



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**  
**JUDICIAL REVIEW CASE NO. 563 OF 2016**  
**IN THE MATTER OF; AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF**  
**PROHIBITION & MANDAMUS**

**AND**

**IN THE MATTER OF; ARTICLE 27(1), 28, 29(A), (B) AND (D) AND 49 OF THE  
CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF; SECTIONS 7 AND 9 OF THE FAIR ADMINISTRATIVE ACTION ACT**

**AND**

**IN THE MATTER OF SECTION 8 OF THE LAW REFORM ACT**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**-VERSUS-**

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

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

**O.C.S KAREN POLICE STATION.....3<sup>RD</sup> RESPONDENT**

**AND**

**STEVEN WAWERU GIKONYO.....EXPARTE APPLICANT**

**ANN CAROLINE WANJIKU MUGANE.....INTERESTED PARTY**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 25<sup>th</sup> November, 2016, he ex parte applicant herein **Steven Waweru Gikonyo**, seeks the following orders:

**1. An order of prohibition does issue restraining the Respondents herein from arbitrarily arresting the ex parte applicant without cause and from detaining him without charges.**

**2. A declaration that the ex parte Applicant's fundamental rights and freedom under Article 27(1), 28, 29(a), (b) and (d) and 49 were contravened and grossly violated by the 2<sup>nd</sup> Respondent and/or his agents when he was arrested on the 10<sup>th</sup> September, 2016 and released on the 11<sup>th</sup> of September 2016 without any charges ever being communicated to him or preferred against him to date.**

**3. An order of compensation for the violation of the ex parte applicant's rights under the aforementioned articles.**

**4. Costs of this application be provided for.**

### **Applicant's Case**

2. According to the applicant, on the night of 10<sup>th</sup> September, 2016 he was with the interested party at their matrimonial residence in Karen along Miotoni Road having just arrived from a marriage ceremony when all of a sudden the interested party started causing a commotion and threatened to kick him out of the house. Thereafter the interested party called a gang of men including her brothers, cousins, security guards from private security firms and. Later on, numerous heavily armed officers to the residence.

3. It was averred that the interested party caused the private security guards to yell at the applicant "mwizi" and together with her brothers and cousin threatened to assault the ex parte applicant causing the applicant to panic and lock himself in a room out of fear. It was averred that upon arrival of the police, the applicant was convince by the police to accompany them and the interested party to the police station to record their statements a request which the applicant agreed to and went driving his personal vehicle Reg. No. KBJ 777P thereto. However upon arriving at the police station he was not asked to record his statement but was instead arrested and locked up in police cells without being informed of the reason therefor and without being allowed to communicate with either his advocate or any member of his family.

4. According to the applicant, on 11<sup>th</sup> September, 2016 in the afternoon he was told by the OCS to pay Kshs 20,000/- for his release which he paid but was not given a receipt to confirm the same.

5. The applicant averred that todate no charges have been preferred against him and that the money he paid the police station has never been refunded to him. Further his vehicle was detained at the police station for reasons unknown to him.

6. According to the applicant, he is a destitute and cannot access his house in Karen in which his identification documents and other personal effects are due to threats by the interested party who has shown the capacity to utilise agents of the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents against him. He however disclosed that the issue of recovery of the motor vehicle and access to his house are pending before the family Division of this Court.

7. It was the ex parte applicant's case that the 3<sup>rd</sup> Respondent has abused his/her powers by exercising the same with open and blatant bias and further acted unprofessionally by rudely ripping apart a letter served on him by the applicant's advocates contrary to the police stating orders and the provisions of the law.

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

8. The application was opposed by the 1<sup>st</sup> interested party.

9. According to the interested party, the Ex parte Applicant assaulted and harassed her physically, verbally and emotionally on various dates from 1<sup>st</sup> to 10<sup>th</sup> September 2016, which events are what culminated in the Ex parte Applicant's arrest on 10<sup>th</sup> September 2016. Immediately thereafter she found out that the Ex parte Applicant had stolen the title deed for her property along with the original log book for my motor vehicle KBJ 777P plus the duplicate insurance certificates and vehicle No. KBM 444M.

10. The interested party averred that she reported these matters to the police under OB2/11/9/2016 and OB30/13/9/16 and further recorded her statement alongside statements from various witnesses to these incidents, and to date she is still waiting for the action to be taken by the relevant authorities. However as a result of the inordinate delay by the police in bringing charges against the Ex parte Applicant, she wrote a letter of complaint to the National Police Service but did not receive a reply thereto. She subsequently escalated the matter to the Deputy Inspector General of Police.

11. It was therefore her case that she was shocked by the Ex parte Applicant's attempt to delude the court by pretending to be the victim when he is in fact the villain.

