



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BOMET**

**JUDICIAL REVIEW APPLICATION NO. 1 OF 2019**

**IN THE MATTER OF AN APPLICATION BY PAUL KIPLANGAT KETER FOR JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF THE PENAL CODE (CAP 63 OF THE LAWS OF KENYA)**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF SOTIK PRINCIPAL MAGISTRATE'S COURT FILE NO. 191 OF 2012**

**AND**

**IN THE MATTER OF KERICHO ENVIRONMENT AND LAND COURT MISC. APPLICATION NO. 10 OF 2017**

**AND**

**IN THE MATTER OF SOTIK PRINCIPAL MAGISTRATE'S CRIMINAL CASE NO. 1522 OF 2018**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**PAUL KIPLANGAT KETER.....EX-PARTE APPLICANT**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTION.....1<sup>ST</sup> INTERESTED PARTY**

**JOHN KOECH MUGUN.....2<sup>ND</sup> INTERESTED PARTY**

**ATTORNEY GENERAL OF KENYA.....3<sup>RD</sup> INTERESTED PARTY**

**JUDGMENT**

1. The Ex-parte Applicant herein, Paul Kiplangat Keter instituted these proceedings through an Amended Notice of Motion Application brought under Order 53 Rule 3 of the Civil Procedure Rules and dated 27<sup>th</sup> November 2020. The Applicant sought the following Orders:-

(i) An Order of Certiorari to remove in the High Court for purposes of quashing the criminal proceedings against the applicant in Sotik Principal Magistrate's Court Criminal Case Number 1522/2018.

(ii) Costs be provided for.

2. The Ex-parte Applicant relied on various grounds key among them being that the 1<sup>st</sup> Interested Party's decision to prefer criminal charges

was in violation of a Court Order in Sotik Civil Suit Number 191/2012 and the Environmental and Land Court at Kericho Misc. No. 10/2017. That the aforementioned decision was in conflict with the Ex-parte Applicant's right to property under the Constitution.

3. This Court on 15<sup>th</sup> December 2020 issued a temporary stay of proceedings in Sotik Principal Magistrate's Court Case Number 1522/2018 for 60 days. The Interim Orders have since been extended pending the determination of the present Application.

### **The Ex-parte Applicant's case.**

#### **The Application.**

4. The Application is supported by the Statement and Amended verifying Affidavit sworn by the Ex parte Applicant dated 27<sup>th</sup> November 2020. The Ex-Parte Applicant also filed a supplementary Affidavit dated 1<sup>st</sup> March 2021 in response to the 1<sup>st</sup> Interested Party's Replying affidavit dated 23<sup>rd</sup> February 2021. It is the Ex-parte Applicant's case as stated on various averments that he instituted civil proceedings at the Sotik Principal Magistrate's Court vide Civil Suit Number 191/2012 against John Kiplangat Koech (2<sup>nd</sup> Interested Party). The suit proceeded to full hearing and Judgment was entered in the Ex-parte Applicant's favour that the Defendant (John Kiplangat Koech) was a trespasser on the Ex-parte Applicant's parcel of land, L.R Number KERICHO/KIPSONOI/1965. Consequently an Eviction Order was issued requiring the Defendant to be evicted and the structures that he had put up be demolished. The Ex-parte Applicant contended that the Defendant came to his land as a licensee but later claimed to have bought the land.

5. It was the Ex-parte Applicant's case that though aggrieved, the 2<sup>nd</sup> Interested Party failed to set aside the ex-parte Judgment and Eviction Order.

6. The Ex-parte Applicant contended that the 2<sup>nd</sup> Interested Party obtained Title number KERICHO/KIPSONOI/1966 fraudulently on 27<sup>th</sup> May 2014 by curving out a portion of his land and thereafter obtained the Title deed without consent from the Land Control Board and also without executed transfer documents. The Ex-parte Applicant further contended that the 2<sup>nd</sup> Interested Party forcefully re-entered his land in 2016 and reconstructed.

