



**Republic v Director of Public Prosecutions & another; Nderi & 2 others
(Exparte); Nthiga (Interested Party) (Judicial Review Application
2 of 2019) [2022] KEHC 11633 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11633 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
JUDICIAL REVIEW APPLICATION 2 OF 2019**

LW GITARI, J

JULY 27, 2022

BETWEEN

REPUBLIC APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

AND

JUSTIN KITHINJI NDERI EXPARTE

ASHFORD MUTEMBEI MWIANDI EXPARTE

EUNICE WANGIGE EXPARTE

AND

NJIRU MICHENI NTHIGA INTERESTED PARTY

JUDGMENT

1. The ex-parte applicants instituted the substantive motion dated November 11, 2019, pursuant to the leave granted by this Honourable Court on October 23, 2019 seeking the following orders, inter alia, against the Respondents:
 - a. That an Order of Certiorari does issue to remove into this Honourable Court and quash the decision of the 1st respondent to institute and undertake criminal proceedings against the Ex-parte applicants.



- b. That an order of prohibition does issue directed to the 1st and 2nd respondents restraining the respondents from proceeding with the implementation and/or enforcement of the decision of the 1st respondent to institute and undertake criminal proceedings against the Ex-parte applicants.
2. The ex-parte applicants Justin Kithinji Nderi Ashford Mutembei Mwiandi and Unice Wangige relied on the grounds on the face of the application, the Statutory Statement dated October 23, 2019 and the Verifying Affidavit sworn by the 1st ex-parte applicant Eunice Wangige on the same date. They also relied on the further affidavits by the 1st ex-parte applicant sworn on March 11, 2020 and December 3, 2021 respectively.
3. In opposing the application, the Respondents Director of Public Prosecutions and The Inspector General of Police relied on the replying affidavit sworn on February 5, 2020 by Inspector Abdi Duble, a police officer attached to Chuka Police Station. The Interested Party Njiru Micheni Nthiga also opposed the application vide his replying affidavit sworn on February 18, 2020, and which the Respondents fully associate themselves with.

The facts of this application are as here under:

- a. The 1st Ex-parte Applicant is elected member of County Assembly for Magumoni Ward in Tharaka Nithi. The 2nd and 3rd E-parte applicants are employees of the County Government of Tharaka Nithi occupying the portfolio of a Senior Survey Porter and Plant Operator respectively.
- b. On January 16, 2019, the County Government of Tharaka Nithi (hereinafter, “TNCG”) Depart of Lands, Physical Planning, Housing, Urban Development, Environment and Natural Resources issued a notice to all residents of Kibugua Market requiring them to remove structures and/or buildings within the road reserve in Kibugua Market.
- c. Upon expiry of the aforementioned notice, the TNCG through its officers and/or agents began the exercise of surveying and recovering the road users in Kibugua Market where all structures and/or buildings which abut the amenity of road were taken down.
- d. Being dissatisfied with the exercise, Mr. Njiru Micheni Nthiga (Suing as the legal representative of the estate of Leonard R.I Nthiga, deceased) instituted (Chuka ELC Case NO. 2 of 2019: Njiru Micheni Nthiga –vs- TNCG & 2 Others) in which he sought several remedies against the 1st Ex-parte Applicant, TNCG and others. Judgment has since been entered in the ELC case in favour of the herein Interested Party.
- e. After filing the aforesaid land case, the herein Interested Party lodged a criminal complaint at Chuka Police Station which prompted “investigations” by officers under the 2nd respondent. Upon conclusion of the purported “investigations”, the police file was forwarded to the office of 1st respondent, Chuka Branch, and a decision was made to institute criminal proceedings against the Interested Party.
- f. On October 23, 2019, the 1st Ex-parte Applicant was charged with the office of malicious damage to property contrary to section 339(1) of the *Penal Code* in Chuka Law Courts’ vide Criminal Case No. 1332 of 2019. Importantly, the 1st Ex-parte Applicant is not an employee of the Executive arm of TNCG, and he was, therefore, not directly involved in the alleged damage of property belonging to the Estate of Leonard R.I. Nthiga, deceased.