12. The interested party denied that the two, the ex parte applicant and the interested party, have a matrimonial residence as alleged, as they are not married. All that they had was a relationship out of which a child was born. She asserted that the vehicle and the property referred to in the verifying affidavit are owned by her. In the applicant's view, the true account of the facts of the night of 10<sup>th</sup> September, 2016 and the days leading thereto, which the Ex parte Applicant has failed to disclose in order to delude the court, are as follows:

i) The Ex parte Applicant was arrested on 10<sup>th</sup> September 2016 following several days of violence, harassment and abuse meted out upon her by the Ex parte Applicant, who had become increasingly hostile towards her and who had for a while begun to display aggressive and threatening behaviour towards her arising from her continued requests that he leave her home, as she was extremely uncomfortable about his continued presence in her home given that they are not married.

ii) In the course of August 2016, the interested party had hired a contractor to repaint her house in Karen and to make some improvements. On 1<sup>st</sup> September 2016, the said contractor called her while she was at work and told her that the Ex parte Applicant was harassing the contractor's workmen telling them that the house belonged to him. The interested party advised the contractor to stop work and that she would deal with the matter when she got home from work that day.

iii) When she got home on that evening of 1<sup>st</sup> September, she asked the Ex parte Applicant why he had been harassing the contractor considering that the interested party is the owner of the house and the contractor had been hired and was being paid by her and thus it was inappropriate for the Ex parte Applicant to engage with the contractor at all. It was then that the Ex parte Applicant appeared to become completely unhinged to the extent that he attacked and assaulted and battered the interested party by hitting her head repeatedly with his fists and begun to strangle her in the full view of their minor daughter.

iv) The Ex parte Applicant briefly let go of her when her housekeeper responded to her screams and thus interrupted his assault of the interested party, whereupon she managed to escape his grip and to reach and press the KK Security panic button that she had installed in her home who arrived within a few minutes of her distress call and several of my neighbours responded to her screams and came to my gate. The interested party understood from one of her neighbours and the KK personnel that the Ex parte Applicant had been ordering the KK security personnel to leave. Thankfully they had refused to do so and had instead called the police, who arrived shortly thereafter.

v) Subsequently, the Ex parte Applicant continued to be hostile towards her, her household staff and the contractor's workers even as she tried to find a way out of the dangerous situation that she and her daughter were in without further aggravating things and pleaded with the ex parte applicant to leave so that things could calm down, which he refused to do. The Ex parte Applicant would

often stare at her with a terrifyingly dead facial expression forcing the interested party to lock herself and her daughter up in the guest bedroom at night. All of this behaviour caused her great fear and trepidation.

vi) On 10<sup>th</sup> September 2016 the interested party's cousin was getting married at St. Francis ACK Church in Karen. The Ex parte Applicant continued to harass her by stalking her and though he was not invited, he showed up half way through the wedding ceremony. Thereafter he followed the interested party to the reception and though they were not on talking terms, she caught him staring at her with the same terrifyingly dead facial expression she had seen before. The interested party became very frightened and tried to avoid being in the line of his gaze. In spite of being a gate-crasher at the wedding, the Ex parte Applicant shortly demanded to sing for the bride and groom and proceeded to do so, in an act that the interested party believe was aimed at intimidating and harassing her by demonstrating his disdain and disrespect for her, before her family.

vii) At the end of the wedding reception, the interested party asked some of her family members to accompany her to her house in Karen as she did not feel safe being alone with the Ex parte Applicant especially because she was alone in the house.

viii) They found the Ex parte Applicant at her house and he immediately became enraged at her family's presence and demanded that they should leave the house so that he would be left alone. He then went to the TV room and demanded that the interested party's daughter and her cousins should also leave the house.

ix) The Ex parte Applicant became increasingly enraged and continued to demand that everyone should leave the house when, emboldened by the interested party's family's presence, she reminded him that the house was in fact hers not his and thus he had no right to demand that anyone should leave. It became evident that he was no longer in control of himself and the interested party became extremely apprehensive that his motive was to have her isolated so that he could attack and cause her grievous harm. She therefore pressed the KK security panic button and the KK Security response team arrived with the Police by which time the Ex parte Applicant was outside the house, attempting to flee.

xi) When he saw the security personnel, the Ex parte Applicant fled back into the house and upstairs and shouted as he ran, that he was getting his own gun and would shoot everyone. He then locked himself up in a bedroom and the rest of the people took refuge in a room downstairs.

xii) The interested party advised the police officers led by one **Corporal Kimeu** and the KK security guards that the Ex parte Applicant had continued to harass her since assaulting her on 1 September 2016, when they had initially responded to her distress call and that she was very afraid for her life.