7. The Ex-parte Applicant averred that the 2<sup>nd</sup> Interested Party was jailed for contempt of court. That upon his release from detention, the 2<sup>nd</sup> Interested Party failed to demolish the structures from Land Parcel Number KERICHO/KIPSONOI/1965. The Ex-parte Applicant claimed that the 2<sup>nd</sup> Interested Party went ahead and made a report to the police that he had demolished his structures and that the DPP subsequently charged him.

8. The Ex-parte Applicant contended that the 2<sup>nd</sup> Interested Party was bringing the criminal element with malice to use the proceedings to defeat justice and retake his land. He further averred that the criminal process initiated by the DPP contravened the provisions of the Constitution concerning fair trial because he was arrested and placed in the police cells before being informed of the offence and before being asked to record a statement. That the DPP disregarded his compelling evidence and proceeded to charge him and his co-accused with the offence of malicious damage to property and forcible entry by relying only on the statements recorded by the 2<sup>nd</sup> Interested Party.

9. It was the Ex-parte Applicant's case that the 2<sup>nd</sup> Interested Party was in collusion with the 1<sup>st</sup> Interested Party and the Land Registrar in Bomet to use the criminal process against him. Further that the 2<sup>nd</sup> Interested Party ought to have instituted civil proceedings if he believed he genuinely owned the parcel of land number KERICHO/KIPSONOI/1966.

### **The Ex-Parte Applicant's Submissions**

10. The Ex-parte Applicant submitted that the genesis of Sotik Criminal Case Number 1522/2018 were the decisions in Sotik SRM Civil Suit Number 191/2012 and Kericho ELC Misc Number 10/2017. That there was also a pending suit vide Kericho ELC Number 45/2019 challenging the legality of the Title KERICHO/KIPSONOI/1966. The Ex-parte Applicant further submitted that the parties ought to be given an opportunity to further their dispute in a civil court. That the criminal trial was malicious and oppressive and was in breach of Article 50 of the Constitution. The Ex-parte Applicant relied on the cases of **Republic Vs Chief Magistrate's Court at Mombasa Exparte Ganijee & Another (2002) 2KLR 703** and **Investments & Mortgage Bank Vs Commissioner of Police & The Director of Criminal Investigations Department & DPP & 2 Others (2013) eKLR** to advance his position.

11. The Ex-parte Applicant further submitted that the instant case merited the court's intervention. That he had proved the need for judicial review as there was an abuse of the court process because the issue in contention had been dealt with in a civil court seized with jurisdiction. The Ex-parte Applicant urged that he deserved the reliefs of judicial review to stop the criminal proceedings against him for matters best suited for a civil court. That he was also entitled to a Prohibition Order to stop further proceedings.

### **The 1<sup>st</sup> Interested Party's case (DPP)**

12. The 1<sup>st</sup> Interested Party responded to the application through the Replying Affidavit sworn by Cpl. Sammy Langat who is the Investigating Officer in the impugned Criminal Case Sotik PMCC No. 1522/2018. It is the DPP's case contained in various averments that the 2<sup>nd</sup> Interested Party made a complaint of malicious damage to his piece of land known as KERICHO/KIPSONOI/1966 against the Ex-parte Applicant. Particulars of the complaint were that the Ex-parte Applicant in the company of others, entered his land and destroyed his house valued at about Kshs.700,000. The DPP directed the OCS Sotik Police Station to commence investigations.

13. The DPP contended that documents availed during the investigations indicated that the 2<sup>nd</sup> Interested Party was the owner of the piece of land known as KERICHO/KIPSONOI/1966 and the Ex-parte Applicant was the owner of the piece of land known as

KERICHO/KIPSONOI/1965, which were neighbouring plots. Additionally, the police received a report from the Land Registrar, Bomet that indicated that the destroyed house was situated in KERICHO/KIPSONOI/1966 registered under the name of the 2<sup>nd</sup> Interested Party.

