



**Sanoye v Director of Public Prosecutions & 2 others (Judicial Review Miscellaneous Application E023 of 2022) [2022] KEHC 15636 (KLR) (Judicial Review) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15636 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E023 OF 2022  
AK NDUNG’U, J  
NOVEMBER 24, 2022**

**BETWEEN**

**SEURI LEGUSI SANOYE ..... APPLICANT**

**AND**

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

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

**HONOURABLE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Vide a Chamber Summon dated February 19, 2022, the Applicant sought the following orders:
  - i. Spent.
  - ii. That leave be granted to the Applicant to apply for a Judicial Review order of Certiorari quashing the decision of the 1<sup>st</sup> Respondent to charge the Applicant herein with the offences of, Forcible Detainer of Property, Conspiracy to Defraud, Forgery and Uttering a false document contrary various sections of the *Penal Code*, Cap 63, Laws of Kenya in Milimani Law Courts, Chief Magistrate’s Court Criminal Case No 3346 of 2020, Republic versus Seuri Legusi Sanoye.
  - iii. That leave be granted, to the Applicant to apply for a Judicial Review order of Prohibition prohibiting the 3<sup>rd</sup> Respondent from arresting, investigating and/or preferring any charges whatsoever against the Applicant herein on account of the same facts in Milimani Law Courts Chief Magistrate’s Court Criminal Case No 3346 of 2020, Republic versus Seuri Legusi Sanoye.



- iv. That the leave so granted do operate as a stay, staying the proceedings in Milimani Law Courts Chief Magistrate's Court Criminal Case No 3346 of 2020, Republic versus Seuri Legusi Sanoye pending the hearing and determination of the instant application as well as the substantive Notice of Motion.
  - v. That the costs of this Application as well as the interest thereon be borne by the Respondents.
  - vi. Any other and further relief that this Honourable Court may deem fit and just to grant in the circumstances.
2. This court in its Ruling dated February 22, 2022, noted that the impugned criminal charges were instituted over one year ago, and directed that the issue of leave to institute judicial review proceedings be dealt with by way pleadings, affidavit evidence, and written submissions. On May 4, 2022, when the matter came up for mention, interim stay in terms of Applicant's prayer 4 was granted.
  3. The Application is supported
  4. In response, the Respondents opposed the Application.
  5. The 1<sup>st</sup> Respondent in their Grounds of Opposition, dated March 10, 2022, relied on the following grounds:
    - i. That the applicant has not demonstrated an arguable case with a reasonable chance of success so as to warrant grant of leave to file substantive motion for Judicial Review and stay of proceedings in Milimani Chief Magistrate Criminal Case No 3346 of 2020- Republic vs Seuri Legusi Sanoye ('the criminal case').
    - ii. That the Application is frivolous and vexatious and only meant to stifle justice by derailing conclusion of the criminal case.
    - iii. That the Applicant has not demonstrated arbitrariness and Caprice by the 1<sup>st</sup> Respondent in espousing the criminal case.
    - iv. That the application does not disclose incidence(s) of illegality, unfairness and irrationality in the making of the decision to charge and in charging the Applicant in the criminal case
    - v. That the Application does not disclose discrimination and abuse of process by the 1<sup>st</sup> Respondent in commencing criminal proceedings against the Applicant
    - vi. That the Applicant has not demonstrated prejudice that he has suffered or is likely to suffer should the orders sought herein be denied.
    - vii. That Section 193 A of the *Criminal Procedure Code* permits concurrence of civil and criminal proceedings arising from the same subject matter and such concurrency cannot form basis for grant of the orders sought.
    - viii. That the charges of forgery, uttering false document and conspiracy to defraud facing the Applicant in the Criminal Case are independent and not contingent upon ownership of the parcel, the subject of the case.
    - ix. That it is in the public interest and in the interest of justice that criminal incidences cited in the Criminal Case be prosecuted and concluded expeditiously.



