



Kisini (Suing as the administrators of the Estate of Gideon Kisini Musau, Deceased for the benefit of the Estate and its beneficiaries and on the Estate) & 2 others v Attorney General & another (Judicial Review E004 of 2021) [2025] KEELC 235 (KLR) (29 January 2025) (Judgment)

Neutral citation: [2025] KEELC 235 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
JUDICIAL REVIEW E004 OF 2021
A NYUKURI, J
JANUARY 29, 2025

BETWEEN

ROMAN MUTUKU KISINI (SUING AS THE ADMINISTRATORS OF THE ESTATE OF GIDEON KISINI MUSAU, DECEASED FOR THE BENEFIT OF THE ESTATE AND ITS BENEFICIARIES AND ON THE ESTATE) 1ST EXPARTE APPLICANT
ELIJAH KAMAU KUSINI ALIAS KAMAU KISINI ... 2ND EXPARTE APPLICANT
MUKUA MUIA 3RD EXPARTE APPLICANT

AND

ATTORNEY GENERAL 1ST RESPONDENT
DIRECTOR CRIMINAL INVESTIGATIONS 2ND RESPONDENT

JUDGMENT

1. Pursuant to leave of court granted by this court on 14th April 2021, the ex parte applicant in this suit, filed a substantive notice of motion dated 30th September 2022 seeking the following orders;
 - a. That an Order of Certiorari do issue for quashing the summons in the letter dated 17th March 2021 issued by the 2nd respondent the Director of Criminal Investigations to the applicants namely Roman Mutuku kisini, Kamau kisini & Mukua Muia Kisini through their Advocates, F. Mwangangi & Company Advocates on account of purported investigations into land parcels Nos. Machakos/ Nguluni/ 2803, 2804 & 2805, the same parcels of land being the subject matter of an ongoing prior court proceedings in Machakos ELC Case No. E029 of 2020.
 - b. That an Order of Prohibition do issue to forbid and prohibit the 2nd Respondent by itself, its agents, servants or employees from implementing and/or howsoever giving effect to the said



summons in the said letter dated 17th March 2021 issued by the 2nd respondent the Director of Criminal Investigations to the applicants namely Roman Mutuku kisini, Kamau kisini & Mukua Muia Kisini through their Advocates, F. Mwangangi & Company Advocates on account of purported investigations into land parcels Nos. Machakos/ Nguluni/ 2803, 2804 & 2805, until the said MACHAKOS ELC CASE NO. E029 OF 2020 is heard and determined.

- c. That an Order of Prohibition do issue to forbid and prohibit the 2nd Respondent, the Director of Criminal Investigations, by itself, its agents, servants or employees from implementing and/ or howsoever giving effect to any subsequent or other summons issued by or on behalf of the 2nd Respondent to the applicants namely Roman Mutuku kisini, Kamau kisini & Mukua Muia Kisini or to their authorized agents, servants or employees, in similar terms, import and or purport as the said summons in the said letter dated 17th March 2021 on account of the said purported investigations into land parcels Nos. Machakos/ Nguluni/ 2803, 2804 & 2805, until the said Machakos ELC Case No. E029 of 2020 is heard and determined.
 - d. That an Order of Prohibition do issue to restrain the Respondents by themselves or their agents, servants or employees from entering, alienating or otherwise howsoever interfering with the applicants' occupation, use, enjoyment and dealing with the said land parcels Nos. Machakos/ Nguluni/ 2803, 2804 & 2805, on the basis of the said summons in the said letter dated 17th March 2021 issued by the 2nd respondent the Director of Criminal Investigations to the applicants through their advocates F. Mwangangi & Company, or any subsequent or other summons issued by or on behalf of the respondents in similar terms, import and/ or purport as the said summons in the said letter dated 17th March 2021 on account of the said purported investigations into land parcels Nos. Machakos/ Nguluni/ 2803, 2804 & 2805, until the said Machakos ELC Case No. E029 of 2020 is heard and determined.
 - e. That this honorable court do issue such other or further orders as it may deem just and expedient to grant in the circumstances herein.
 - f. That the costs of this application and incidentals to the application be provided for.
2. The application is premised on the grounds set forth in the statutory statement and verifying affidavit of Roman Mutuku Kisini, both dated 19th March 2021. The ex parte applicants' (hereinafter referred to as applicants), case is that they are administrators and beneficiaries respectively of the estate of the late Gideon Kisini Musau who was the owner of the parcel of land known as Nos. Machakos/ Nguluni/ 2803, 2804 & 2805, formally registered during the adjudication process as Nguluni Adjudication Section Plot Nos. 2803, 2804 and 2805 in the names of the 1st and 2nd applicants and Nahashon Muia Kisini the late father of the 3rd applicant (hereinafter referred to as the suit property).
 3. The applicants stated that the late Gideon Kisini Musau acquired the suit property through purchase in 1983 when the same was a portion of a larger parcel in the Nguluni Adjudication Section known as Plot No. 797. That the deceased shared and bequeathed the suit property to the applicants herein and that since 1985 they have been in actual, open and uninterrupted occupation of the same. They further stated that they instituted MACHAKOS ELC CASE No. E029 OF 2020 suing Mary Mwikali Muasya, Katua Muasya and Francis Nganga Kihege and others for trespassing on the suit property in August 2020 and claiming ownership thereof. That they also sought and were granted interim orders restraining the defendants from interfering with the suit property. They averred that despite the pendency of the above case, the 2nd respondent under undue influence and behest of Mary Mwikali Muasya, Katua Muasya and Francis Nganga Kihege; the defendants in that suit, begun interfering with the applicants' witnesses therein by harassing, intimidating and summoning them to record statements in the purported investigations over the said parcels of land which are subject of MACHAKOS ELC