14. It was the DPP's case that based on the evidence gathered, there was probable cause to arrest the Ex-parte Applicant and charge him. The DPP further averred that its decision to charge was correctly made and was founded on the facts elucidated above.

#### **The 1<sup>st</sup> Interested Party's submissions**

15. The DPP submitted that it took its decision to charge after a complaint had been made to the ODPP Bomet by the 2<sup>nd</sup> Interested Party and after calling for the investigation by the police, it was satisfied that the case had a reasonable prospect to attain a conviction. The DPP cited Article 157 of the Constitution of Kenya on its prosecutorial powers and stated that the decision to charge the Ex-parte Applicant was made by a duly authorized officer in the rank of Assistant Director of Public Prosecution. The DPP submitted that the said decision was a proper one.

16. The DPP submitted that his discretion to charge was not unfettered but that courts should be reluctant to interfere with his discretion and only then where there was proof that the decision was actuated by malice and ultra vires the powers of the DPP. He relied on the cases of **Peter Ngujiri Maina Vs Director of Public Prosecutions & 2 Others eKLR** and **R Vs Commissioner of Police and Another Ex-Parte Michael Monari & Another (2012) eKLR** to advance its position. The DPP also submitted that there was no evidence on record to show that there was any personal vendetta between them and the Ex-parte Applicant herein.

17. It was the DPP's submission that Sections 90 and 339 of the Penal Code were supported by eye witness evidence and the report from the Land Registrar Bomet and that the two sections were not unconstitutional as they represented the fulfilment of a citizen's right to own and protect property as enshrined under Article 40 of the Constitution. The DPP objected to the Ex-parte Applicant's assertion that the two sections apply retrospectively.

#### **The 2<sup>nd</sup> Interested Party's case.**

18. It was the 2<sup>nd</sup> Interested Party's case that he was the bonafide owner of all that land known as KERICHO/KIPSONOI/1966. That on or about the year 2018, the Ex-parte Applicant trespassed forcefully on the said parcel of land in the company of other unknown people and destroyed his house.

19. The 2<sup>nd</sup> Interested Party proceeded to Sotik Police Station and reported the said incident vide O.B 24/29/8/2018. The police commenced investigations and finally preferred criminal charges against the Ex-parte Applicant.

#### **The 2<sup>nd</sup> Interested Party's submissions.**

20. The 2<sup>nd</sup> Interested Party quoted Article 157 (6) of the Constitution and stated that it was trite law that for a court to interfere with the decision of the DPP to charge, there must be sufficient proof that the DPP's action or decision is actuated with malice and made in bad faith which amounts to abuse of office.

21. The 2<sup>nd</sup> Interested Party submitted that the DPP cannot work under the direction of the court on who to charge. He relied on the case of **Republic Vs Director of Public Prosecution & Another Ex-Parte Justus Ongera (2019) eKLR** to support his submission. He urged this court not to interfere with the decisions of the DPP or other statutory bodies.

22. I have carefully perused and considered the Amended Notice of Motion Application and its Supporting Affidavit dated 27<sup>th</sup> November 2020, the 1<sup>st</sup> Interested Party's Replying Affidavit dated 23<sup>rd</sup> February 2021, the 2<sup>nd</sup> Interested Party's Replying Affidavit dated 7<sup>th</sup> May 2021, the Ex-parte Applicant's Supplementary Affidavit dated 1<sup>st</sup> March 2021, the Ex-parte Applicant's Written Submissions dated 8<sup>th</sup> March 2021, the 1<sup>st</sup> Interested Party's Written Submissions filed on 1<sup>st</sup> March 2021 and the 2<sup>nd</sup> Interested Party's Written Submissions dated 7<sup>th</sup> May 2021 and the issues that crystallize for determination are:

- (i) Whether the Ex-parte Applicant's decision to charge fell outside the ambit of Article 157 of the Constitution
- (ii) Whether the Ex-parte Applicant is entitled to the Judicial Review Orders sought.

