



**Mutitu Water & Sanitation Co. Ltd v Attorney General & 4 others (Judicial Review 1 of 2023) [2025] KEHC 1353 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1353 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
JUDICIAL REVIEW 1 OF 2023  
MA ODERO, J  
FEBRUARY 7, 2025**

**BETWEEN**

**MUTITU WATER & SANITATION CO. LTD ..... APPLICANT**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF NATIONAL POLICE  
SERVICE ..... 3<sup>RD</sup> RESPONDENT**

**THE OFFICER COMMANDING STATION NAIRUTIA POLICE  
STATION ..... 4<sup>TH</sup> RESPONDENT**

**INDEPENDENT POLICING OVERSIGHT AUTHORITY ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. Mutitu Water and Sanitation Company Limited, the Applicant herein, filed in the High Court a Notice of Motion application dated 25<sup>th</sup> February 2023 seeking the following orders:-
  1. That this Honourable Court be pleased to grant an Order of Mandamus to compel the 3<sup>rd</sup> Respondent to commence investigations into the claims of threats made, vandalism, breaking in, assault and theft that occurred in the Applicant’s premises on the 8<sup>th</sup> November 2022.
  2. That this Honourable Court be pleased to grant an Order of Mandamus to compel the 2<sup>nd</sup> Respondent, after the conclusion of investigations, to prefer relevant charges against the perpetrators of crime in courts of competent jurisdiction.



3. That an Order of Mandamus compelling the 3<sup>rd</sup> Respondent to open an inquiry as to the conduct of the 4<sup>th</sup> Respondent in the discharge of his duties in regard to the crime reported by the Applicant.
  4. That this Honourable court be pleased to grant an order of Certiorari to remove to the High Court and quash the decision of the 5<sup>th</sup> Respondent in finding that there was no police culpability in the crimes reported by the Applicant.
  5. That this Honourable Court be pleased to give further orders and/or directions as it may deem fit and just to grant.
  6. That costs of this Application be borne by the Respondents.
2. The application is premised upon Order 53 3(1), (2), (3), (4) of the Civil Procedure Rules 2010, Sections 8 and 9 of the Law Reform Act, CAP 26, Laws of Kenya, Sections, 7, 8, 9, 10 and 11 of the Fair Administrative Actions Act 2015 and all other enabling provisions of law and was supported the statutory statement of even date and the verifying Affidavit sworn by Peter Muturi the CEO of the Applicant.
  3. The 1<sup>st</sup> Respondent the Honourable Attorney General, the 3<sup>rd</sup> Respondent the Director of Public Prosecutions and the 4<sup>th</sup> Respondent The Officer Commanding Station, Nairutia Police Station, all opposed the application through the Replying Affidavit dated 28<sup>th</sup> April 2023 sworn by Chief Inspector Harun Mwenda, the officer Commanding (OCS) Nairutia Police Station.
  4. The 5<sup>th</sup> Respondent The Independent Policing Oversight Authority (IPOA) also opposed the application through their Grounds of opposition dated 25<sup>th</sup> May 2023 and the Replying Affidavit of the same date sworn by Rashid Wekesa the Nyeri Office Regional Co-ordinator.
  5. The matter was canvassed by way of written submissions. The Applicants filed the written submissions dated 12<sup>th</sup> March 2024. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents relied upon their written submissions dated 7<sup>th</sup> June 2024 whilst the 5<sup>th</sup> Respondent relied upon its written submissions dated 19<sup>th</sup> May 2024.

## **Background**

6. The Applicants deponed that their premises were on 8<sup>th</sup> November 2022 invaded by goons whom they believe were hired to sabotage its operations. That the said goons attacked and injured the Applicants employees, destroyed valuable documents and CCTV cameras, stole a backup generator and cash as well as engaging in other criminal acts of vandalism, threats, assault, which occasioned substantial loss to the applicant.
7. The CEO of the Applicant reported the incident to Nairutia Police Station and the said reports were duly recorded and various OB numbers issued. The applicants were assured that the investigations would be conducted with a view to identifying the perpetrators and bringing them to book.
8. However according to the applicants no such investigations ever took place in spite of incessant follow up by the Applicant. The Applicant accuses the officers at the said police station of neglecting, failing and/or refusing to conduct investigations into the reports made to them.
9. The Applicant then reported the matter to IPOA seeking to have the said officers sanctioned and action taken against them.



