



**Republic v Office of the Director of Public Prosecutions & 5 others;
Ojiambo & 2 others (Exparte Applicants) (Judicial Review E186 of 2024)
[2025] KEHC 2331 (KLR) (Judicial Review) (5 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2331 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**JUDICIAL REVIEW
JUDICIAL REVIEW E186 OF 2024**

**JM CHIGITI, J
FEBRUARY 5, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT
DIRECTORATE OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT
OFFICE OF THE INSPECTOR GENERAL OF POLICE 3RD RESPONDENT
OFFICER IN CHARGE OF MUTHAIGA POLICE STATION . 4TH RESPONDENT
THE HON ATTORNEY GENERAL 5TH RESPONDENT
CHIEF MAGISTRATE’S COURT AT MILIMANI 6TH RESPONDENT**

AND

**COLBERT OUMA OJIAMBO EXPARTE APPLICANT
ROBERT OMONDI OWINO EXPARTE APPLICANT
MILKA WAHUKURIA EXPARTE APPLICANT**

JUDGMENT

Applicants’ case;

1. The Ex- Parte Applicants are before this Court vide a Notice of Motion application dated 29th August, 2024 filed under Articles 23 (3) (D) & 47 of *the Constitution* of Kenya 2010; Sections 7 & 11 of the



Fair Administrative Actions Act, 2015; Sections 8 & 9 of the Law Reform Act Cap 26; and Order 53 of the Civil Procedure Rules 2010; and other enabling provisions of the Laws of Kenya.

2. The application is seeking the following Orders:
 - A. An Order of Certiorari to remove into the High Court and quash the entire decision of the Respondents to charge, arrest, summon, arraign, and prosecute the Applicants in Milimani MCCR/E812/2024; R v Colbert Ouma Ojiambo, Robert Omondi Owino, & Milka Wahu Kuria.
 - B. An Order of Prohibition to restrain the Respondents, their agents and servants from arresting, detaining, summoning, or arraigning the Applicants or continuing the charges and prosecution in Milimani MCCR/E812/2024; R v Colbert Ouma Ojiambo, Robert Omondi Owino, & Milka Wahu Kuria.
 - C. The costs of this Application.
3. The Application is supported by a statutory statement dated 26th August, 2024, and a verifying affidavit by Colbert Ouoma Ojiambo sworn on even date.
4. The Applicants aver that they are Advocates and practicing partners of good standing at Acorn Law Advocates- LLP.
5. It is their case that the Respondents unlawfully and unreasonably charged the Applicants on 15th August 2024 in MCCR/E812/2024; R v Colbert Ojiambo, Robert Owino Omondi, & Milka Wahu Kuria.
6. It is the Applicants case that Respondents charged them without reasonable basis, independent investigations, or evidence to support the charges.
7. They contend argue that the Respondents are using criminal proceedings to settle scores arising from a civil case in which they represent the Plaintiffs (High Court Commercial Case No. 39 of 2007 between Anna Marie Cassiede & Bruno Cassiede (Plaintiffs) and Peter Kimani Kairu t/ a Kairu Kimani & Co. Advocates (Defendant) contrary to the jurisprudence by the High Court and Court of Appeal particularly, Civil Appeal No. 56 of 2012.
8. It is their case that the Respondents wish to criminalize advocate-client representation contrary to the public policy that the Law Society and Judiciary of Kenya remain independent from external private influence.
9. The Applicants deponed that they were not summoned to appear in court or anywhere else but prepared and submitted a charge sheet for plea-taking with the intention that the same would be read in their absence to obtain warrants of arrest against them however on 20th August, 2024 their statements were sought.
10. The applicants posit that the following questions emerge from the manner by which the charges were preferred against them by the Respondents:
 - i. On what basis or information did the Respondent draw and bring the Charge Sheet dated 15/8/2024 if they had not questioned us?
 - ii. Why would the prosecution draw a charge sheet against us, with full knowledge of our whereabouts and contacts, and submit it to court for plea-taking without informing us?