#### **(i) Whether the Ex-parte Applicant's decision to charge fell outside the ambit of Article 157 of the Constitution.**

23. Article 157 of the Constitution of Kenya 2010 establishes the office of the Director of Public Prosecutions (DPP) and key among the powers that the office holds is the ability to 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 office of the DPP has the power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with such direction.

24. The DPP has powers to decide on who to charge based on the evidence at hand. The DPP cannot be directed on who to charge and who not to charge. The law equally allows the DPP to discontinue prosecution if they find it necessary. As to whether the person charged is guilty or not, it is for the court to decide upon conducting a full trial.

25. The Ex-parte Applicant contended that the DPP had violated Article 50 of the Constitution as continuation of the proceedings would be malicious and oppressive. It was the Ex-parte Applicant's position that the pending civil suit number 45/2019 would be jeopardized. Further that the DPP's decision to charge was not founded in law. In response, the DPP stated that his discretion to charge was well within the law and that their office has no personal vendetta against the Ex-parte Applicant.

26. In the case of **Republic Vs Director of Public Prosecutions and Another Ex-Parte Justus Ongera (2019) eKLR**, the High Court held that:-

***“In executing that mandate, the DPP shall have due regard to public interest, promote the interest of justice, apply national values and principles of good governance, promote the rule of law and only be answerable to the constitution. He is expected to work diligently without any discrimination, abuse of power/office and free from any direction, control or influence from any quarters.....”***

***There is no doubt that for the court to interfere with decisions made by the Director of Public Prosecution, one must demonstrate sufficiently that the Director of Public Prosecutions has exceeded his mandate or acted in contravention of the law. The Director of Public Prosecution does not have blank cheques to do what he wishes regardless of the law. He is bound by the Constitution and where there is clear and sufficient proof of such contravention of the law, the court will not hesitate to set such orders aside.”***

However, Article 157 (11) of the Constitution provides that:-

***“In exercising the powers conferred by this Article, the Director of prosecutions shall have regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of legal process.”***

27. Section 4 of the Office of Director of Public Prosecutions Act stipulates the guiding fundamental principles which, in addition to the constitution guide the DPP in the performance of his powers and functions. The section provides that:

***“In fulfilling its mandate, the office shall be guided by the Constitution and the following fundamental principles-***

- a) The diversity of the people of Kenya***
- b) Impartiality and gender equity***
- c) The rules of natural justice***
- d) Promotion of public confidence in the integrity of the office***
- e) The need to discharge the functions of the office on behalf of the people of Kenya***
- f) The need to serve the cause of justice, prevent abuse of the legal process and public interest***
- g) Protection of the sovereignty of the people***
- h) Secure the observance of democratic values and principles and***
- i) Promotion of constitutionalism.***

In the case of **Diamond Hasham Lalji and Another Vs Attorney General and 4 Others (2018) eKLR**, the Court of Appeal stated that:-

***“Among the guiding principles outlined in section 4 of the ODPP Act No. 2 of 2013 and the National Prosecution Policy formulated by the DPP pursuant to section 5 (1) (c) of the ODPP Act are that, the decision to prosecute as a concept envisages two basic components namely; that the evidence available is admissible and sufficient and that public interest requires a prosecution to be conducted.”***

28. Paragraph 4 (b) (2) of the National Prosecution Policy provides that the evidence that the state considers should be strong enough to prove all the elements of an offence and that the evidential material should be sufficient to meet the other issues in dispute.

29. The 2<sup>nd</sup> Interested Party made a complaint that the Ex-parte Applicant had accessed his parcel of land known as KERICHO/KIPSONOI/1966 and destroyed his house. The Ex-parte Applicant averred that the 2<sup>nd</sup> Interested Party fraudulently obtained his Title fraudulently by carving out the portion from his land, parcel number KERICHO/KIPSONOI/1965.