- x. That it is in the public interest and in the interest of justice that deference be accorded to independent offices such as the 1<sup>st</sup> Respondent to discharge their constitutional mandate without undue interference by the Applicant herein.
6. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent in their undated Grounds of Opposition relied on the following grounds:
    - i. That the application herein is unmerited and therefore an abuse of the due process of the Court.
    - ii. That the application herein is intended to curtail the statutory obligations and duties of the Respondents herein.
    - iii. That should the applicant be charged, he has an opportunity before the trial Court to prove and demonstrate innocence.
    - iv. That the Applicant has not demonstrated any prejudice that he will suffer by honouring requisitions that seek their respective attendance made pursuant to the law.
    - v. That the Applicant in essence, seeks that this honourable Court to direct a Public officer to exercise or not to exercise his/her statutory discretion in a particular manner hence usurp the said officer's authority.
    - vi. That the application is premised on a presumptuous Notion that the applicant has foreknowledge of what the requisitioning officer is looking for in terms of evidence.
    - vii. That the application herein should be dismissed with Costs to the Respondents
  7. As directed by court, parties filed their respective submissions. In supporting the Application, the Applicant submitted that the 1<sup>st</sup> Respondent unilaterally, arbitrarily, and capriciously commenced criminal proceedings in Milimani Law Courts against the Applicant in Milimani Criminal Case Number E3346 OF 2020 being Republic vs Seuri Legusi Sanoye - with respect to ownership, possession, and acquisition of land parcel number LR NO 26700/3 JR 89699. That the Applicant, was charged in court on October 9, 2020 for the said offences.
  8. Also, that there exists a land litigation matter at the High Court of Kenya at Machakos being ELC Number 91 of 2016 seeking to determine ownership of the same parcel that is also the subject of the criminal case against the applicant in Criminal Case Number 3346 of 2020. That the parties in the criminal case are also the same parties in the ELC case as the Complainant in the criminal case is the plaintiff in the ELC case while the Accused person in the criminal case is the defendant in the ELC case (the Applicant herein). That both Environment and Land Court Number 91 of 2016 and Criminal Case Number 3346 of 2020 are yet to be determined.
  9. The Applicant contended that ownership of the said parcel of land is yet to be determined by the Environment and Land Court at Machakos, yet the plaintiff in ELC Number 91 of 2016 has proceeded to institute criminal proceedings against the Applicant herein, in Criminal Case Number 3346 of 2020.
  10. The Applicant maintained that preferring of charges against him is prejudicial, discriminative, and an abuse of the powers of the 1<sup>st</sup> Respondent, and as such should not be condoned by this Honourable Court. That the Applicant herein ought not to be embarrassed by the proceeding both in the criminal proceedings at Milimani Law Courts and Civil proceedings at the ELC court at Machakos Law Courts.



11. According to the Applicant, the decision to charge, prosecute, and try the him can only follow upon the conclusion of the Environment and Land Case at the ELC court at Machakos Law Courts, and in that case only if, judgment therein is issued in favour of the Plaintiff therein. Further, that the timing of the institution of the criminal case at Milimani Law Courts is suspect as the ELC Case at Machakos Law Courts was filed on August 29, 2016, while the criminal case was instituted on the October 9, 2020. A period of over four years after the filing of the ELC case at Machakos.
12. That this is testament of the fact that the decision to prosecute the Applicant herein, while the ELC case is yet to be determined, and the decision to prosecute the Applicant over four years after the filing of the ELC case, is tainted in illegality, unfairness, irrational and equally tainted in substantive and procedural impropriety. Also, that the said decision is indeed discriminatory and an abuse of the prosecutorial powers granted to the 1<sup>st</sup> Respondent. Reliance was placed on the case of *Loyford Kaburu Joseph v Director of Public Prosecutions 3 others [2016] eKLR*.
13. The Applicant posited that the issues of fraud, possession and ownership of property are live issues in the ELC case ELC Number 91 of 2016, which issues are before the Honourable Judge of the ELC for determination; yet in the charge sheet in Criminal Case Number E3346 of 2020, the prosecution has already concluded and determined the issue of ownership, in favour of the complainant. That therefore, the prosecution has now usurped the powers of the ELC Judge at Machakos in declaring the complainant the owner of the subject parcel of land and the ownership documents to the same. That the 1<sup>st</sup> Respondent cannot act as judge in the ELC case and prosecutor in the criminal case all at the same time. The case of Loyford Kaburu Joseph (Supra) was relied upon.
14. The Applicant averred that the criminal charges have been instituted so as to embarrass the Applicant herein and the same are irrational and are but only out to harass the Applicant in light of the ELC matter. Reliance was placed on *Mohamed Gulam Hussein Farzal Karmah & Another V CM's Court Nairobi [2006] eKLR* case.