- iii. Is it not the reverse of process and contrary to the rule of law to charge, seek to arrest, and only afterward try to investigate the offence brought?
 - iv. Why do the charge sheets conceal the identity and source of the allegations against us?
 - v. Why does the charge sheet conceal the identity of the investigating officer? Is it to cover up the illegalities undertaken?
11. . The Applicants canvassed their application by way of written submissions dated 9th October, 2024.
 12. . It is submitted that the Respondents have no basis to arrest, charge and or prosecute the ex-parte Applicants solely on the basis that they are advocates in the Law firm which is discharging professional duties as opposed to deliberately committing a criminal offence.
 13. They place reliance in the reasoning in the case of Alfred Nyandieka v Director of Public Prosecutions & 2 others [2020] eKLR, the Honourable Court correctly observed that,
 66. The 1st and 2nd respondents' intention to arrest and prosecute the petitioner was an attempt^o to interfere with the administration of justice and^o the rule of law, a fundamental value in criminal justice. The petitioner, as an advocate, was discharging his professional duties to enhance criminal justice. He could not be considered a criminal while acting in the course of his duties. The 1st and 2nd respondents being active players in the cases the petitioner is involved in on behalf of his clients were attempting to steal a march against the petitioner's clients in those cases which amounted to improper motive
 - ...
 77. I have carefully considered the petition; the responses; submissions and the authorities relied on by parties and those cited by the court. I have also considered the material placed before court, *the constitution* and the law. The conclusion I come to is that there was no basis for attempting to arrest the petitioner with a view to prosecuting him given that he was discharging professional duties as opposed to deliberately committing a criminal offence. The 2nd respondent's officers' conduct was unlawful and reproachable in the circumstances of this case. The 1st respondent could not support their actions without appearing to compromise the petitioner's clients' right to a fair trial.
 14. It is also submitted that the Respondents failure to enter appearance and or file any affidavits to controvert the factual allegations raised by the Ex- Parte Applicants goes to show the Respondents admittedly have no reasonable justification for their actions or conduct.
 15. The Applicants contend that the criminal charges arise from a civil dispute in which the ex-parte Applicants' Law Firm represents the Plaintiffs in a civil dispute High Court Commercial Case No. 39 of 2007 between Anna Marie Cassiede & Bruno Cassiede (Plaintiffs) and Peter Kimani Kairu t/ a Kairu Kimani & Co. Advocates (Defendant). The Complainant in the criminal proceedings is the Defendant in the civil suit. The ex-parte Applicants' clients are seeking to recover about Ksh.40 million from the Defendant (the Complainant). The civil suit is currently pending before High Court. The alleged forged document was an affidavit filed in the said civil case by the ex-parte Applicants' Law firm on behalf of the Plaintiffs. The Plaintiffs acknowledged signing the said affidavit, and hence it cannot be a forged document by all intends and purposes.
 16. It is submitted that the Respondents are using criminal proceedings to settle scores arising from a civil case contrary to the jurisprudence.



17. They rely on the case *Republic v Inspector General of Police & 3 others Ex-Parte Lilian Wangari & 5 others* (20171 eKLR where Ngugi J, held thus:

“I will begin my analysis by pointing out that where parties have been involved in a civil dispute, the DPP ought to be circumspect and have his antennae up when one of such parties turns up to his office seeking initiation of criminal charges based on the same facts as those traversed by the civil dispute which is pending in Court. In such a case, there is at least a suspicion that such a party may be hoping to enlist the criminal justice system in aid of his civil dispute.

In this particular case, there are a number of tell-tale factors which should have given the DPP pause before accepting the Interested Party’s victimhood narrative lock, stock and barrell.” (see para 31 and 32).

18. Reliance is also placed in the case of *Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012* [20131 eKLR that;

“While the law (Section 193A of the *Criminal Procedure Code*) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that that power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court.”

19. It is their case that the criminal proceedings herein are unreasonable, made in bad faith aimed at embarrassing, humiliating, disparaging, and intimidating them

20. They further argue that the Respondent wish to criminalize advocate-client representation contrary to the public policy and if the criminal proceedings are not quashed, many advocates will find themselves being arrested and arraigned in criminal courts for every defect or error in their pleadings or affidavits sworn by their clients.