30. It is important to note that if the DPP's decision to charge is legal and within the bounds of legal reasonableness, the court cannot interfere with that role. If the DPP acts outside the bounds of legal reasonableness, he acts ultra vires and at that point the court can intervene because it is the court's duty and inherent power to secure fair treatment for all persons brought before it and to prevent an abuse of the court's process.

31. In the case of **Communications Commission of Kenya Vs Office of The Director of Public Prosecution & Another (2018) eKLR**, the Court of Appeal held that:-

***“The decision whether or not to institute criminal proceedings is purely discretionary. That discretion must however be exercised by the DPP within the constitutional limits, that is, with regard to public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process.”***

32. In my view, the dispute between the Ex-parte Applicant and the 2<sup>nd</sup> Interested Party is ownership of land. From their respective pleadings, this land and its transactions seemed to be clothed in controversy. The Ex-parte Applicant averred in his Supplementary Affidavit dated 1<sup>st</sup> March 2021 that there was no succession done on the land upon the death of the original owner, Tamuige Koros. The Title Number KERICHO/KIPSONOI/1966 is also disputed.

33. Additionally, there is a Judgement in Sotik Civil Suit Number 191/2012 and ELC Kericho Misc. Number 10/2017 that have not been appealed or set aside. There is also a pending Kericho ELC Suit Number 45 of 2019 that challenged the legality of Title Number KERICHO/KIPSONOI/1966. The Judgment in Sotik Civil Suit Number 191/2012 is still valid and it identified the 2<sup>nd</sup> Interested Party as a trespasser in the Ex-parte Applicant’s parcel of land known as KERICHO/KIPSONOI/1965 and ordered his eviction. The dispute between the Ex-parte Applicant and the 2<sup>nd</sup> interested party therefore clearly is civil in nature. The decision to charge was made despite existing court orders. The 1<sup>st</sup> or 2<sup>nd</sup> Interested Parties ought to have set aside the court orders so as to commence criminal proceedings. The criminal proceedings in this case will inevitably defeat the purpose of Kericho ELC Suit Number 45 of 2019.

34. It is my finding that by proceeding to charge the Ex-parte Applicant would deprive the Ex-parte Applicant his rights enshrined under Article 50 of the Constitution. That every person has a right to a fair and public hearing before the court or any impartial tribunal or body. The dispute between the Ex-parte Applicant and the 2<sup>nd</sup> Interested Party is ownership of land. The issues raised between them are civil in nature and a fair hearing would only be achieved where both parties get to ventilate and prove their allegations against each other. A criminal trial implies culpability on one party. The validity or invalidity of a Title Deed and other related issues regarding the transfer of land cannot be effectually determined by a criminal trial.

35. It is settled law that criminal proceedings cannot be used to frustrate or advance a civil suit. In **Republic Vs Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & Another (2002) 2 KLR 703**, it was held that:-

***“It is not the purpose of criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth. . . When a remedy is elsewhere provided and available to a person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For a criminal case, a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court.”***

36. Further in **Kuria & 3 Others Vs A.G (2002) 2 KLR 69**, the court emphatically stated thus:-

***“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tolls for personal score-settlings or vilification of issues not pertaining to that which the system was even formed to perform..... The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court’s) independence and impartiality [as per Section 77(1) of the Kenya Constitution (now referred to as the old Constitution- addition mine) in relation to criminal proceedings and Section 79(9) for the civil process.]..... It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the Court.... What matters is the objective for which the court procedures are being utilized, because the nature of judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances...where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives...”***

37. In the persuasive authority of **The State of Maharashtra & Others Vs Arun Gulab & Others, Criminal Appeal No. 590 of 2007**, the Supreme Court of India set out the grounds upon which a prosecution may be prohibited as follows:-

***(i) Where institution or 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 clearly or manifestly fails to prove the Charge.*

38. It is my finding that the Ex-parte Applicant's and the 2<sup>nd</sup> Interested Party's right to property would as provided for under Article 40 of the Constitution. A criminal proceeding will not determine the issues of land ownership between the two parties.