- g. The 2nd & 3rd Ex-part applicants are employees of TNCG and, if at all, they played their role in survey and recovery of road reserves in Kibugua Market in good faith and strict execution of their duties, their actions cannot render them criminally liable.
 - h. The charging and intended prosecution of the Ex-parte Applicants is irrational. Unreasonable and an abuse of prosecutorial power. If the orders sought herein are not granted, the applicants will be unfairly subjected to an unprocedural and unlawful criminal process much to their irreparable harm, prejudice and injury. On the other hand, the interested party herein has been adequately compensated in the ELC case and therefore, no prejudice shall be suffered by the respondents, or the interested party should the orders sought herein be granted as prayed.
4. The application was canvassed by way of written submissions. The interested party filed his written submissions on December 15, 2021 whereas the respondents filed their written submissions on January 28, 2022. On their part, the ex-parte applicants filed their submissions on 9th May 2022. Hereunder is a summary of the respective submissions by the interested party and the respondents.

The Ex Parte Applicants case

- 5. The ex-parte applicants are mainly challenging legitimacy of the decision by the 1st respondent to charge them for malicious damage to property contrary to section 339(1) of the Penal Code in Chuka Criminal Case No. 1332 of 2019. They contend that the said decision was wrong, improper, an abuse of office, capricious, and will lead to an abuse of the due process as the investigations leading to the said decision were not done properly.
- 6. In addition, the ex-parte applicants contend that the demolitions were carried out on the strength of a notice that had been issued by the County Government of Tharaka Nithi Department of Land, Physical Planning, Housing, Urban Development, Environment and Natural Resources. They noted that the 1st ex-parte Applicant is a sitting member of the County Assembly of Tharaka Nithi County and submitted that the Respondents and Interested Party have failed to demonstrate any nexus between the 1st ex-parte applicant and the said demolitions. Further, it was their submission that the actions of the 2nd and 3rd ex parte applicants should be attributed and/or blamed on their employer, the County Government of Tharaka Nithi County.
- 7. They relied on the following cases to buttress their submissions:
 - a. Republic v Chief Magistrate's Court Nairobi & 3 others Ex parte Stephen Oyugi Okero [2015] eKLR;
 - b. Republic v Director of Public Prosecutions & 2 others; Evanson Muriuki Kariuki (Interested Party); Ex parte James M. Kahumbura [2019] eKLR;
 - c. Republic v Kenya Revenue Authority & 2 others Ex parte Kungu Gatabaki & 4 others; Jacaranda Hotel Limited (Interested Party) [2020] eKLR;
 - d. Joseph Wabukho Mbayi v Frida Lwile Onyango [2019] eKLR;
 - e. Simon Kiama Ndiangu v Republic [2017] eKLR;
 - f. Charles Weta Wandengu v Republic [2019] eKLR.

The 1st and 2nd Respondent's case

- 8. The Respondents submitted that the 2nd respondent is a constitutional office under article 245(1) of the Constitution. The mandate to investigate crime is vested in the police under section 24 of the National



Police Service Act and once done they recommend prosecution to the 1st respondent who then makes the decision on whether to charge the person or not. It is their contention that the merit of the charges leveled against the applicants falls within the jurisdiction of the trial court after hearing the parties and evidence. The respondents thus submitted that the applicants have not demonstrated any fundamental flaws in the decision by the 1st and 2nd respondents to investigate and prosecute them, to warrant the orders of judicial review.

9. They relied on the following cases to buttress their submissions:
- a. [*Republic v National Employment Authority & 3 others Ex-parte Middle East Consultancy Services Limited*](#) [2018] eKLR;
 - b. [*Director of Public Prosecutions v Martin Maina & 4 others*](#) [2017] eKLR;
 - c. [*Sylvana Mpabwanayo Ntaryamira v Allen Waiyaki Gichubi & another*](#)
 - d. [*Republic v Director of Public Prosecutions & 3 others Ex Parte Meridian Medical Center Ltd & 7 others*](#) [2015] eKLR.