- CASE No. E029. That this prompted the applicants' advocates to write to the advocates of the said defendants seeking cessation of the said interference. They complained that the interference by the 2nd respondent has persisted and now they have summoned the applicants in their letter of 17th March 2021 which was served on their advocates on 18th March 2021 requiring the applicants to report to the 2nd respondent's offices on 19th March 2021 on account of purported investigations of fraud over the suit property.
4. The applicants stated that having informed the agents of the 2nd respondent that the suit property is subject of MACHAKOS ELC CASE No. E029 OF 2020, the latter indicated that he was empowered under section 193A of the Criminal Procedure Code to summon the applicants over the suit property notwithstanding the pendency of MACHAKOS ELC CASE No. E029 OF 2020.
 5. The applicants argued that the conduct of the 2nd respondent of summoning them in regard to investigations of the suit property when the same was subject of a suit pending before a competent court, is improper, irregular, irrational, unlawful, unconstitutional and in bad faith. They argued that section 193 A of the Criminal Procedure Code does not apply in these circumstances and that the acts of the 2nd respondent amount to wrongful interference with the process of a competent Superior Court in ongoing proceedings and the effect of the 2nd respondent's actions are to defeat the temporary injunction orders issued in Machakos ELC Case No. E029 of 2020 in favour of the applicants. According to the applicants, the actions of the 2nd respondent amount to gross contempt of the court and is an affront to the dignity and standing of the said court in handling Machakos ELC Case No. E029 of 2020. The applicants took the position that the actions of the 2nd respondent amount to defiance of the statutorily and constitutionally vested jurisdiction of the said Machakos ELC Court in view of the fact that the matter of the suit property is a live matter before the said court in Machakos ELC Case No. E029 of 2020 and that therefore it is a flagrant breach and disregard of the clear provisions of the law and the *Constitution* that govern the operations of the 2nd respondent vis a vis the statutory and constitutional rights of the applicants to a fair hearing, fair administrative action, ownership of property and protection by and equality before the law.
 6. They further argued that the 2nd respondent's action is unreasonable and premised upon consideration of irrelevant matters and disregard of relevant factors. Further that the actions of the 2nd respondent were ultra vires its powers and the same is a gross abuse or misuse of the powers of the 2nd respondent. They expressed apprehension that unless the orders sought herein are granted, the 2nd respondent will proceed to summon them and subsequently defeat their search for substantial justice, thereby prejudicing them and causing them hardship and irreparable loss and damage. They also argued that they are reasonably fearful that they may be wrongfully arrested by the 2nd respondent, charged or cited for contempt if the purported investigations on account of the said summons or other summons in similar terms, import or purport proceed. They maintained that a statutory power can only be exercised validly and reasonably and no statute can allow anyone who has been empowered under the statute to exercise such power arbitrarily, capriciously, in bad faith or ultra vires or in a manner that transgresses upon the rights of others.
 7. They attached copies of their identification cards; certificate of confirmation of grant of letters of administration; a plaint in Machakos ELC Case No. E029 of 2020; pleadings filed by counsel for defendants in the said suit; the response filed by the applicants; application for injunction; temporary orders of injunction issued in favour of the applicants; a letter by the defendants' advocates and the 2nd respondent's letter summoning the applicants dated 17th March 2021.
 8. The application was opposed. The respondents filed grounds of opposition dated 6th November 2023. They stated that the motion was incurably defective, incompetent, untenable, frivolous, scandalous,