xiii) The police officers and KK guards entered the house and spoke with the Ex parte Applicant through the locked bedroom door upstairs for almost an hour before he finally agreed to come out of hiding. The police then asked the Ex parte Applicant and the interested party to accompany them to Karen Police Station, driving in their private vehicles. The Ex parte Applicant who was then driving KBJ 777P initially tried to flee and was pursued by the security personnel. He shortly gave up and drove to Karen shopping center where he left the car parked outside the Karen Shopping Centre and walked across into Karen police station, whereupon he was arrested and booked overnight. The police also had vehicle KBJ 777P towed in and impounded.

xiv) On the following day 11 September 2016, the Ex parte Applicant was released.

xv) The interested party further requested the OCS Karen not to release KBJ 777P to the Ex parte Applicant as she was the owner of the said vehicle.

xvi) Shortly thereafter the interested party found that the title document for her Karen house was

missing and after frantically looking for it, reported its loss and the loss of other documents.

xvii) The interested party also at the same time discovered that the Ex parte Applicant had removed the security padlocks from the kitchen backdoor and had taken copies of the keys to the doors that lead to the patio/ veranda that is at the back of my house. She believed that the Ex parte Applicant removed the security padlocks and took these keys for ulterior motives given his violent conduct.

xviii) The interested party advised the OCS Karen that she thought that the missing documents could possibly be in KBJ 777P which was at the time still impounded at Karen police station. The OCS Karen called the Ex parte Applicant on several occasions in her presence and asked him to come to the station to open the car so that it could be searched in his presence, which the Ex parte Applicant refused to do.

xix) The OCS Karen then asked whether the interested party had a spare key for this car which she supplied, whereupon the car was opened and searched by a police officer in the presence of her brother **Charles Mugane** and herself, where the title deed for my Karen house, the original log book for KBJ 777P and the duplicate insurance stickers in her name for both KBJ 777P and my other car KBM 444M were recovered hidden under the back seat and concealed in a Nation Newspaper dated 3 September 2016. Also recovered in the said vehicle were the security padlocks and keys to the back doors, which were in the side pocket of the driver's door. That indeed the Ex parte Applicant subsequently admitted that he had in fact stolen the title deed and the log book for the car and hidden these in KBJ 777P.

The Applicant has been on the run from the police since his release on cash bail on 11 September 2016 and the interested party believed that he has been interfering with due process by occasioning the delay of his criminal prosecution in relation to assaulting and battering her and also for the theft of her title deed, log book and insurance certificates.

13. The interested party insisted that motor vehicle KBJ 777P is hers and was released to her by the OCS Karen when she availed to him copies of the logbook, duplicate insurance certificate showing her as the insured, a copy of the Registration Certificate for Ithanji River Farm and its latest annual returns which showed me as the sole owner of Ithanji River Farm.

14. The interested party reiterated that the Ex parte Applicant has continued to harass, stalk and intimidate her via email and WhatsApp and to stalk both the interested party and her minor daughter by showing up unannounced at her daughter's school and hair salon, and in her belief with the intention to kidnap her. The interested party averred that she has on each of these occasions alerted the OCS Karen of the Ex parte Applicant's presence but on each occasion he has escaped apprehension. The Ex parte Applicant has also been sending her abusive, threatening emails.

15. Based on her advocate' advice the interested party believed that the Respondents acted within the law by arresting the Ex parte Applicant in that the Ex parte Applicant had committed an arrestable offence. To the interested party, the Ex parte Applicant's Application has not met the threshold to merit the grant of the Orders sought in that the Respondents are mandated in law to investigate, arrest and prosecute any party who has committed arrestable offence.

16. The interested party maintained that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had the jurisdiction to arrest the Ex parte Applicant. To her the Ex parte Applicant's constitutional rights have not been violated nor has there been any threat of such violation in light of the matters set out hereinbefore. In her view, the Ex parte Applicant has committed a series of crimes and ought to be arrested as by law mandated.

17. The interested party therefore prayed that this application be dismissed with costs.

### **Determinations**

18. I have considered the applications, the affidavits sworn by the applicant in support of his case as well

as the replying affidavit sworn by the interested party, e submissions filed and the authorities relied upon by both parties.

19. In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. 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 principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. 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 procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. See **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479**

20. The applicant is seeking an order of prohibition to prohibit the Respondents from arresting or charging him with a criminal offence.

21. I have considered the grounds upon which the applicant has sought judicial review herein. The applicant's case seems to be hinged on the ground that the intended criminal proceedings have no basis as he has not committed any offence.

22. In my view if the applicant has any issues touching on his criminal culpability the same ought to be raised before the trial court. It must always be noted that judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence to the complaint is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant to raise before the trial court which is better placed to evaluate the evidence and arrive at an informed decision.