Ex-parte's case

10. On its part, the interested party contends that the Applicants are seeking intervention of this court to avoid appearance in the subordinate court to face the criminal charges, a move that is a clear abuse of the court process. He thus supports the Respondents' position that the present application should be dismissed with costs.

Issues for determination

11. After considering the pleadings and submissions made by the respective parties, it is my view that the main issues for determination are:
- a. Whether the decision by the Respondents to investigate and prosecute the ex-parte Applicants was an abuse of power and without any factual basis.
 - b. Whether the Ex-parte Applicants application for the grant of the Judicial Review Orders for Certiorari and Prohibition is merited.

Analysis

Whether the decision to investigate and prosecute the ex-parte applicants was an abuse of power

12. Article 157(6)(a) of [*the Constitution*](#) provides that:
- (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may-
- a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;"
- The second respondent is therefore vested with the mandate to institute and undertake criminal proceedings before court.

13. In this case, the interested party is the complainant in the criminal case being challenged by the ex-parte applicants. He is also the administrator of the estate of his late father, Leonard Nthiga (deceased). The deceased was the registered proprietor of land parcel no. Magumoni/Thuita/779 (hereinafter the "suit land"), which forms the basis of the institution of the charges against the ex-parte applicants.



14. The interested party made a report of malicious damage to property on the suit land to Chuka Police Station on 11th February 2019. He alleged that the buildings on the suit land had been maliciously demolished by T.N.G through its officers and or agents. It is the Respondents contention that after the complaint was made, it was their duty to undertake investigation into the same. The decision whether or not to prosecute is made by the 2nd respondent.
15. The Respondents further contend that after undertaking their investigations diligently, they established that in 2019, the 1st ex-parte applicant then working as a county surveyor in the Tharaka Nithi County Government, caused the buildings on the suit land to be marked with an X sign, with an intention of having them demolished. The 1st ex-parte applicant is now a member of the County Assembly of Tharaka Nithi.
16. It is alleged that the investigations by the Respondent further showed that the 1st and 2nd ex-parte Applicants herein were directly involved in the process of the marking of the buildings on the suit land for demolition and were subsequently joined by the 3rd ex-parte Applicant who maneuvered the excavator that brought down the buildings of the Interested Party.
17. The ex-parte applicants, particularly the 2nd and 3rd ex-parte applicants, have not denied demolishing the said buildings but contend that they did same in due execution of their duties under the Physical Planning Act, with instructions from their employer, the Tharaka Nithi County Government, and after issuance of a notice to the interested party. The 2nd and 3rd ex-parte applicants hold the positions of Senior Survey Porter and Plant Operator respectively with the County Government of Tharaka Nithi.
18. The notice referred to by the ex-parte applicants is dated 16th January 2019. It was issued by the County Government of Tharaka Nithi and addressed to “All Residents Kibugua Market”. It was referenced “Removal of structures and or buildings within the road reserves in kibugua market” and partly read as follows:

“In reference to the physical Planning Act 1996 and subsequent subsidiary Regulations, the County Government of Tharaka Nithi issues a notice to owners along these roads to remove structures and or buildings on the road reserves.”
19. The ex-parte Applicants contend that upon expiry of the aforementioned notice, the Tharaka Nithi County Government, through its officers and/or agents began the exercise of surveying and recovering the road reserves in Kibugua Market where all structures and/or buildings which were built on the road were taken down.
20. Being affected and aggrieved by the demolitions, the Interested Party instituted Chuka ELC Case No. 2 of 2019 Njiru Micheni Nthiga v Tharaka Nithi County Government & 2 Others (hereinafter the “ELC case”) in which he sought several remedies against the 1st ex-parte applicant and the Tharaka Nithi County Government among others. This court, although differently constituted, ordered that the present application be stayed pending the determination of the ELC case so as to avoid a situation where the court issue conflicting orders.
21. The Chuka ELC rendered its decision on June 15, 2021 and found that the notice dated January 16, 2019 was not addressed to the Interested Party as he is not a resident of Kibugua Market. The court further found that the notice itself did not qualify to be called an enforcement notice. thus, the demolition of the Interested Party’s building was not done in the implementation of a proper enforcement notice. Judgment was therefore entered in favour of the Interested Party and he was awarded damages in excess of Kshs. 25 Million.