39. In this case, the DPP's decision to charge violated the constitution as stated above and failed the Public Interest Test. The National Prosecution Policy at page 6 states that:-

***“Public Interest in relation to the decision to charge is the positive presumption that prosecution should ensue where the evidence discloses a contravention in criminal law.”***

As earlier stated, the evidence produced at this stage reveals a dispute of ownership of land.

40. It is this court's finding that the DPP decision to charge was unreasonable and/or irrational and outside the ambit of his powers as enshrined in Article 157 (11) of the Constitution which states that:-

***“In exercising the powers conferred under this Article, The Director of Public Prosecutions shall have regard to the Public Interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process.”***

It is clear that the criminal proceedings were commenced for a collateral purpose outside the goals of justice.

#### **(ii) Whether the Ex-parte Applicant is entitled to the Judicial Orders sought**

41. As already stated, the Ex-parte Applicant seeks an Order of Certiorari to quash criminal proceedings against him in Sotik Principal Magistrate's Court Criminal Case number 1522/2018. The law governing Judicial Review proceedings is anchored under Order 53 of the Civil Procedure Rules and they are based on the common law principles in which a court or judicial review proceedings are concerned only with the decision making process as opposed to the merits of the decision. However, in the case of **Communication Commission of Kenya Vs Royal Media Services and 5 Others, Petition Number 14/2014 Consolidated With Petition 14A, 14B and 14C of 2014**, the Supreme Court held that:-

***“However, notwithstanding our findings based on common law principles of estoppel and res judicata, we remain keenly aware that the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law.”***

42. The High Court under Article 165 (6) of the Constitution of Kenya is empowered to exercise supervisory powers over a subordinate court. This can be done either under Order 53 of the Civil Procedure Rules, Articles 22, 23 and 47 of the Constitution of Kenya and the Fair Administrative Actions Act. For a court to exercise the judicial powers of certiorari, prohibition or mandamus, the court must be satisfied that the act or omission complained of was arrived at illegally, unreasonably, improperly or in bad faith.

43. In the case of **Ernest Young LLP Vs Capital Markets Authority and Another (2017) eKLR**, Mativo J. stated:-

***“Judicial Review is available as a relief to a claim of violation of the rights and freedoms guaranteed in the Constitution. The Constitution has expressly granted the High Court jurisdiction over any person, body or authority exercising quasi-judicial function. The point of focus is no longer whether the rule was public or private or by a statutory body, but whether the function was judicial or quasi-judicial and affected constitutional rights including the right to fair administrative action under Article 47, or the right to natural justice under Article 50. The Kenyan Judiciary must guard against the development of a two-tracked system of Judicial Review. One that looks like the old cases influenced by the common law, on the one hand, and cases that are decided under the 2010's Constitution principal of Judicial Review (On the other). Those two tracks are likely to underline the establishment of a vibrant tradition of judicial review as required by the 2010 Constitution.”***

44. Certiorari orders can issue in certain cases as elucidated in the case of **Captain Geoffrey Kugoya Murungi Vs A. G Misc. Civil Application Number 293 of 1993**, where the Court held that:-

***“Certiorari deals with decisions already made . . . such an order (certiorari) can only be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice or contrary to the law. Thus, an order of certiorari is not a restraining order.”***

45. Judicial review focuses on an illegality, irrationality and procedural impropriety in the decision making process. In **Republic Vs National Transport and Safety Authority & 10 Others Ex-Parte James Maina Mugo (2015) eKLR**, Odunga J. while quoting the case of **Civil Service Unions Vs Minister for Civil Service (1985 A.C 374, At 401D)**, held that:-

***“Judicial Review has I think developed to a stage today when. . . one can conveniently classify under three heads the grounds upon which administrative action are subject to control by Judicial Review. The first ground I would call “illegality”, the second “irrationality”, and the third “procedural impropriety”. . . By “illegality” as a ground for judicial review I mean that the decision***