vexatious and devoid of substance and that the affidavits in support of the application were full of falsehoods, misrepresentations of facts and law, inconsistent with unsupported conclusions and tailored and stage-managed to unfairly and improperly hoodwink the court. They contended that the application was an abuse of the court process since the applicants were attempting to curtail the statutory and constitutional mandate of the respondents to investigate complaints. They made reference to the case of *Muslims for Human Rights (Muhuri) & 4 Others v Inspector General of Police & 2 Others* [2014] e KLR and argued that the National Police Service is bound by the Constitution and limitations of rights by police is subject to Article 244 of the Constitution as permitted by Article 24 thereof.

9. According to the respondents, the application herein was a mere lamentation on the acts taken by the 2nd respondent in the course of their duties. They referred the court to Petition No. 113 of 2009 consolidated with petition No. 44 of 2009 and Petition No. 48 of 2012 *Charles Murigu Murithi & 2 Others v Attorney General* [2015] e KLR and argued that the duties of the police owed to the general public include prevention and detection of crime and apprehension of offenders and to protect life and property. They contended that the motion dated 30th September 2022 is outside the purview of judicial review and that this court is not the right forum to adjudicate the dispute. Further that the application lacks merit and ought to be dismissed with costs.
10. The respondents argued that the application sought to paralyze the respondents from carrying out their mandate as the applicants had not demonstrated that the respondents acted irregularly, unfairly, unreasonably and irrationally in arriving at the decision. According to the respondents, the motion before court is an afterthought, a non-starter and without basis as there is no evidence to validate the applicants' claim that the impugned letter of 17th March 2021 has been implemented or is awaiting further action from the 2nd respondent. They stated that the motion is an abuse of the court process because the applicants seek to preempt recommendations from the criminal investigation that may arise from the said investigations which goes against the tenets of natural justice and the law. They took the view that the application was meant to interfere with the constitutional mandate of the respondents in investigating, arresting or charging individuals with criminal offences. They argued that judicial review orders of prohibition cannot lie to correct a course, practice or procedure of inferior tribunal or to correct a wrong decision on merit of the proceedings and a Mandamus cannot issue to compel exercise of statutory discretion in a particular way or to achieve particular results.
11. The application was disposed by way of written submissions. On record are submissions by the applicants dated 16th September 2024 and those of the respondents dated 17th April 2024.

Applicants' submissions

12. Counsel for the applicants submitted that the actions of the respondents are in the circumstances of this suit, improper in law for being undertaken in bad faith and in breach of their constitutional rights and fundamental freedoms set out in the Bill of Rights of the Constitution. They argued that the respondents' actions are unreasonable and justified and ultra vires the powers of the 2nd respondent as the purported investigations were undertaken only after the applicants filed suit and upon issuance of orders of temporary injunction by the Environment and Land Court, which injunction was to preserve the suit property in the wake of invasion by the defendants in the case before court. The applicants argued that the 2nd respondent's actions are not proper in the circumstances of the matter and that the impugned summons is in bad faith, undertaken for wrong purposes, is an abuse of discretion and of the criminal process and in breach of the applicants' constitutional rights. They sought for the court to proceed to quash the administrative decision of the 2nd respondent and prohibit their actions.