22. The aforementioned judgment notwithstanding, the Respondents still maintain that their investigations prove that the demolitions were accentuated in bad faith and with ulterior motives of the 1st ex-parte applicant. According to them, their investigations point to the fact that an offence had been committed by the ex-parte applicants hence the decision to prosecute them.
23. Any prosecution commenced without sufficient evidence and proper investigations can easily lead to the conclusion that the prosecution has been launched for ulterior motives. The decision to prosecute by the 1st respondent must be taken with utmost care as it may have profound consequences for victims, witnesses, accused persons' and their families. A wrong decision to prosecute may also erode the public confidence in the office of the 1st respondent and the justice system at large. There are various decisions as cited by the ex-parte applicants to demonstrate that the exercise of prosecutorial power by the 1st respondent is amenable to review by the High Court. See *Commissioner of Police and Director of Criminal Investigations Department and another -v- Kenya Commercial Bank & 4 Others* (2013) eKLR. The ex-parte applicant relies on the case of *Republic -v- Chief Magistrate's Court Nairobi & 3 Others*, Nairobi High Court Misc Civil Application No.114/1997 (unreported) quoted with approval in *R- V- Chief Magistrate's Court Nairobi & 3 Others Ex Parte Stephen Oyugo Okero* 2015 eKLR, where the court pointed out the factors to be taken into consideration before a criminal prosecution is launched. The power to prosecute must be exercised responsibly in accordance with the laws of the land and in good faith. Any prosecution commenced without sufficient evidence and proper investigations may portray a prosecution that has been launched for ulterior motives. In such a case, the decision to prosecute can be reviewed by this court and this is exactly what the ex-parte applicants have invited this court to do. They have urged this court to review the prosecution evidence and find that the same is not sufficient for mounting a prosecution.
24. There are many decisions showing that the exercise of prosecutorial power by the DPP is amenable to review by the High Court. In *Diamond Hasham Lalji & another v Attorney General & 4 others* [2018] eKLR, the Court of Appeal expressed itself as follows:
- “It is also indubitable that the constitutional prosecutorial power of DPP is reviewable by the High Court as Article 165(2)(d)(ii) of *the Constitution* ordains. However, the doctrine of separation of powers should be respected and the courts should not unjustifiably interfere with the exercise of discretion by DPP unless it is exercised unlawfully by, inter alia, failing to exercise his/her own independent discretion; by acting under the control and direction of another person; failing to take into account public interest or interest of the administration of justice in all their manifestations; abusing the legal process; and by acting in breach of fundamental rights and freedoms of an individual.”
25. The circumstances under which the High Court may review of prosecutorial powers were highlighted in the case of *State of Maharashtra & others v Arun Gulab Gawali & others* Criminal Appeal No. 590 of 2007 (27 August, 2010) the Supreme Court of India outlined as follows:
- (I) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;
 - (II) where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;
 - (III) where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; and



- (IV) where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.”
26. In the persuasive case of *Republic v CS, In Charge of Internal Security & 3 others Ex-Parte Jean Eleanor Margaritis Otto* [2015] eKLR, the court observed as follows:

“Proceedings of this nature, ordinarily, do not deal with the merits of the case but only with the process. In other words these proceedings determine, inter alia, whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made, whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters, whether the decision to commence the criminal charges go contrary to the applicant’s legitimate expectation, whether the respondents’ decision to charge the applicant is irrational. It follows that where an applicant brings such proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction to determine such a matter and will leave the parties to resort to the usual forums where such matters ought to be resolved. In other words, such proceedings are not the proper forum in which the innocence or otherwise of the petitioner is to be determined and a party ought not to institute such proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in these kinds of proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and whether such proceedings amount to a violation of his/her rights and fundamental freedoms and once the Court is satisfied that that is not the case, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution’s evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.”