10. The 5<sup>th</sup> Respondent after conducting an investigation into the matter found that there was no evidence of laxity and/or indifference on the part of the police officers. In short the 5<sup>th</sup> Respondent found no police culpability in the crimes reported by the Applicant.
11. The Applicant asserts that the 5<sup>th</sup> Respondent (IPOA) failed to execute its statutory mandate by failing to conduct an independent investigation and by failing to render a finding of culpability against the 4<sup>th</sup> Respondent.
12. The Applicant states that it is apprehensive that it will be the victim of further attacks arising from the failure of the Respondents to intervene to protect it against criminal elements. That the inaction by the officers of the 4<sup>th</sup> Respondent was unconstitutional and amounted to a breach of the officers' oath of office. The Applicant prays that the 2<sup>nd</sup> Respondent (ODPP) direct that investigations be properly done and that upon conclusion of said investigations the 3<sup>rd</sup> and 4<sup>th</sup> Respondents be compelled to prefer charges against the perpetrators.
13. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents deny the allegation that they neglected and/or refused to act on the reports made by the Applicants. The Respondents state that upon receiving the said reports, the 4<sup>th</sup> Respondent and his officers rushed to the scene and calmed down the situation. That CCTV footage was taken for review and that the Deputy Sub County Commander for Kieni was nominated to investigate the case.
14. The Respondents insist that investigations in some cases were concluded and perpetrators have been arraigned in court facing various charges. The Respondents deny the Applicants claim that they have breached their statutory duties and instead accuse the applicant of stalling some cases by being uncooperative with the officers.
15. On its part the 5<sup>th</sup> Respondent (IPOA) aver that having received the complaints from the Applicant, it conducted independent investigations as per its mandate and found that the 4<sup>th</sup> Respondent had in fact acted on and investigated the Applicants reports.
16. The 5<sup>th</sup> Respondent states that it found no evidence of inaction and/or culpability on the part of the police officers which finding was communicated to the Applicant. The Respondents all urge the court to dismiss this application in its entirety.

### **Analysis and Determination**

17. I have carefully considered the application before this court, the replies filed thereto as well as the written submissions filed by the parties.
18. Article 165(3) of the [Constitution](#) of Kenya 2010 confers upon the High Court unlimited original jurisdiction in civil and criminal matters, including the jurisdiction to hear and determine any question with respect to interpretation of the [Constitution](#).
19. The High Court derives its powers to review of decisions made by judicial or quasi-judicial bodies from Section 165(6) of the [Constitution](#) which confers upon the High Court supervisory jurisdiction as follows:-

“The High Court has supervisory jurisdiction over the subordinate courts, and over any person, body or authority exercising a judicial or quasi-judicial function but not over a superior court.”



20. The only issue for determination is whether the Court should grant the orders of certiorari and mandamus prayed for.
21. The Applicant has sought orders of mandamus to compel the 2<sup>nd</sup> Respondent (the ODPP) to commence investigations into the incident that occurred at the Applicants premises on 8<sup>th</sup> November 2022.
22. The Applicant also seeks orders of mandamus to compel the 2<sup>nd</sup> Respondent (the ODPP) after conclusion of investigations to prefer relevant charges against the perpetrators of the incidences of threats, attacks or vandalism on the applicants premises.
23. The purpose of an order of mandamus is to compel the performance of a public duty. Such an order would therefore be issued against a public officer who has failed/omitted to perform a specific duty required of him/her by law.
24. The condition for grant of an order of mandamus is that the applicant must demonstrate that the public officer has failed to perform his duty. The court will not grant an order of mandamus where there is an alternative remedy available to the applicant. Likewise the court may decline to grant such order in cases where the enforcement of the order mandamus will pose implementation challenges that will require supervision by the court.
25. In the case of Republic -vs- The Commissioner Of Lands & Another Ex Parte Kithinji Murugu M'agere [2012] eKLR the court held that an order of mandamus is to be employed to enforce the performance of a public duty which is imperative, not optional or discretionary, with the authority concerned. Further that an order of mandamus may be issued to enforce a mandatory duty which may not necessarily be a statutory duty but which has "a public element" which may take any form.
26. In Republic -vs- Town Clerk, Kisumu Municipality Ex Parte East African Engineering Consultants [2007] 2 E.A, the Court stated that an order of mandamus compels a public officer to act in accordance with the law. As such the court will only issue an order of mandamus where it concludes that it is the only decision lawfully open to the public body and there is no other legal remedy available to remedy the infringement of a legal right.
27. Finally on this part in Republic -vs- Kenya National Examinations Council Ex Parte Gathenji & Others [1997] eKLR, the Court of Appeal expounded on the principles applicable for an order of mandamus to issue as follows

“ ..... what is the scope and efficacy of an Order Of Mandamus? Once again we turn to Halsburys Laws of England, 4<sup>th</sup> Edition Volume 1 at page 111 Paragraph 89. The learned treatise says:-

“ The order of mandamus is of most extensive remedial nature, and is in form, a command issuing from the High Court of Justice, directed to any person corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue to the end that justice may be done, in all cases where there is a specific legal right and not specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.....what do these principles mean? They mean that an order of mandamus will compel the performance of



a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.....”