13. Reliance was placed on the case of Republic v Director of Public Prosecution & 2 Others Masibo Ex parte applicant) MM (minor) & Another (Interested parties) (Miscellaneous Criminal Application E040 of 2022) [2023] KEHC 22555 (KLR) for the proposition that an administrative decision is deemed to be improper if there is abuse of discretion, is made in bad faith and for an improper purpose, is in breach of the duty to act fairly, it is irrational and unreasonable, the decision maker has failed to exercise statutory discretion reasonably, the decision maker acts in a manner to frustrate the purpose of the law donating the power, is an abuse of process, is not supported by law, is unreasonable or is ultra vires or beyond the limit of power or authority that authorizes the public body to make the decision. Counsel further argued that courts have emphasized the need to protect the individual's constitutional rights where criminal process is applied in a manner that breaches rights and cited the case of George Joshua Okungu & Another v The Chief Magistrates Court Nairobi & Another [2014] e KLR for the proposition that where a petitioner demonstrates that the intended or ongoing proceedings constitute an abuse of process and are being carried out in breach of, or threatened breach of the petitioners constitutional right, the court will not hesitate in putting a halt to such proceedings.
14. Counsel submitted that in the instant case, it was evident that the applicants filed Machakos ELC Case No. E029 of 2020 in the Superior Court of the Environment and Land Court in exercise of their constitutional rights to access justice over the suit property and the said court is constitutionally and legally mandated to hear and determine the claim. Further that the court heard the matter and at an interlocutory stage granted temporary injunction in favour of the applicants while the summons by the 2nd respondent was issued long after the said suit had been instituted and after the orders had been issued. They argued that the defendants in the above suit would have recourse under the civil process to prove their claim over the land in the suit and to challenge any orders of the court through the processes provided for in the civil process. They also submitted that the applicants have been in possession of the suit property for decades since 1985 and that the defendants in the said suit have never challenged the applicants' occupation and up to date 2nd respondent had never summoned the applicants over the land. They contended that the action by the 2nd respondent has a great potential of causing a breach of the orders of the court by the defendants in the aforesaid suit, hence embarrassing the court when the court has heard the parties at an interlocutory stage and issued orders.
15. Counsel referred to the case of Republic v Al Ruhia Estates Limited & 2 Others ex Parte John Oduor Okwaro & Another [2021] e KLR for the proposition that a court ought to issue certiorari and prohibitory orders against a decision taken in a matter which is pending in a civil case where the same was an abuse of the criminal process aimed at advancing a purely civil transaction. Counsel argued that the commencement of criminal proceedings against the applicants by the 2nd respondent is meant to intimidate and force them to cease the civil claim in the suit and that their application of the criminal process against the applicants is for the achievement of a collateral purpose other than its legally recognized purpose of the law under which the 2nd respondent claimed to have been acting. Counsel submitted that the orders sought ought to be granted so that the judicial process would not be made to look like a circus in the event of the courts arriving at opposing findings and argued that proceedings which were commenced first in time ought to be permitted to proceed to their logical end.
16. Counsel contended that it can easily be deduced that it is a case of forum shopping by the defendants in the earlier suit and are unnecessarily involving the 2nd respondent in a land dispute for purposes of defeating civil process in the said suit and specifically to defeat the orders of the court by summoning the applicants and even confiscating the original documents in the possession of the applicants over the disputed land. Counsel argued that the defendants in the said suit should have set out to prove their case in the said suit if at all they had any proper claim over the land. It was further submitted for the applicants that the totality of the above show that the 2nd respondent's conduct of setting out to



investigate the land dispute with respect to Machakos ELC Case No. E029 of 2020 which is a civil claim already before a competent court is improper and an abuse of the criminal process as it is an oppression, intimidation and harassment of the applicants as the 2nd respondent did not produce any report on the complaint made before it, for it to undertake the criminal process nor a report on what it has done so far despite summoning the applicants and receiving and withholding the original documents from the applicants nearly three years down the line. Counsel submitted that that casts doubt on the purpose and intention of the 2nd respondent in conducting the investigations. Counsel also submitted that the applicants had made out a case for the issuance of the orders sought.