### **1<sup>st</sup> Respondent' Submissions**

15. In opposing the Application, the 1<sup>st</sup> Respondent submitted that Prayer number 3, in the subject Application should be dismissed in limine as the power to institute charges is by Article 157 of the *Constitution* vested in the 1<sup>st</sup> Respondent. Moreover, that the 3<sup>rd</sup> Respondent does not wield any powers to investigate crime. That a public body or an institution cannot by way of judicial review be prohibited from exercising powers that it does have in the first place. That, thus Prayer number 3 seeks to engage the Honourable court in an academic exercise and therefore ought to be instantly dismissed.
16. Further, that the Applicant has not demonstrated an arguable case with a reasonable chance of success, so as to warrant grant of leave to file substantive motion for Judicial Review and have the criminal case stayed. Moreover, that concurrency of civil and criminal proceedings arising from the same subject matter cannot form basis for grant of leave to file Judicial Review. Also, that the 1<sup>st</sup> Respondent submits that the Applicant has not, as a condition precedent, demonstrated the prejudice he will suffer should the orders sought be denied.
17. It was the 1<sup>st</sup> Respondent submission that, it is trite law that an Applicant seeking leave to institute Judicial Review must at first demonstrate that he has an arguable case having realistic prospect of success.; and that the duty of demonstrating an arguable case with prospect of success lay on the Applicant. Reliance was placed on the cases of *Republic v Kenyatta University Ex Parte Orwa Dominick & 7 Others (2018) eKLR*; *Sharma Brown -Antoine [2007] 1 WLR 780*, *Republic vs Chief Magistrate Milimani Commercial Courts & 2 Others Ex parte Fredrick Bett [2022] Eklr*; *Uwe Meixner & another*



*v Attorney General [2005] eKLR*; and *Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No 384 of 1996*.