28. The Applicant is seeking orders of judicial review on the basis of its claim that the 4<sup>th</sup> Respondent (a police station) as well as the 2<sup>nd</sup> respondent (the ODPP) failed the Applicant by failing and/or refusing to investigate and prosecute the perpetrators of the crimes committed as per the incident which reportedly occurred on 8<sup>th</sup> November 2022.
29. The purpose of judicial review was set out by the Court of Appeal in the case of Municipal Council Of Mombasa -vs- Republic & Umoja Consultants Ltd [2002] eKLR 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 makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters..... The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.” [Own emphasis]
30. The Applicant has accused the 4<sup>th</sup> Respondent of failing to investigate the report made at the Nairutia Police Station regarding the incident of 8<sup>th</sup> November 2022. However this is not an entirely correct representation of the facts.
31. According to the Replying Affidavit dated 28<sup>th</sup> April 2023, as soon as the report was made at the police station Chief Inspector Harun Mwenda mobilized other officers and rushed to the scene. The police immediately attended to the scene and calmed down the crowd.
32. Thereafter police conducted investigations by obtaining CCTV footage for review. The Deputy Sub-County Police Commander Kieni East was nominated to spearhead the investigations. In the circumstances the police cannot be said to have failed/refused to conduct investigations. A visit to a scene amounts to investigation.
33. In Paragraph 12 of the 4<sup>th</sup> Respondents Replying Affidavit a list of eleven (11) charges laid against various individuals as a result of police investigations into the incident have been set out. One cannot be charged in the absence of investigations. The fact that so many charges arose from that incident is sufficient proof that the police did perform their duty/mandate and did in fact investigate offences reported to them.
34. The Applicant has also accused the ODPP of failing in their duty to act by prosecuting the perpetrators of the offences committed on 8<sup>th</sup> September 2023.
35. Article 157 of the Constitution of Kenya 2010 establishes the office of the Director of Public Prosecutions. Article 157 (6) to (11) sets out the duties of the ODPP in relation to its prosecutorial powers as follows:-
  - (6). The director of public prosecutions shall exercise state powers of prosecution and may....
    - a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;



- (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
  - (c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the director of public prosecutions or taken over by the director of public prosecutions under paragraph (b)
- (7) If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution's case, the defendant shall be acquitted.
  - (8) The director of public prosecutions may not discontinue a prosecution without a permission of the court.
  - (9) The powers of the director of public prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.
  - (10) The director of public prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.
  - (11) In exercising the powers conferred by this article, the director of public prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. [own emphasis]
36. It is clear from the above provisions that the decision whether or not to institute a prosecution lies exclusively with the ODPP. No other person or body can compel the ODPP to prosecute. The best an aggrieved party can do is to institute a private prosecution.
37. It must be remembered that not every report made to a police station will result in charges being laid. A charge will only be laid where there exists sufficient evidence to sustain that charge. In the case of *Republic -vs- Attorney General Ex parte Kipngeno Arap Ngeny High Court Civil Application No. 406 OF 2001*, the court held:
- “A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting criminal prosecution otherwise the prosecution will be malicious and actionable.”
38. In any event as stated earlier the claim that the ODPP failed/rejected to act on the Applicants report has no basis. As demonstrated by the Respondent a total of not less than eleven (11) charges were mounted by the ODPP arising from the Applicants complaint. The fact that the Applicant felt that more ought to have been done cannot amount to an indictment against the ODPP.
39. On the whole I find no evidence of deliberate failure to act by the 2<sup>nd</sup> and 4<sup>th</sup> Respondents. The grounds meriting judicial review have not in my view been demonstrated by the Applicant.
40. The Applicant also prayed for orders of Certiorari to remove to the High Court and quash the decision of the 5<sup>th</sup> Respondent IPOA. The Applicant stated that it registered with IPOA a complaint of inaction against the 4<sup>th</sup> Respondent. That following investigations IPOA found no evidence of wrong doing on



the part of the police officer and communicated its findings to the Applicants Advocate vide a letter dated 25<sup>th</sup> January 2023.