21. In *Republic v Al Ruhia Estates Limited & 2 others Ex Parte Tohn Oduor Okwaro & another* [20211 eKLR the court held that:

“Whereas the mere fact that the facts of the case constitute both criminal and civil liability does not warrant the halting of the criminal case as stated in *Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another* (supra) it is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases otherwise it would amount to abuse of the process of the court. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process.”

22. According to the Applicants, the actions and conduct of the Respondents amount to abuse of power as they failed to consider relevant factors or evidence in arriving at the decision to arrest, charge and prosecute them.



23. They urge this Honourable Court to quash the criminal proceedings by the Respondents as the same would result in the crippling legal practice and legal representation, as many advocates will find themselves being arrested and arraigned in criminal courts for every defect or error in their pleadings or affidavits sworn by their clients.

24. Reliance is placed in the case of *Republic v Al Ruhia Estates Limited & 2 others Ex Parte Tohn Oduor Okwaro & another* [2021] eKLR in which it was held that,

“Whereas the mere fact that the facts of the case constitute both criminal and civil liability does not warrant the halting of the criminal case as stated in *Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another* (supra) it is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases otherwise it would amount to abuse of the process of the court. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process.” (See para 42)

25. Reliance is also placed in *Alfred Nyandieka v Director of Public Prosecutions & 2 others.* (supra) where it was held:

“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] IEA 205. See also *Kuria & 3 Others V. Attorney General* [2002] 2KLR 69”

Analysis and Determination;

26. . Upon perusing the application, affidavits, annexure and the Applicants submissions ,the issue for determination by this court is whether the applicant is entitled to the prayers sought.

27. . In *Pastoli v Kabale District Local Government Council & Others*, [2008] 2 EA 300, the court held:

“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: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR). Illegality is when the decision making authority commits an error of law in the process of taking the decision 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: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”. Procedural impropriety is when there is 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. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876).”

28. . Judicial Review is entrenched in Article 47 of *the Constitution* which provides for the right to fair administrative action, and Section 7 of the *Fair Administrative Action Act* which provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision.
29. . The Applicants argue that the criminal charges against them are in bad faith, unreasonable and an abuse of power by the Respondents.
30. . In the case of Republic vs Commissioner of Police and Another ex parte Michael Monari & Another (2012) eKLR it was held that:

“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. 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”.
31. . Section 24 of The *National Police Service Act* provides as follows:
 24. The functions of the Kenya Police Service shall be the
 - (a) provision of assistance to the public when in need;
 - (b) maintenance of law and order;
 - (c) preservation of peace;
 - (d) protection of life and property;
 - (e) investigation of crimes;
 - (f) collection of criminal intelligence;
 - (g) prevention and detection of crime;
 - (h) apprehension of offenders;
 - (i) enforcement of all laws and regulations with which it is charged; and
 - (j) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.
32. . Section 35 provides for the functions of the Directorate of Criminal Investigations
 35. 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 cybercrime 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.

33. The Director of Public Prosecutions has a constitutional duty to direct investigations and also to prosecute as provided for under Article 157 which states:

157. Director of Public Prosecutions

- (4) The Director of Public Prosecutions shall have power to direct the Inspector- General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.
...
- (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;
 ...
- (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.



34. . It is not denied that the Applicants were charged, have taken plea and the criminal proceedings are yet to be concluded.
35. . The Applicants have not adduced any/sufficient evidence to show any bad faith, procedural impropriety or ulterior motives on the part of the Respondents in investigating and prosecuting them for a criminal offence.
36. . This court is guided by Republic vs. Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & Another (2002) 2 KLR 703, where it was held as follows:

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

37. . The criminal proceedings are yet to be concluded and the trial court will no doubt give the Applicants an opportunity to tender their evidence as is provided for under Article 50 of *the Constitution*.
38. . In the case of D.P.P versus Humphrey’s (1976) 2 ALL ER 497 at 527-8 it was held:

“A judge has not and should not appear to have any responsibility for the institution of prosecutions, nor has he any power to refuse to allow a prosecution to proceed merely because he considers that as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to interfere. Fortunately, such prosecutions are hardly brought but the power of the court to prevent them is, in my view, of great constitutional importance and should be jealously preserved.”