18. It was the 1<sup>st</sup> Respondent's position that, by scrutiny of the material placed before the court, the Applicant has not demonstrated an arguable case to warrant further investigation at a full inter parties hearing of the substantive Application for judicial review. That in particular, the Applicant has not demonstrated arbitrariness and/or caprice by the 1<sup>st</sup> Respondent in espousing CMCC No 3346 of 2020, Republic vs. Seuri Legusi Sanoye. That the Application does not disclose incidence(s) of illegality, unfairness and irrationality in the making of the decision to charge and in charging the Applicant in the criminal case. Also, that the allegation by the Applicant that the decision to prosecute was tainted in illegality, unfairness, irrationality and tainted in procedural impropriety is not backed by evidence of probative value as to be countenanced by the court. The same should be disregarded for being of no legal significance. The case of *Kenya Transport Association vs Municipal Council of Mombasa & Another [2011] eKLR* was relied upon.
19. The 1<sup>st</sup> Respondent averred that the circumstances under which the decision of the DPP may be reviewed are explained in the cases of *Regina vs. Director of Public Prosecutions, Ex-Parte Kabilene [2000] 2 AC 326, 371*; *Jeniffer C. Tele vs Director of Public prosecutions & 3 others (2021) eKLR*; *Pastoli -vs-Kabale District Local Government Council and Others [2008] 2 EA 380*; *Council of Civil Unions Vs-Minister for the Civil Service [1985] AC Z*; and in *Bukoba Gymkhana Club [1983] EA 478*.
20. The 1<sup>st</sup> Respondent maintained that the decision to charge the Applicant was made after the evidential and public interest threshold tests had been surmounted as by law required. That the 1<sup>st</sup> Respondent thus, had regard to the public interest, the interests of administration of justice, and never abused the legal process in approving charges against the Applicant. Consequently, that the 1<sup>st</sup> Respondent posits that as an independent office, it should be accorded deference to discharge its constitutional mandate without undue interference by the Applicant. The 1<sup>st</sup> Respondent contended that courts have previously denied Applicants leave to commence Judicial Review Proceedings on similar grounds as the ones presented in this instant case. The case of *Erick Kibiwott Tarus & 2 others v Director of Public Prosecutions & 7 others [2014] eKLR* was relied on.
21. Further, that the charges of forgery, uttering false document, and conspiracy to defraud facing the Applicant in the Criminal Case are independent and not contingent upon ownership of the parcel, the subject of the case. On the allegation that the decision by the 1<sup>st</sup> Respondent to institute criminal on October 9, 2020, four years after the filing of the Machakos ELC 91 of 2016 was tainted with illegality, unfairness and irrationality, the 1<sup>st</sup> Respondent submits that the allegation is misleading and made in bad faith. That a look at the charge sheet in the criminal case, reveals that offences in count 2 (uttering a false document) and count 4 (forcible detainer) are alleged to have occurred on the June 4, 2020, thus the 1<sup>st</sup> Respondent maintained that it would not have been possible to institute criminal proceedings in 2016 long before the date the offences are alleged to have occurred. That the offence captured at count 3 (conspiracy to defraud) of the charge sheet occurred at an unknown date.
22. The 1<sup>st</sup> Respondent argued that, even assuming that there was delay in prosecuting the Applicant (which is denied), that this would not be a ground for granting leave for judicial review proceedings. Reliance was placed on the cases of *Erick Kibiwott Tarus & 2 others v Director of Public Prosecutions & 7 others [2014] eKLR*; and
23. Additionally, that the Applicant has failed to demonstrate the prejudice that he will suffer in the event of denial of the orders sought. Also, that the Applicant has not demonstrated or even shown apprehension that he will suffer prejudice, or not have a fair trial in the criminal case. That a mere allegation that he will be 'embarrassed' during trial is not prove of prejudice and cannot therefore



form basis for grant of leave to file Judicial Review proceedings. The prayer for stay of the criminal proceedings should therefore be denied. The cases of *Sophia Abdullahi Chacha vs The Director of Public Prosecutions & Another* [2012] eKLR and *Ndynabo vs The Attorney General* [2001] 2 EA 485 were relied upon.

24. The 1<sup>st</sup> Applicant contended that the purpose of leave stage is to sieve through and only allow those applications that have a probability of success. The cases of *R (H) vs. Ashworth Hospital Authority* [2003] WLR 127 at 138) and *Lempaa Suyianka & 5 Others vs Nelson Andayi Havi & 14 others, Caucus of LSK Branch Chairpersons (interested Party)* [2021] eKLR were relied upon.
25. The 1<sup>st</sup> Respondent therefore prays that the subject application be sieved out and prayers therein be denied for being unmerited, frivolous, vexatious and an abuse of the court process as it seeks to unjustifiably stifle justice by derailing conclusion of the criminal case and attempting to foreclose the 1<sup>st</sup> Respondent from executing its constitutional mandate.