*maker must understand correctly the law that regulates his decision making power and must give effect to it. . . By “irrationality” I mean what can now be succinctly referred to as “Wednesbury unreasonableness”. . it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. . I have described the third head as “procedural impropriety” rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”*

46. The question in this case therefore is whether the criminal prosecution against the Ex-parte Applicant meets the above threshold. In this case I have reviewed the DPP’s decision on the basis of the material before me to see if it was illegal, irrational or unprocedural. I have perused the Ex-parte’s Notice of Motion Application and the Supporting Affidavit, his Supplementary Affidavit and his written submissions and the conclusion I have drawn is that the dispute between the Ex-parte Applicant and the 2<sup>nd</sup> Interested Party is land ownership and the same is civil in nature.

47. It became clear to me that the institution of criminal proceedings against the Ex-parte Applicant was irrational and improper particularly because that decision was made despite the existence of valid court orders authorising the act complained of.

48. As already shown above, the prosecution was mounted for a collateral purpose. The Court will intervene in instances where it is proved that the prosecution was commenced with ill motive or for a collateral purpose. I agree with Majanja J’s holding in the case of **Thuita Mwangi & 2 Others Vs Ethics and Anti-Corruption Commission & 3 Others (2013) eKLR**, that:-

*“The discretionary power vested in the Director of Public Prosecution is not an open cheque and such discretion must be exercised within the four corners of the constitution. It must be exercised reasonably, within the law and to promote policies and objects of the law which are set out in section 4 of the Office of Public Prosecutions Act. These objects are as follows: the diversity of people of Kenya, impartiality and gender equity; the rules of natural justice; promotion of public confidence in the integrity of the office; the need to discharge the functions of the office on behalf of the people of Kenya; the need to serve the course of justice; prevent abuse of legal process and public interest; protection of the sovereignty of the people; secure the observance of democratic values and principles and promotion of constitutionalism. The court may intervene where it is shown that the impugned criminal proceedings are instituted for other means other than the honest enforcement of criminal law, or are otherwise an abuse of the court process.”*

49. It is my conclusion in this case that the dispute between the Ex-parte Applicant and the 2<sup>nd</sup> Interested Party ought to be ventilated in the Environmental and Land Court that is clothed with the jurisdiction to hear disputes relating to land. It is my further conclusion that the ODPP allowed themselves to become an unwitting player in ignoring existing court orders to mount a prosecution outside the goals of justice. This clearly is an abuse of process of court which must not be allowed to stand.

50. In the premises, based on the material before this court, I find that the Ex-parte Applicant has met the threshold for the grant of the Order of Certiorari. Accordingly, an order of Certiorari to remove in to this court for purposes of quashing the criminal proceedings against the applicant in Sotik Principal Magistrate’s court Criminal Case Number 1522/2018 shall issue.

51. Each party shall bear their costs in this Application.

52. Orders accordingly.

**JUDGMENT DELIVERED, DATED AND SIGNED THIS 21ST DAY OF OCTOBER, 2021.**

.....

**R. LAGAT-KORIR**

**JUDGE**

**JUDGMENT DELIVERED ELECTRONICALLY TO THE PARTIES AS PER THEIR CONSENT AT THE FOLLOWING EMAIL ADDRESSES:-**

**M/S J.K RONO & CO. ADVOCATES FOR THE EX-PARTE APPLICANT - [ronoadvocates@outlook.com](mailto:ronoadvocates@outlook.com)**

**MR. MURITHI FOR 1ST INTERESTED PARTY – [bomet@odpp.go.ke](mailto:bomet@odpp.go.ke)**

**M/S GEOFFREY KIPNGETICH & COMPANY ADVOCATES FOR 2ND INTERESTED PARTY – [geoffreykipngetich@gmail.com](mailto:geoffreykipngetich@gmail.com)**