23. In **Meixner & Another vs. Attorney General [2005] 2 KLR 189**, the Court of Appeal expressed itself as hereunder:

**“The other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the prosecution is sufficient to support the charge. The criminal trial process is regulated by statutes, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court, which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.”**

24. The duty and mandate of the police was appreciated in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** where it was held:

**“The police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and**

**those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”.**

25. It is therefore clear that whereas the discretion given to the respondents to investigate criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence, the Court will not hesitate to bring such proceedings to a halt. However, it must be emphasised that judicial review applications do not deal with the merits of the case but only with the process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are *bona fides* and that the same are being conducted in a fair manner, the High Court ought not to usurp the powers of the police by halting otherwise proper complaints made before them.

26. In this case, the interested party has detailed the relationship between herself and the ex parte applicant and contends that though their relationship has never been formalised, the conduct of the ex parte applicant gravitates towards domestic violence. Such an allegation cannot be taken lightly and ought to be investigated by the Respondents and if found credible appropriate legal proceedings be undertaken.

27. In my view, if what the applicant means by harassment is the investigation of the said complaints, then this Court would be abusing its supervisory jurisdiction by granting the orders sought.

28. It is therefore clear that the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers *inter alia* to take statements and apprehend those who in their view are culpable.

29. It is not for the Court in judicial review proceedings to minutely examine the nature of the evidence in possession of the police in order to determine whether or not that evidence will mount a conviction. The decision whether or not to commence a criminal proceeding is at the discretion of the Director of Public Prosecution and whereas that discretion must be exercised *bona fide* and ought not to be abused, concrete evidence must be presented before the Court in order for the Court to interfere with the exercise of the powers and the discretion of the investigative and prosecutorial agencies. An order of prohibition is an order of serious nature and cannot and should not be granted lightly more so on mere allegations and blunt statements.

30. In this case the investigations are yet to be completed and a decision to prosecute the applicant is yet to be made. There is no allegation that in the conduct of such investigations and even in the course of the trial, if that decision will be made, injustice is likely to be meted to the parties before it. In fact, it is the court's view, without deciding, that the allegations made by the ex parte applicants herein, if true, may well found a *bona fide* defence to the offence with which he is intended to be charged and the mere fact that he has a defence to the intended charge is no ground for prohibiting the criminal trial from being instituted.

31. Having considered the material before me I am not satisfied that a case has been made out by the applicant to warrant the grant of the orders sought herein. The *ex parte* applicant is at liberty to defend himself before the trial court in the event that he is charged where he will have an opportunity afforded to him to challenge the veracity of the evidence against him.

32. At this stage I cannot say with certainty that the actions of the Respondents are tainted with *mala fides* or with ulterior motives. If that evidence was to come out in the course of the proceedings, the ex parte applicants would still be at liberty to institute appropriate judicial proceedings. As was held by **Kriegler, J** in **Sanderson vs. Attorney General-Eastern Cape 1988 (2) SA 38:**

**“Even if the evidence he had placed before the Court had been more damning, the relief the appellant seeks is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins - and consequently without any opportunity to ascertain the real effect**

of the delay on the outcome of the case – is far reaching. Indeed it prevents the prosecution from presenting society’s complaint against an alleged transgressor of society’s rules of conduct. That will seldom be warranted in the absence of significant prejudice...Ordinarily, and particularly where the prejudice alleged is not trial related, there is a range of “appropriate” remedies less radical than barring the prosecution. These would include a mandamus requiring the prosecution to commence the case, a refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by the accused. A bar is likely to be available only in a narrow range of circumstances, for example, where it is established that the accused has probably suffered irreparable trial prejudice as a result of the delay.”

33. Similarly as was held in Jago vs. District Court (NSW) 106:

“An abuse of process occurs when the process of the court is put in motion for a purpose which, in the eye of the law, it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve. The purpose of criminal proceedings, generally speaking is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and, on that account, is deserving of punishment. When criminal process is used only for that purpose and is capable of serving that purpose, there is no abuse of process...When process is abused, the unfairness against which a litigant is entitled to protection is his subjection to process which is not intended to serve or which is not capable of serving its true purpose. But it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court’s control unless it be said that an accused person’s liability to conviction is discharged by such unfairness. This is a lofty aspiration but it is not the law.”

34. Having considered the issues raised in this application it is my view, and I so hold, that this application has no merit.

### **Order**

35. Accordingly, the order that commends itself to me and which I hereby make is that the Notice of Motion dated 25<sup>th</sup> November, 2016 be and is hereby dismissed with costs to the interested party.

36. Orders accordingly.

**Dated at Nairobi this 20<sup>th</sup> day of September, 2017**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Ndolo for Mrs Wambugu for the interested party***

***Miss Chege for Mrs Kinyanjui for the applicant***

**CA Ooko**