### **2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Submission**

26. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents also opposed the Application. It was their submission that any unlawful act is a matter of evidence. That the Police and the Office of the Director Public Prosecutions have special powers of investigations, and if satisfied that there are reasonable grounds of suspecting that an offence under the Act has been committed by the person investigated, then that person will be charged for the offence.
27. It was further submitted that matters of fraud are complex and require investigations and such offenders be brought to book. That once investigations are complete, and there is evidence to charge the person, the trial court will be moved to commence trial. It was therefore their submissions that the 2<sup>nd</sup> Respondent has powers under the Police to conduct investigations.
28. That the grounds relied upon by the Applicant, do not in any way show that the Applicant will not get justice at the Trial Court. The Applicant has not shown how he will suffer if the trial proceeded. That whereas, the Applicant stated that the criminal case and land case were coming up for hearing on February 2, 2022 and February 28, 2022 respectively, this has been overtaken by events and cannot be relied on for the orders sought.
29. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent contended that a Judicial Review Court is a statutory instrument put in place to check the excesses of administrative bodies. That the Applicant has not shown that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents acted or will act in excess or without jurisdiction.
30. That the Applicant also prays for an order of prohibition, prohibiting the 3<sup>rd</sup> Respondent from arresting, investigating, and or preferring any charges whatsoever against the Applicant on account of the facts in Milimani Law Courts Chief Magistrate's Court Criminal Case No 3346 of 2020, Republic vs Seuri Legusi Sanoye. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent submitted that such an order is misplaced since it is not the mandate of the 3<sup>rd</sup> Respondent to carry out investigations and charge any person. The mandate of the 3<sup>rd</sup> Respondent is clearly set out under Article 156 of the *Constitution* which does not include charging any suspect in any criminal case. Therefore, that an order of Certiorari and Prohibition cannot and should not be issued against the Respondents. Reliance was placed on the cases of *Erick Kibiwott Tarus & 2 others v Director of Public Prosecutions & 7 others* [2014] eKLR; and *Francis Matheka & 10 others v Director of Public Prosecutions & another* [2015] eKLR.
31. Further, that He who comes to equity must come with clean hands. That It is evidently clear the Applicant has come to this court just to block a criminal trial against him. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent posited that the fact that there exists a civil suit is not a bar to any criminal proceedings. That Section



193A the criminal procedure code (cap 75) Laws of Kenya provides and permits simultaneous and concurrent civil and criminal proceedings. In the end, the Respondents prayed that the Application dated February 19, 2022 be dismissed with costs.

### Issues for Determination

32. I have had due regard to the Chamber Summons, the statutory statement and verifying affidavit. I have put into account the responses on record and the learned submissions by counsel. The issue for determination is: Whether the Application for leave to commence judicial review proceedings is merited.

### Analysis and Determination

33. It is a requirement of the law under Order 53 Rule 1 of the [Civil Procedure Rules 2010](#), that an Applicant must seek leave to institute judicial review proceedings.
34. Leave is meant to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless; to ensure that the Applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration; to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error; and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived. This reason for leave was discussed in the case of *Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others*, Mombasa HCMCA No 384 of 1996.
35. The Learned Judge further held that leave may only be granted if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the Applicant; the test being whether there is a case fit for further investigation at a full inter parties hearing of the substantive application for judicial review. Granting of leave to file for judicial review is an exercise of the court's discretion, but as always it has to be exercised judiciously.
36. From the foregoing, in an Application for leave, such as the instant one, this court ought not to delve deeply into the arguments of the parties; but should make cursory perusal of the evidence before it [court] and make the decision as to whether an Applicant's case is sufficiently meritorious to justify leave.
37. In the instant matter, the gist of the Application before this court is that the Applicant is seeking to stop prosecution by the 1<sup>st</sup> Respondent, stop investigations by the 2<sup>nd</sup> Respondents, and stop arresting, investigating, and or preferring of any charges by the 3<sup>rd</sup> Respondent.
38. Also, that the criminal prosecution of the Applicant, was preferred when there is still a pending civil case, regarding similar facts in issues in both cases. The law does not bar, criminal and civil case from proceeding concurrently; Section 193A of the Criminal Procedure Code on this issue provides: '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 pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.'
39. The 1<sup>st</sup> Respondent is legally mandated by Article 157 of the [Constitution](#) to carry out prosecution; while the 2<sup>nd</sup> Respondents are legally mandated under Article 245 of the [Constitution](#), to carry out investigations of crimes and apprehension of offenders. The mandate of the 3<sup>rd</sup> Respondent as clearly set out under Article 156 of the [Constitution](#) does not include charging any suspect in any criminal



case, thus an order of Certiorari and Prohibition cannot be issued against the 3<sup>rd</sup> Respondents in the instant circumstances.