Respondents' submissions

17. Counsel for the respondents submitted that the 2nd respondent followed due process in issuing the impugned summons. Counsel argued that the Constitution establishes the National Police Service under Article 243 and section 24 of the National Police Service Act provides that one of the functions of the police is the investigation of crimes. That Section 28 of the same Act establishes the Directorate of Criminal Investigations and places it under the command and control of the Inspector General of police. It was submitted for the respondents that the 2nd respondent did not act in excess of their power but was merely discharging their statutory mandate by summoning the applicants for investigations. They also argued that under section 35 (b) of the National Police Service Act, the Directorate of Criminal Investigations is mandated to undertake investigations of crimes for as long as it is for reasonable and probable cause.
18. Reliance was placed on the cases of *Thuita Mwangi & 2 Others v Ethics and Anti-Corruption Commission & 3 Others* and *Republic v Commission of Police & Another ex-parte Michael Monari & Another* for the proposition that the police have a duty to investigate any complaint once a complaint is made and that what the police need is only to establish reasonable suspicion before preferring charges and the rest is left to the trial court so long as the decision to charge is made in a reasonable manner.
19. Further reference was made to the case of *William & Others v Spoutz* [1993] 2 LRC 659. Counsel argued that it is the responsibility of the police to investigate whether a complaint discloses any reasonable grounds to prefer charges after recording statements from all relevant witnesses. Counsel submitted that there was no evidence adduced by the applicants to show that the respondents did not follow due process and that it has not been demonstrated that the actions of the respondents were motivated by any other reason apart from the purpose of conducting a fair process. Counsel further held the view that there was no evidence to suggest that the investigation against the applicants is an abuse of office by the 2nd respondent. It was further submitted for the respondents that where acts of a criminal nature are brought to the attention of the DCI, it is incumbent upon the DCI to ensure that the allegations are thoroughly investigated and appropriate actions taken. They contended that the 2nd respondent in summoning the applicants was merely fulfilling their statutory mandate and following due process and therefore it acted in a rational manner in the just discharge of their statutory mandate.
20. On whether the actions of the 2nd respondent were an abuse of the court process, counsel submitted that ongoing civil proceedings by themselves cannot be a bar to bringing of criminal charges because one set of facts can be both the foundation of a criminal charge and the basis of a civil action. Reliance was placed on section 193 A of the Criminal Procedure Code and counsel submitted that the applicants cannot allege abuse of the court process by the DCI to escape criminal liability. They submitted that it is not within the ambit and the powers of this court to delve into the evidence the prosecution intends to produce at the trial in support of their case as the duty to examine that evidence and determine its veracity and adequacy belongs to the trial court, a principle laid down in the cases of *Uwe Mexner &*



Another v Attorney General [2005] e KLR and Republic versus Commission of police & Another ex parte Michael Monari & Another [2012] e KLR.

21. On whether the judicial review orders sought ought to be granted, counsel submitted that judicial review orders are not an appeal from a decision but a review of the decision-making process and the legality of the decision-making process itself and therefore the court in a judicial review application is concerned with the question as to whether or not the action under attack is lawful and should be allowed to stand or be quashed. Counsel argued that the applicants had failed to demonstrate that the 2nd respondent acted ultra vires in issuing the impugned summons. They argued that throughout the process of investigation, due process was followed and the respondents complied with article 47 of the *Constitution*. Reference was made to the cases of Thuita Mwangi & Another v Ethics & Anti-corruption Commission Petition No. 153 of 2023 and the Kenya National Examinations Council v Republic ex-parte Geoffrey danger Gathenji Njoroge & 9 Others [1997] KLR. Counsel submitted that the applicants had failed to provide evidence to demonstrate that the respondent acted in violation or excess of their power and therefore they are not entitled to the orders sought.

Analysis and determination

22. The court has carefully considered the motion, the response thereto and the parties' respective submissions. The only issue that arise for determination is whether the applicants are entitled to judicial review orders sought as against the respondents regarding the summons issued by the 2nd respondent dated 17th March 2021.
23. Judicial review orders are concerned not with the merit of the case but with the decision-making process of the decision complained of.
24. In the case of Municipal Council of Mombasa -Vs- Republic & Umoja Consultants Ltd CA, Civil Appeal No. 185 of 2011 the Court of Appeal addressed the issue as follows;

Judicial review is concerned with the decision-making process, not with the merits of the decision itself, the court would concern itself with such issues as to whether the decision maker 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. The court should not act as a Court of Appeal over the decider which would involve going into the merit of the decision itself.

25. Similarly, in the case of Pastoli -Vs- Kabale District Local Government Council & Others [2008] 2EA 300 it was stated as follows: -

In order to succeed in an application for judicial review, the application has to show that the decision or act complained of is tainted with illegality, irrationality, and procedural impropriety....illegality is when the decision making authority commits an error of law in the process of taking or making the act the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principle are instances of illegality.....irrationality is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice or to act with unprocedural fairness toward one to be affected by the decision.