27. From the above authorities, it is apparent that the role of judicial review in criminal cases is limited. This court has not been called upon to try and determine the innocence or otherwise of the accused persons. Rather, it is the duty of this court to determine whether the grounds prohibiting a criminal trial has been established. In *Uwe Meixner & another v Attorney General* [2005] eKLR the Court of Appeal stated that:

“It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.”

28. The above point was emphasized in the persuasive case of *Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji* [2014] eKLR where Odunga, J stated that:

“Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect



urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are bona fides and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the court abetting abuse of the court process by the prosecution.”

29. “Nevertheless, sometimes it is necessary for the court to look at the statements in order to establish if there is evidence to support the charges. Absence of evidence is a ground for quashing a criminal trial and the Court cannot conclude that there is no evidence without looking at the witness statements and exhibits.” [See: *Republic v Chief Magistrate's Court, Nairobi & 3 others Ex parte Stephen Oyugi Okero* [2015] eKLR]
30. The ex-parte applicants herein have been charged with the offence of malicious damage to property contrary to section 339(1) of the *Penal Code*. The said section provides that:
- “Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years.”
31. The ex-parte applicants produced a copy of the judgment by the ELC. The said court found that the County Government of Tharaka Nithi liable for the illegal demolitions of the Interested Party's buildings and awarded him damages. While the decision to prosecute the ex-parte applicants was made before the ELC case was determined, the Respondents maintained the decision notwithstanding the judgment.
32. In the case of *Diamond Hasham Lalji & another v Attorney General & 4 others* (supra) the Court of Appeal stated that:
- “The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision.”
33. The only witness statement on record is that of the Interested Party. He states that his buildings were marked with the X marks sometimes in October 2018. This was prior to the issuance of the notice that the ex-parte Applicants relied on to justify the demolitions. The statement further indicates that the Interested Party met with the 1st ex-parte applicant in his office in Chuka and questioned the legality of the intended takeover of his property. According to his statement 1st ex-parte applicant indicated that the freehold land would not be touched until due legal process was followed. This indicates that the 1st ex-parte applicant was aware of the plan to demolish some properties in the area.



34. The witness statement of the interested party does not implicate either the 2nd or the 3rd ex-parte applicants. In addition, the Interested Party has not described the alleged participation by 1st ex-parte applicant in the demolitions. He only states that he informed the ex-parte applicant of the X-marks on his buildings and inquired on the legality of the intended demolitions.
35. The key words in the offence of malicious damage to property are that the damage must have been done “willfully” and “unlawfully”. The nature of this offence, unlike in a civil jurisdiction, is not one where vicarious liability can attach. Thus, the willful and unlawful act must be attributed directly to the person charged and cannot be assigned. In the instant case, the Respondent ought to have produced clear and manifest evidence to demonstrate that the charges against the ex-parte applicants has some sound foundation and not whimsical. A prosecution commenced without sufficient evidence and proper investigations can lead to an inevitable conclusion that it has no basis. The prosecution must establish that the property was destroyed, that a person destroyed the property and that the destruction was willful and unlawful. The prosecution must prove all the elements of the charge. As submitted by counsel for the ex-parte applicant, the court ought to take into account the intent of the accused person and be satisfied that there is malice. Intent/malice must be proved by the prosecution beyond any reasonable doubts. Malice on the part of the applicants has not been demonstrated
36. In the circumstances, the respondents’ decision to prosecute the ex-parte applicants is not well founded and is therefore amenable to Judicial Review.

Whether the Judicial Review Orders of Certiorari and prohibition sought should be granted.

