



**Republic v Directorate Criminal Investigations & another; Mwadime (Exparte);  
Mohamud (Interested Party) (Miscellaneous Application E016 of 2020)  
[2022] KEHC 26877 (KLR) (Judicial Review) (16 February 2022) (Judgment)**

Neutral citation: [2022] KEHC 26877 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
MISCELLANEOUS APPLICATION E016 OF 2020  
AK NDUNG'U, J  
FEBRUARY 16, 2022**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**DIRECTORATE CRIMINAL INVESTIGATIONS ..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**CONSTATINE MAGHANGA MWADIME ..... EXPARTE**

**AND**

**FAUZZIAH EMMAN MOHAMUD ..... INTERESTED PARTY**

**JUDGMENT**

1. Pursuant to leave of court granted on 30<sup>th</sup> July 2020, the ex parte Applicant moved this court vide her Notice of Motion dated 10<sup>th</sup> August 2020 under Section 8(2) of the *Law Reform Act*, Cap 26 of the Laws of Kenya, Order 53. rule 1 of the Civil Procedure Rules 2010 made under Cap. 21 of the Laws of Kenya, Part III of the *Fair Administrative Action Act*, No. 4 of 2015 seeking:
  - i. An Order of Certiorari directed to the Respondents removing into the High Court for purposes of being quashed the Respondent's decision to arrest, charge and or prosecute the Ex parte/ Applicant on allegations of breach of a contractual obligation pertaining to a Sale and Purchase of Maisonette Number 82 Erected on LR Number 12715/100.



- ii. An Order of Prohibition directed at the respondent prohibiting himself, his agents and or employees from arresting, detaining, charging, arraigning in court and or prosecuting the Ex parte/ Applicant on allegations of breach of a contractual obligation pertaining to a Sale and Purchase of Maisonette Number 82 Erected on LR Number 12715/100.
  - iii. The costs of this application be borne by the Respondent.
2. The Application was supported by the grounds on the face of it, Statutory Statement, and a Verifying Affidavit both dated 28<sup>th</sup> July 2020. It was the Applicant's case that the circumstances leading to the Interested Party lodging a complaint with the Respondent are purely civil in nature arising from a Sale and Purchase transaction (purely a contractual issue whose remedy is in civil law and not criminal proceedings) which transaction doesn't warrant intervention of Respondent in execution of their Criminal and Prosecutorial mandate as by law provided. Further, that the 1<sup>st</sup> Respondent has since embarked on harassing, intimidating and threatening the ex-parte Applicant with arrest and prosecution in the event that she (ex-parte Applicant) does not pay/refund the Interested Party the Purchase Price.
3. Opposing the Application, the 2<sup>nd</sup> Respondent filed their Grounds of Opposition dated 15<sup>th</sup> July 2022; on the grounds that:
- i. The Prayers sought by the Applicant are unconstitutional as they seek to prevent the 1st and 2nd Respondents from exercising their mandate. The prayers if granted would result to a greater injustice in the criminal justice system and public interest.
  - ii. The Applicant has not adduced reasonable evidence to show that criminal investigations that are ongoing and yet to be concluded are mounted for an ulterior purpose and have not demonstrated how any of the Respondents have acted without or in excess of powers conferred upon them by law.
  - iii. The applicant must demonstrate that substantial injustice would otherwise result if the criminal investigations proceed.
  - iv. The facts raised by the Applicant can be raised at the trial court as the accuracy and correctness of the facts or evidence gathered by the Respondents can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered in support of the charges.
  - v. Article 157 of *the Constitution* is to the effect that the 2nd Respondent shall institute criminal proceedings only where a criminal offence has been committed.
  - vi. Article 245(4) of *the Constitution* states that no person may give direction to the Inspector General with respect to the investigation of any particular offence or offences or the enforcement of the law against any particular person or persons.
  - vii. Section 14 of the Police Act mandates the police to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed. The 1st Respondent should therefore be allowed to discharge this mandate in the interest of justice and fairness.
  - viii. The petitioner has merely stated his rights and has failed to meet the specificity rule as espoused in the case of Anarita Karimi Njeru vs. Republic(1979) and therefore the petition commends only one order and that is striking out on the grounds that having failed to meet the specificity rule it remains scandalous, speculative and does not meet the doctrine of ripeness since he has



failed to demonstrate how each of his specific rights stated in his application have been or will be infringed, violated and or threatened by the Respondents if the criminal process proceeds to its logical conclusion.