26. A writ of certiorari is derived from the Latin word “certiorari” meaning “to be certified, informed, appraised or shown.” It is issued in circumstances where a superior court of the status of the High Court requires proceedings of an inferior court or tribunal to be transferred to the superior court for purposes of being reviewed for validity. On the other hand, an order of prohibition is issued where an inferior court or tribunal is forbidden to proceed with the impugned invalid actions.
27. The Court of Appeal held in *Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996* inter alia, as follows as regards judicial review orders of prohibition:

Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...

28. The dispute herein turns on whether or not the 2nd respondent can lawfully proceed to summon the applicants for purposes of obtaining information in regard to the complaint of fraud regarding the suit property made against the applicants by the defendants in Machakos ELC NO. E029 OF 2020.
29. Section 24 (e) of the *National Police Service Act* provides that one of the functions of the Kenya Police Service is to investigate crimes.
30. Section 35 of the *National Police Service Act* provides as follows;
35. Functions of the Directorate
- The Directorate shall—
- a. Collect and provide criminal intelligence;
 - b. Undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber crime among others;
 - c. Maintain law and order;
 - d. Detect and prevent crime;
 - e. Apprehend offenders;
 - (f) Maintain criminal records;
 - (g) Conduct forensic analysis;
 - (h) Execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157(4) of the *Constitution*;



- i. Coordinate country Interpol Affairs;
 - (j) Investigate any matter that may be referred to it by the Independent Police Oversight Authority; and
 - (k) Perform any other function conferred on it by any other written law.
- 31. Therefore, the Director of Criminal Investigations has power to investigate crime. Part of investigations includes summoning those involved in the matter under investigation to accord them opportunity to explain their side of the case to enable the investigator be clear on whether there is reasonable basis to escalate the matter to court for trial.
- 32. Section 52 of the *National Police Service Act* empowers a police officer to compel attendance before him or her at a police station or police office, of anyone whom the police officer has reason to believe has information that may assist in the investigation of an alleged offence. That section provides as follows;
 - 52. Power to compel attendance of witnesses at police station
 - (1) A police officer may, in writing, require any person whom the police officer has reason to believe has information which may assist in the investigation of an alleged offence to attend before him at a police station or police office in the county in which that person resides or for the time being is.
 - (2) A person who without reasonable excuse fails to comply with a requisition under subsection (1), or who, having complied, refuses or fails to give his correct name and address and to answer truthfully all questions that may be lawfully put to him commits an offence.
 - (3) A person shall not be required to answer any question under this section if the question tends to expose the person to a criminal charge, penalty or forfeiture.
 - (4) A police officer shall record any statement made to him by any such person, whether the person is suspected of having committed an offence or not, but, before recording any statement from a person to whom a charge is to be preferred or who has been charged with committing an offence, the police officer shall warn the person that any statement which may be recorded may be used in evidence.
 - (5) A statement taken in accordance with this section shall be recorded and signed by the person making it after it has been read out to him in a language which the person understands and the person has been invited to make any correction he may wish.
 - (6) Notwithstanding the other provisions of this section, the powers conferred by this section shall be exercised in accordance with the Criminal Procedure Code (Cap. 75), the Witness Protection Act (Cap. 79) or any other written law.
 - (7) The failure by a police officer to comply with a requirement of this section in relation to the making of a statement shall render the statement inadmissible in any proceedings in which it is sought to have the statement admitted in evidence.
- 33. Therefore, the decision of a police officer to summon a person to a police office for purposes of obtaining relevant information to assist in investigation of alleged offences, ought to be done within the parameters of the law, where the police officer reasonably believes that the person summoned has relevant information. The power to summon by a police officer, being statutory power ought to be exercised in good faith, intra vires, reasonably, rationally and in consideration of relevant matters.



Relevant matters would, in my considered view include, but are not limited to, whether or not the person being summoned has an interest in the subject matter, whether or not such person has reasonably been mentioned in connection with the alleged offence and whether there are reasonable grounds to show that such person has relevant information in regard to the offence being investigated.