The ex-parte applicants have shown that a notice and marking of the plots which were allegedly on the road reserve were issued. The 2nd ex-parte and 3rd applicant were employees of TNCG.

I agree with the contention by the applicants that their actions can only be attributed to their employer. It has been demonstrated that the interested party instituted Environment and Land Court case at Chuka seeking compensation arising from same demolitions.

In the case claiming compensation, he filed the case against the Governor Tharaka Nithi County and five others. The 2nd and 3rd applicants were not sued in that suit. Likewise the 1st ex-parte applicants or join them in the suit, then, was not sued and there was no nexus between him and the demolitions. If the interested party did not find reason to sue the ex-parte applicant the question is, why they should be subjected to individual criminal prosecution for actions undertaken on instructions of the employer. The interested party obtained Judgment and compensation was ordered. It is my view in the circumstances there are no basis for prosecuting the applicants for malicious damage to property. The claim in the ELC case was based on trespass. The prosecution for malicious damage whose ingredients are willful destruction is without basis and is clearly in bad faith. In Republic -v- D.P.P & 2 Others, Evanson Muriuki Kariuki (interested Party) ex parte, James K. Kahumbura (2019) eKLR, a persuasive decision which I agree with it was stated:

“Abuse of process has been defined as something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case. Whether a prosecution is an abuse of court process, unfair, wrong or breach of fundamental rights, it is for the court to determine on the individual facts of each case. I am aware that the inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances. The essential



focus of the doctrine is on preventing unfairness at trial through which the accused is prejudiced in the presentation of his or her case or where there is clear breach of fundamental rights to a fair trial courts should first consider whether or not there is anything in the trial to prevent 'a fair trial' and if there is, then the court ought to stop the prosecution."

Whether the Judicial Review Orders for Certiorari and Prohibition sought should be granted

37. In exercising the power of quashing criminal proceedings, the Supreme Court of India in the case of *State of Maharashtra & others v Arun Gulab Gawali & others* Criminal Appeal No. 590 of 2007 (27 August, 2010) gave caution by stating that:

"The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor it can 'soft-pedal the course of justice' at a crucial stage of investigation/ proceedings. The provisions of articles 226, 227 of *the Constitution* of India and section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as 'Cr.P.C.') are a device to advance justice and not to frustrate it. The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of power of the court, but the more the power, the more due care and caution is to be exercised in invoking these powers."

38. It follows that the power to prohibit criminal prosecution should be exercised with great care. It should be remembered that in the first place the people of Kenya bestowed prosecutorial power upon the DPP and in accordance with article 157 of *the Constitution* granted it decisional autonomy. The DPP and his officers are expected to use their expertise in determining which case to prosecute and which one not to prosecute.
39. The ODPP Act in section 4 stipulates the guiding fundamental principles which, in addition to *the Constitution*, guide the DPP in the performance of his powers and functions. One of the powers given to DPP by section 5(4) (e) of the *ODPP Act* is to review a decision to prosecute or not to prosecute any criminal offence.
40. The respondent has not considered review of its decision to charge despite the fact that the Interested Party has pursued the civil case to its logical conclusion against other parties apart from the ex parte applicants. The dispute, by the conduct of the interest is of a civil nature and it would be an abuse of court process to continue with the prosecution of the applicants. It is my view that the prosecution lacks factual basis and the prosecution of the ex-parte applicants is an abuse of the law and the criminal process. It cannot be allowed to proceed. In the circumstances I find that the ex-parte applicants application has merits and is allowed.

I order that

- i. An order of Certiorari do issue to remove to this court and quash the decision of the 1st respondent to institute and undertake proceedings against the ex-parte applicants



- ii. An order of prohibition do issue directed to 1st & 2nd respondents restraining them from proceeding with the implementation of the 1st respondents decision to institute criminal proceedings against the ex-parte applicants.

I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 27TH DAY OF JULY 2022.

L.W GITARI

JUDGE

27/7/2022

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

27/7/2022