40. As was held in *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji*[10]:-

'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.'

41. The law as in the provision in Section 193(A) of the Criminal Procedure Code is clear and the courts have in various decisions settled the law on the matter. In *James Mutisya & 5 others v Alphayo Chimwanga Munala & 2 others* [2021] eKLR it was held as follows;

'Firstly, that the fact that there exist civil proceedings emanating from the same subject matter is not a bar to institution and continuation of criminal proceedings. This is the dictate of Section 193 A of the Criminal Procedure Code (Cap 75) Laws of Kenya it provides thus:

'Notwithstanding the provisions of any other written law the fact that any matter in issue in any criminal proceedings is also directly and substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.'

As rightly submitted by the claimants criminal and civil proceedings can run concurrently. We agree with the Holding of the court in the case of *Alfred Lumiti Lusiba -vs- Pethad Pank Shantilal & 2 others*[2010] eKLR that:

'The conclusion that one can draw from Section 193 A of the Civil Procedure Code together with the decisions of the learned Judges in the aforementioned cases is that both civil and criminal jurisdiction can run parallel to each other and that neither can stand in the way of the other unless either of them is being employed to perpetuate ulterior motives or generally to abuse the due process of the court in whatever manner.'

We could not agree more with the holding of the court in the Alfred Lumiti Lasiba case above. These are civil proceedings governed by civil procedure rules and also different evidential and legal standards. On the other hand, Criminal Case No 2066/18 is governed by the Criminal Procedure Code with a different set of evidential standard and outcome. While the central component of both cases is guarantorship, the legal burden of proof is totality different in both cases. It cannot this be said that



these proceedings an sub-judice the criminal proceedings. We thus do not find merit in the Notice of Preliminary Objection and the Application dated January 23, 2020.'

42. Useful guidance is also found in the case of Alfred Lumiti Lusiba vs Pethad Pank Shantilal & 2 others [2010] eKLR where the court held that:

' The law is clear that the pendency of a civil suit is not a bar to criminal proceedings; it acknowledges the fact that the trial of the tortfeasor in a criminal prosecution need not be affected by the pending civil action against him. It is implied, therefore, that a civil suit cannot be stayed because of the prosecution of the tortfeasor for the obvious reason that the cause of action is neither rooted in the prosecution of the tortfeasor nor in his subsequent conviction. The conclusion that one can draw from Section 193A of the Criminal Procedure Code together with the decisions of the learned judges in aforementioned cases is that both civil and criminal jurisdictions can run parallel to each other and that neither can stand in the way of the other unless either of them is being employed to perpetuate ulterior motives or generally to abuse of the process of the court in whatever manner. The upshot of this discussion is that the learned magistrate misdirected herself on law by staying the civil case against the respondents on the ground that the case was based on a judgment which was a subject of an appeal that was pending for determination. I find merit in the appellant's appeal and I hereby allow it. The appellant will also have the costs of the appeal.'

43. Having invoked the judicial review jurisdiction of this court, it was upon the Applicant to demonstrate an arguable case that requires ventilation at a substantive hearing. I have carefully scoured through the record and submissions. No prima facie case is established to warrant the grant of the leave sought. The law allows both civil and criminal cases to run concurrently. No abuse of prosecutorial powers on the part of the Respondents is demonstrated. Finally, the Applicant has the full protection to be accorded a fair trial, an inalienable right granted to him under Article 50(2) of the *Constitution*.
44. In the end, I reach the inevitable finding that the application for leave before court has no merit. The same is dismissed with no orders as to costs.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF NOVEMBER 2022.**

.....  
**A.K. NDUNGU**

**JUDGE**

