeed an attempted forced transfer.
43. The Interested Party, upon receipt of the call/information, he corresponded with the 1st Respondent's offices vide a letter dated 16th February, 2023 complaining about the forced transfer of the vehicles. That were the auction to hold as true, there were procedural missteps that the Applicants made which made the said auction not to stand as valid.
44. Interested Party's lodging of the complaint at the Kabete Police Station is purely on the fact that he was assaulted, and also that he has been deprived the motor vehicles unduly which complaint falls in the province of the 1st and 2nd Respondents.
45. Additionally, that the investigations by the criminal investigations department cannot be stopped when there is an apparent illegality being committed by individuals who may want to hide under the guise and cover of the courts orders, as a cover -up on the acts of commission and omission. And, that the 3rd Respondent cannot be gagged to present criminal charges before a court of law, when elements of criminal acts have been unearthed. This is a constitutional safeguard under Article 157 of *the Constitution* of Kenya, 2010.
46. Therefore, that this instant Application is misconceived, bad in law, and incapable of grant of any known remedy at law; Hence it should be dismissed with costs.



Issues for Determination

47. I have considered the parties' pleadings and submissions. The Ex-parte Applicants' written submissions dated 12th June, 2023 by the learned counsel in the law firm of CSA Advocates LLP. The written submissions dated 29th June, 2023 for the Respondents by learned counsel Becky Arunga from the Office of the Director of Public Prosecutions. And, the written submissions for the Interested Party dated 24th June, 2023 by the learned counsel in the law firm of Omwoyo, Momanyi Gichuki & Co. Advocates. The issues for determination are: first, Whether the 1st, 2nd and 3rd 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

48. Judicial review jurisdiction, was discussed in the Ugandan case of *Pastoli v 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).”

49. 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.
50. 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.



51. 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.
52. On the first issue, on abuse of investigative and prosecutorial powers, it is important to first deal with the applicable principles and circumstances under which the Court will grant an 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.
53. 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.
54. 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; and (h) Where the decision-maker is irrational and unreasonable.
55. 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.
56. 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”.
57. 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.”

58. 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.”

59. 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”

60. 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”.



61. 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.
62. Turning back to the facts of the instant matter, it is not disputed that the investigations and likely prosecution of the Applicant may/arise from a complaint made by the Interested Party. The nature of the complaint is that the Applicants illegally deprived the Interested Party of his motor vehicles (2 buses) that were parked in the 1st Ex-parte Applicant's parking bay – under the disguise of an alleged illegal/nonexistence public auction.
63. Therefore, the investigations and likely prosecution of the Applicants arises from a dispute they had with the Interested Party, who moved the Respondents to act in accordance with their mandate and duties as set down by *the Constitution* and the law.
64. In this respect, under Article 157(4) of *the Constitution*, the Director of Public Prosecutions, who is the 3rd Respondent herein, has the power to direct the Inspector General of Police (whom the 1st and 2nd Respondents are under) to investigate any information or allegation of criminal conduct. The Inspector General of Police is required to comply.
65. Further, the power of prosecution under Article 157(6) of *the Constitution* rests with the 3rd Respondent, and under Article 157(10), he does not require the consent of any person to commence prosecution, and shall be independent in the execution of his or her duties.
66. Nevertheless, in the circumstances of the instant application, there is no evidence of an ongoing or commenced prosecution of the Ex-parte Applicant. It is not indicated in which matter they have been charged, or the charges preferred against them. As such the orders sought against the 3rd Respondent, Director of Public Prosecutions regarding prosecuting the Ex-parte Applicants is premature and pre-emptive; hence such orders cannot issue.
67. Additionally, this Court finds that since the decisions to investigate the Applicants by the 1st and 2nd Respondent were made not on their own motion, but at the request of an aggrieved Interested Party, the said decisions were made legally, and were not unreasonable or in abuse of powers.
68. Moreover, it is pertinent that in the present case no evidence was brought by any party of any civil proceedings that have been instituted against the Applicants or the Interested Party, and the argument that the criminal investigations/proceedings were meant to force the Applicant to submit to a civil claim cannot therefore lie. On the contrary, both parties averred that their advocates had at some point initiated a process of resolving the dispute amicably.
69. This Court therefore finds that insufficient evidence has been brought by the Applicants to show any bad faith or ulterior motives on the part of the Respondents in investigating and prosecuting her for a criminal offence.
70. On the issue as regards the relief sought, the Applicant has sought orders of mandamus, 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.”

71. 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 mandamus, certiorari, and prohibition sought by the Ex-parte Applicants. In addition, the Respondents cannot be restrained from undertaking their Constitutional and statutory duties.

ORDER:

In the premises, the Applicants’ Notice of Motion dated 27th March, 2023 is found to be unmerited, and is accordingly dismissed with costs to the Interested Party.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF OCTOBER 2023.

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J. CHIGITI (SC)

JUDGE