39. . It is not the duty of the judicial review court to engage in an examination of the merit or otherwise of the charges to be preferred. The insufficiency or otherwise of the charges is left to the trial court and an order of Certiorari cannot avail in the circumstances.
42. . Article 165(6) of *the Constitution* of Kenya 2010 provides that this Court has supervisory jurisdiction over any person, body or authority that exercises a quasi-judicial function or a function that is likely to affect a person’s rights.



43. The circumstances when a court can intervene in a criminal prosecution was the subject of the decision in R vs. Attorney General exp Kipngeno Arap Ngeny, High Court Civil Application No. 406 of 2001 wherein it was held that:

“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 a criminal prosecution otherwise the prosecution will be malicious and actionable.”

44. . This Court finds that since the decisions to investigate the Applicants by the Respondents was at the request of an aggrieved Complainant, and not on their own motion, the said decisions were not unreasonable and not in abuse of power.

45. . The Applicants argue that if the criminal proceedings are not quashed, many advocates like themselves will find themselves being arrested and arraigned in criminal courts for every defect or error in their pleadings or affidavits sworn by their clients. It is this court’s finding that every case is determined on the basis of its peculiarities as they avail.

46. In the eyes of the law as provided for under Article 27 (1) and (2) of the Constitution every person is equal before the law and enjoys equal protection and benefit of the same irrespective of their status, profession or any other discriminatory consideration. It states:

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(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

47. Advocates as would any other law abiding person are required to perform their duties/operate within the law, and in instances where they are in breach of the law, they cannot be said to enjoy immunity from prosecution.

48. . The Applicants have also sought prohibitory orders.

49. . In Republic v Principal Kadhi, Mombasa Ex-parties Alibhai AdamaliDar & 2 others; Murtaza Turabali Patel (Interested Party) [20221 eKLR, the Court rendered itself thus:

“The Order of “Prohibition” issues where there are assumptions of unlawful jurisdiction or excess of jurisdiction. It’s an order from the High Court directed to an inferior tribunal or body as in this case the Kadhi’s Court. Its functions is to prohibit and/or forbids encroachment into jurisdiction and further to prevent the implementation of orders issued when there is lack of jurisdiction.”

“Although prohibition was originally used to prevent tribunals from meddling with cases over which they had no jurisdiction, it was equally effective and equally often used, to prohibit the execution of some decision already taken but ultra vires. So long as the tribunal or administrative authority still had power to exercise as a consequence of the wrongful decision, the exercise of that power could be restrained by prohibition. Certiorari and



prohibition frequently go hand in hand, as where certiorari is sought to quash the decision and prohibition to restrain its execution. But either remedy may be sought by itself."

50. . It is my finding that the issuance of prohibition orders as sought will serve no useful purpose given that this court has already made a finding that the applicants did not prove the 1st prayer, and I so hold. The Prayer for an order of prohibition is declined.

51. . Costs always follow the event and are at the discretion of the court. In the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR, the Supreme Court stated that the purpose of costs is not to penalise the losing party but to compensate the successful party for costs incurred in prosecuting or defending the suit:

“(14) So the basic rule on attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party; rather, it is for compensating the successful party for the trouble taken in prosecuting or defending the suit. In Justice Kuloba’s words [Judicial Hints on Civil Procedure, at p.94]: “[T]he object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure...Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action.”

Disposition;

52. . It is this court’s finding and I so hold that the Applicants have failed to prove that the Respondents have abdicated their statutory duties.

53. . The Application lacks merit.

Order:

54. . The application dated 29th August, 2024 is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF FEBRUARY 2025

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J. M. CHIGITI (SC)

JUDGE