- ix. The matter is still under investigations and no criminal charges have been preferred neither has the file been submitted to the 2<sup>nd</sup> Respondent to make a decision to charge, therefore the 2<sup>nd</sup> Respondent is wrongfully enjoined in this Judicial Review Application.
  - x. That in any event Section 193(A) of the Criminal Procedure Code allows for concurrent civil and criminal proceedings over the same subject matter.
  - xi. That it is in the public interest that complaints made to the police are investigated and the perpetrators of crimes are charged and prosecuted within the confines of the law.
  - xii. That the Application is misconceived, frivolous, vexatious, as the Applicant has not demonstrated how the Respondents have acted illegally, unreasonable, ultra vires and or contrary to natural justice.
  - xiii. That the application is without merit, an abuse of court process and should therefore be dismissed with cost to the Respondents.
4. In response and opposing the Application, the 1<sup>st</sup> Respondents filed their Replying Affidavit dated 22<sup>nd</sup> October 2020, sworn by IP. Desterio Omukaga No. 237017, police investigating officer. It was the Repondents case that the investigations against the ex-parte Applicant, and Amani Village Development Company Ltd are still ongoing with a view of preferring a charge related to obtaining property to wit land parcel number Kajiado/Dalalekutuk/13994 valued at Kshs. 13,500,000/=. The charging will be done if available evidence allows and based on the decision of the 2<sup>nd</sup> Respondents office, the DPP. It was further averred that investigations are yet to be concluded as to whether the Applicant had any authority to transact on behalf of the company being that he has zero(O) shares in the said company. That the investigations are clearly aimed at establishing whether there was the criminal intent to commit a criminal offence and serves no ulterior motive.
  5. The Interested Party in responding to, and opposing the Application filed her Replying Affidavit dated 23<sup>rd</sup> October 2020. The Interested Party's case was that on 28<sup>th</sup> June 2017, at the instance of the Applicant and his company Amani Village Limited, she (Interested Party) and the Applicant entered into two (2) agreements for sale and purchase of properties. That at all material times the Applicant presented himself as a Director of the Amani Village Limited and negotiated and executed sale agreements on its behalf. That the Applicant defrauded her (Interested Party) of land measuring six (6) acres being Parcel Number Kajiado/Dalalekutuk/13992 and that the agreements were just a means to illegally acquiring the land without payment/consideration.
  6. From the record before this court, the ex-parte Applicant did not file his written submission regarding the substantive Application.
  7. The Respondents, in advancing their case filed their written submissions dated 15<sup>th</sup> July 2022. It was their submission that under Article 244 of *the Constitution*, the legal obligation of the National Police Service includes crime prevention, and protection of life and property. That Section 24 of the *National Police Service Act* confers on the Police the duty to investigate crime and recommend prosecution. Once that is done, it is then the 2<sup>nd</sup> Respondent's duty to decide whether or not to prosecute, in accordance with their powers as per Article 157 of *the Constitution*. Reliance was placed on the case of Raphael Waweru Kung'u v Director of Public Prosecutions [2018] eKLR.