34. The purpose of summons by a police officer is to obtain relevant information to assist in the investigation of an alleged offence which will ultimately be useful in the decision by the Director of Public Prosecutions on whether or not to charge. The police officer's powers to summon are not limited to the persons alleged to have committed a criminal offence. That power extends to all persons with relevant information, including anticipated witnesses. However, where the decision to summon a person by a police officer is manifestly oppressive, an abuse of power or in a clear violation of fundamental rights and freedoms of the person summoned, this court has power to intervene, but that power must be exercised sparingly taking into account public interest in the administration of justice.
35. Section 193 A of the criminal procedure code provides for concurrent civil and criminal proceedings as follows;
- 193A. Concurrent criminal and civil proceedings
- 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.
36. It is clear therefore that the pendency of a civil dispute in court does not of itself amount to a bar against the police investigating crime relating to the same facts as those upon which the civil proceedings are premised.
37. In *Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others* [2018] eKLR the Court of Appeal acknowledged that the Office of the Director of Public Prosecutions is an independent constitutional office but stressed the fact that that office is subject to the control of the Court in appropriate instances where illegality, irrationality and procedural impropriety is demonstrated.
38. Also, in the case of *State Of Maharashtra & Others V Arun Gulab & Others*, Criminal Appeal No. 590 of 2007, the Supreme Court of India stated as follows:

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 to 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 can it 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.

39. Similarly, in the case of *Amir Lodges Ltd & Another v Mohammed Omar Sharriff & Another* [2022]e KLR, the court cited with approval the reasoning in the case of *R v BBC, x p Lavelle* [1983] 1 All ER 241 (QBD) at 255 where Woolf J maintained that there should be no automatic intervention by the court where there are both civil and criminal proceedings based on the same transaction. In the latter case, the learned judge further pointed out that while the court must have jurisdiction to intervene to prevent serious injustice occurring, it will only do so in very clear cases in which the applicant can show that there is a real danger and not merely notional danger that there would be a miscarriage of justice in criminal proceedings if the court did not intervene.
40. Therefore, the power of court to grant judicial review in regard to institution of criminal proceedings on the same transaction where civil proceedings are already pending, ought to be exercised sparingly in the clearest of cases where the applicant has demonstrated that if the criminal proceedings complained of are not halted, they will suffer injustice due to abuse of power or want of legality or procedural propriety of the process.
41. Essentially, where there is illegality, irrationality, abuse of power and procedural impropriety in summoning a person to give information in regard to the same facts and transaction subject to a pending civil case, the court should not hesitate to intervene, as exercise of statutory power must be done within the parameters of the law and in good faith.
42. In the instant case, the applicants' complaint is that there is already pending ELC Case No. E 029 of 2020 in the Environment and Land Court at Machakos involving themselves as plaintiffs on one hand, and Mary Mwikali Muasya, Katua Muasya and Francis Ngánga Kihege as defendants on the other hand; yet at the latter's behest, the 2nd respondent summoned them vide their letter of 17th March 2021 purportedly for purposes of investigating an alleged fraud regarding a complaint filed by Katua Muasya in respect of the suit property. They stated several allegations regarding the suit property including allegations that they are owners of the suit property by virtue of purchase thereof and have all along been in occupation of the same; that the dispute between them and the defendants in Machakos ELC E029 of 2020 is purely civil and that therefore the summons are motivated by motives other than the pursuit of justice; that the defendant in the aforesaid suit are forum shopping, among other allegations. They insisted that the 2nd respondent's actions are unreasonable, irrational, in bad faith, ultra vires, in contempt of court and aimed at defeating the temporary injunction orders issued in the above suit. That the defendants in that suit should present their evidence of ownership in that case and not use the 2nd respondent to harass the applicants.
43. On the other hand, the 2nd respondent has stated that they have powers under section 35 of the National Police Act to investigate crime or complaints of crime and that section 193A of the Criminal Procedure Code grants them power to proceed with criminal investigations and proceedings despite pendency of civil proceedings over the same facts. They maintain that they are acting within their statutory mandate in the issuance of summons.
44. In the instant matter, while the applicants complained that the complaint made to the 2nd respondent by the defendants in Machakos ELC Case No. E029 of 2020 was in bad faith and malice, and meant to forum shop, they did not sue or join those defendants to this suit as interested parties herein, to enable this court interrogate the complainants' basis for the complaint and establish whether indeed there was bad faith and malice as alleged. The applicants have not demonstrated justification for the exclusion in this suit, of the defendants in Machakos ELC Case No. E029 of 2020, yet the orders sought herein



will directly affect them as they are the complainants, which in my view would be a breach of the rules of natural justice of condemning those defendants unheard.