41. The Applicant was not satisfied by the findings of IPOA and seeks to have those findings quashed.
42. In the case of *Pastoli -vs- Kabale District & Others* [2008] 2 E.A the court set out the duty of the court in Judicial review proceedings as follows;-

“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or the 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 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 would have made 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 National 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”

43. An order of certiorari can be made where the court is satisfied that tribunal or public body made a decision in excess of its jurisdiction. The burden lies upon the Applicant to prove that this was in fact the case.
44. The Applicants seek to quash the findings of the 5<sup>th</sup> Respondent that there was no culpability on the part of the police which finding was communicated to the Applicant through a letter written by IPOA to their advocate;-
45. The principles for Judicial Review order of certiorari were set out in a land mark case of *Republic Vs Kenya National Examination Council Ex parte Gathenji and others Civil Appeal No. 266 of 1996*, where the Court of Appeal stated inter alia:

“an order of certiorari can only quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not adhered to or any other reasonable cause. It is trite law that the remedy of Judicial Review is not concerned with the merits of the case but the decision-making process. In order for an applicant to succeed in an application for Judicial Review, he must satisfy the court that a public officer has acted unprocedurally, that his decision was unreasonable and that the impugned decision was illegal.” [own emphasis]

46. The 5<sup>th</sup> Respondent received the complaint forwarded to it by the Applicants, investigated the same and communicated their finding. In all this the 5<sup>th</sup> Respondent acted well within its mandate.
47. The Applicants have not demonstrated that IPOA acted in excess of its jurisdiction nor is it shown that it acted unfairly or unreasonably. The mere fact that the Applicants did not like or did not agree with the decision of the 5<sup>th</sup> Respondent is not valid grounds for an issue of orders of certiorari to quash that decision.
48. The Applicants also alleged that there was a breach of the Fair Administrative Actions Act and urged the court to review the actions of all the Respondents.



49. It is not in any doubt that the Respondents being Public bodies are subject to the provisions on Fair Administrative Action as outlined by Article 47 (1) of the Constitution of Kenya 2010 which provides as follows

“47(1) Every person has the right to administrative action that is expeditious efficient, lawful, reasonable and procedurally fair.”

50. In the case of *Judicial Service Commission vs. Mbalu Mutava & Another* {2015} eKLR the Court of Appeal held that:-

“ Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47 (1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

51. The importance of fair administrative action as a Constitutional right was appreciated in the South African case of *President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others* CCT 16/98 2000(1) SA 1 at paragraph 135 – 136 as follows which dealt with similar provisions on just administrative action in Section 33 of the South African Constitution as follows:-

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles.

The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades....”

52. Similarly, Section 7(2) of the Fair Administrative Action Act, 2015 provides for the grounds of Judicial Review which include bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power.

53. From the material placed before this court I find no evidence that the Respondents failed and/or refused to exercise their constitutional mandates. I find no basis for the assertion by the Applicants that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents failed to detect investigate and prosecute crime.

54. Courts in this country are generally reluctant to interfere in matters which fall within the province of the police or the ODPP. The Courts ought to wait for investigations to be conducted and a suspect charged in a court of law before pronouncing itself.



55. In *Cyrus Shakhalanga Khwa Jirongo -vs- 504 Developers Ltd & 9 Others* [2021] eKLR the Supreme Court of Kenya observed as follows:-

“(73) Although the DPP is not bound by any directions, control or recommendations made by any institution or body, being an independent public office, where it is shown that the expectations of article 157 (11) have not been met, then the High Court under article 165(3) (d) (ii) can properly interrogate any question arising therefrom and make appropriate orders. [83] In that regard, the Court of Appeal in the case of *Commissioner of Police & another v Kenya Commercial Bank Ltd & 4 others* [2013] eKLR persuasively found that the High Court can stop a process that may lead to abuse of power and held that:-

Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged. By the same token and in terms of article 157(11) of the *Constitution*, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate all allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the inspector general undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution. See *Githunguri v Republic* [1985] KLR 3090. It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See *Ndarua v R* [2002] 1EA 205. See also *Kuria & 3 others v Attorney General* [2020] 2 KLR.” [Own emphasis]

56. In conclusion I find that the Applicants have not demonstrated a case to warrant issuance of the orders of Judicial Review which they are seeking. The Notice of Motion application dated 25<sup>th</sup> February 2023 is hereby dismissed in its entirety. Costs to be met by the Applicants.

**DATED IN NYERI THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2025.**

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**MAUREEN A. ODERO**  
**JUDGE**