8. That in the instant case, the Applicant has failed to demonstrate how any of his constitutional rights have been violated to warrant the orders sought. That the Applicant has highlighted and merely alluded to constitutional provisions without showing through concrete evidence how the rights and fundamental freedoms have been violated to meet the legal threshold for the court's intervention. For this proposition, the cases of Andrew Okoth Onanda v Inspector General Police & 2 others [2018] eKLR, and Petition 546 of 2016, Ashish Kampani v Director of Public Prosecution & 3 others [2016] eKLR were cited.
9. Further, the Respondents posited that the fact a dispute has both civil and criminal elements is per se not a ground for terminating on-going criminal proceedings; as the law anticipated such a situation, hence the provisions of Section 193A of the Criminal Procedure Code. The Case of Paul Ng'ang'a vs OPP and William S.K Ruto & Anor vs AG were relied upon.
10. The Respondents averred that Investigations of criminal complaints do not in any way amount to infringement of rights, and the Applicant has failed to prove how the said investigations infringed on his rights. That the 2<sup>nd</sup> Respondent is yet to receive the investigations file from the 1<sup>st</sup> Respondent; and as yet, no decision to prosecute has been made. At no point was the constitutional rights of either of the parties infringed or threatened. The Respondents beseeched the court to dismiss the instant Application with costs.
11. Additionally, the Interested Party advanced her case, in the filed written submissions dated 3<sup>rd</sup> November 2022. That Section 93A of the Criminal Procedure Code is clear that the institution of civil proceedings does not preclude the State from proceeding with the criminal process. That the person seeking that the criminal proceedings be halted, must justify the grant of such orders. George Joshua Okungu & Another vs The Attorney General Petition NO. 227 and 230 of 2009; Republic v Director of Public Prosecutions & 3 others Ex-Parte Meridian Medical Center Ltd & 7 others [2015] eKLR and Kuria & 3 Others vs Attorney General (2002) 2 KLR 69, cases were relied on.
12. The Interested party submitted that the actions of the Respondents are purely for purposes of conducting a fair process and the Applicant has not tendered any evidence to suggest that by preferring charges against him there will be gross abuse of the criminal process. That the police have a duty to investigate on any complaint once a complaint is made and failure to act would be failing to uphold their constitutional mandate and avert crime. Reliance was placed on the cases of Republic V Commissioner of Police & Another Ex-Parte Michael Monari & Another [2012] eKLR; Investments & Mortgage Bank Limited {I & M} vs Commissioner of Police and 3 others, Nairobi HC Petition No. 104 of 2012, and Midlands Limited & 2 others v Director of Public Prosecutions & 7 others [2015] eKLR
13. It was the Interested Party's submissions that there is no time limit for preferring criminal charges under the Penal Code or the Limitations of Actions Act, Cap 22 Laws of Kenya; and moreover, that the Applicant has not demonstrated how his constitutional rights have been infringed. The cases of Anarita Karimi Njeru versus the Republic [1979] KLR 154; Raymond Kipchirchir Cheruiyot & another v Republic [2021] eKLR; Attorney General v Chief Magistrate, Milimani Law Courts & 3 others Ex-parte Mohan Galot [2018] eKLR were cited in this regard.. The Interested Party urged this honourable court to dismiss this instant Application.
14. After a careful considering of the Application, parties' cases, and submissions on record, the issue for determination crystalizes to whether the Applicant has established the legal threshold for the grant of the judicial review orders sought, and if in the affirmative, what orders should issue. The court is also tasked to make an order on costs.



15. 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).”

16. 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.
17. 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.
18. Notably, in the instant matter, from the records before this court, I note that the Applicant has not yet been charged with criminal offence as of yet; however, there are ongoing investigations on the suspected criminal conduct of the Applicant in regards to the dealings with the Interested Party.
19. It is important at this stage to set out 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.

20. 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 would 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.
21. 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.
22. 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”.
23. 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.”

24. 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.”

25. 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 dispute litigated in court. This is 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”

26. 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”.



27. 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 proper authority.
28. Turning back to the instant matter, the question that therefore need to be answered by this court is whether criminal investigations/proceedings against the ex parte Applicant are likely to be brought in abuse of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's powers, are unreasonable or are motivated by improper motives.
29. In this respect, it is not disputed that there are contractual dealings between the ex-parte Applicant and the Interested Party, which dealings led to the Interested Party lodging a complaint with the 1<sup>st</sup> Respondent, against the ex parte Applicant. The Respondents conceded to the fact that investigations to that complaint are still ongoing by the 1<sup>st</sup> Respondent; and no criminal charges/proceedings have yet been preferred against the ex parte Applicant by the 2<sup>nd</sup> Respondent. Further, there is no evidence before this court that there is a pending civil case between the parties in regard to the business transaction and the argument that the criminal investigations/proceedings are meant to force the Applicant to submit to a civil claim cannot therefore lie.
30. The Applicant has the legal onus to demonstrate that the process undertaken by the Respondents is marred with illegality, irrationality or procedural impropriety. A review of the facts in this matter clearly shows that the sued agencies are, in conducting the investigations, merely undertaking their legal mandate. There is no evidence of breach of the Applicants constitutional rights or principles of natural justice. Neither is there an iota of evidence that there is illegality, irrationality or procedural impropriety. This Court therefore finds that insufficient evidence has been brought by the Applicant to show any actual or imminent abuse of powers, bad faith, or ulterior motives on the part of the Respondents in investigating and likely prosecuting the ex-parte Applicants for a criminal offence.
31. I find that as the ex parte Applicant has not demonstrated to this court how his rights have or are likely to be violated. 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 Applicant. In addition, the Respondents cannot be restrained from undertaking their constitutional and statutory duties.
32. In the premises, the ex parte Applicant's Notice of Motion dated 10<sup>th</sup> August 2020 is unmerited, and is accordingly dismissed. Each party to bear its own costs.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF FEBRUARY 2022**

.....

**A. K. NDUNG'U**

**JUDGE**