45. The applicants have insisted that if they comply with the 2nd respondent's summons, the injunctive orders made in Machakos ELC No. E029 of 2020 will be defeated and that the respondents' actions amount to contempt of court in Machakos ELC E029 of 2020 as their actions are an interference with the court process in that suit. It is the opinion of this court that as the aforesaid suit is still pending, nothing stops the applicants herein from citing the respondents herein for contempt in Machakos ELC E029 of 2020, as that would also give opportunity to the defendants in that suit to be heard on whether their complaint has led to contempt of court orders, and the court in that suit will have occasion to determine whether or not the respondents' actions amount to contempt of its orders. I take the view that to address contempt of court regarding an order of a superior court, an applicant ought to cite the alleged contemnor within the same proceedings where the orders alleged to have been breached were issued. This is because section 5 of the *Judicature Act* empowers the superior court to punish contempt of court. Therefore, questions of contempt of the orders made in Machakos ELC E029 of 2020 can only be raised in that suit and not in a separate suit.
46. On the argument by the applicants that the respondent should await the determination of Machakos ELC E029 of 2020 before summoning the applicants or setting in motion the criminal process, Section 193A of the Criminal Procedure Code allows criminal proceedings to proceed alongside civil proceedings where the same set of facts disclose both civil and criminal liability. This position notwithstanding, I agree with the applicants' submissions that every statutory office must act within its legal mandate as provided in law and the court should not be hesitant to intervene where a statutory body acts ultra-vires, irrationally, unreasonably, in abuse of office, in bad faith or unlawfully.
47. I have considered the evidence before this court. The applicants accuse the 2nd respondent of irrationality, abuse of office and acting ultra-vires, they have not demonstrated the manner in which the 2nd respondent's summons are irrational, unreasonable, an abuse of office or ultra-vires. The fact that there is pending before court Machakos ELC Case No. E029 of 2020 per se cannot be evidence of illegality, irrationality, unreasonableness or ultra vires acts on the part of the 2nd respondent. Every person is entitled to due process. In this case, summoning the applicants on the basis that the 2nd respondent is alleged to have reasonable belief that they have relevant information in regard to the investigation of an alleged offence of fraud regarding the suit property, in my view, does not amount to acting beyond their powers, but is a step towards according the applicants who obviously have an interest in the suit property, an opportunity to be heard. This is because the question of ownership of the suit property is yet to be determined by a competent court.
48. If the applicants are apprehensive that there will be contempt of court in view of the temporary injunction granted to them in Machakos ELC Case No. E029 of 2020, then as observed above, nothing stops them from citing the 2nd respondent for contempt of court orders within that suit. In addition, the argument that the complaint made to the 2nd respondent is malicious, is not supported by any evidence. I have considered the temporary injunction issued by the court dated 10th December 2020, and I note that the import thereof was to stop the defendants in that suit from interfering with the applicants' use of the suit property. On the other hand, the 2nd respondent's letter dated 17th March 2021 summoned that applicants to the 2nd respondent's office for purposes of recording their statement in regard to a complaint of fraud made by Katua Muasya. That being the case, the applicants have not demonstrated before this court how being summoned by the 2nd respondent to record a statement, will defeat the injunction orders of 10th December 2020 that required the defendants to keep off the suit property. Therefore, the applicant has not established the nexus between defeating the injunction orders and the summons by the 2nd respondent.



49. The argument that there is a likelihood of conflicting decisions in the civil and criminal proceedings ought to be raised before the trial court in Machakos ELC Case No. E029 of 2020 and not in a separate suit. In any event, that argument cannot be the basis of this court's intervention as the standard of proof in civil cases and in criminal cases is different and for that reason it is possible to have different conclusions regarding a civil matter on one hand and a criminal matter on the other hand, based on the same facts.
50. For the above reasons, I am not convinced that the actions of the 2nd respondent are unjustified in the circumstances of this case to warrant this court's intervention. The applicants have failed to demonstrate abuse of power, illegality, procedural impropriety, or ultra vires actions on the part of the 2nd respondent. I therefore find no merit in the application dated 30th September 2022, which I hereby dismiss. I make no order as to costs.
51. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 29TH DAY OF JANUARY, 2025 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

A. NYUKURI

JUDGE

In the presence of;

Mrs Mwangangi for the applicants

Ms Njuguna for the respondents

Court Assistant: M. Nguyayi

