



**Republic v Director of Public Prosecutions & 2 others; Wachira (Exparte Applicant); Wokabi (Interested Party) (Judicial Review Miscellaneous Application E002 of 2024) [2025] KEHC 3980 (KLR) (24 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3980 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E002 OF 2024**

**LN MUTENDE, J  
MARCH 24, 2025**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

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

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 2<sup>ND</sup> RESPONDENT**

**CHIEF MAGISTRATE’S COURT NYAHURURU ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**PETER NDIRITU WACHIRA ..... EXPARTE APPLICANT**

**AND**

**ZACHARIAH KIHARA WOKABI ..... INTERESTED PARTY**

**RULING**

1. The Ex-parte Applicant, Peter Ndiritu Wachira, approached this court through a chamber summons dated 22<sup>nd</sup> February, 2024 seeking leave to apply for;
  - a. An order of Certiorari to quash the charge sheet in Nyahururu CM. Criminal Case No. E277 of 2024 registered against the Applicant on charges of Stealing motor vehicle contrary to Section 45(1) of the Succession Act, Obtaining registration by false pretence contrary to Section 320 of the [Penal Code](#), uttering a false document contrary to Section 353 of the [Penal Code](#) and, Forgery contrary to Section 345 as read Section of the [Penal Code](#).
  - b. An order of prohibition prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from charging the Applicant with the impugned offences before the Chief Magistrate’s Court Nyahururu or any other court



in the Republic of Kenya or to register any charge of similar offences from the same transaction before any court within the Republic.

- c. That the leave granted to operate as stay of proceedings in Nyahururu Criminal Case No. E277 of 2024 registered against the Applicant on the aforesaid offences.
2. The application for leave is accompanied by a statement which sets out inter alia grounds upon which is sought to the effect that he is to be charged with a criminal offence that is an abuse of the criminal justice system aimed at intimidating and harassing the Applicant to yield to the Interested Party's demand in the Succession Cause No. E159 of 2023; as well as an affidavit verifying facts to be relied on.
3. This is a matter that was filed at Nanyuki High Court at the outset. On 28<sup>th</sup> February, 2024 Ndung'u J. issued an order staying further proceedings against the Applicant on temporary basis pending the disposal of the application. The Respondents were directed to file a response and the Ex-parte Applicant was to file supplementary affidavit together with skeleton submissions and the file was transferred to this court.
4. On the 18<sup>th</sup> May, 2024, the 1<sup>st</sup> Respondent filed grounds of opposition to the effect that the Ex-parte Applicant seeks to direct the 1<sup>st</sup> Respondent in exercise of his powers and/or functions contrary to Article 157(10) of the *constitution*. That the petition is an invitation to this court to intervene against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's exercise of their constitutional mandate without proper legal basis.
5. That the Petitioner has not demonstrated a prima facie arguable case on breach of any constitutional provision or fundamental and human rights or any other provision of law, by the Respondents; and, that the court should be shy in accepting invitation by litigants to interfere with the independent exercise of constitutional and statutory authority by State organs in those cases where such organs and offices are acting ultra vires, outside the confines of reasonableness, procedural fairness, malafides and in total disregard of the doctrine of proportionality in decision making.
6. Subsequently, on 8<sup>th</sup> May, 2024, No. 11963 PC Felix Maundu of the 2<sup>nd</sup> Respondent filed a replying affidavit where he deposed that the Directorate received a complaint from the Interested Party which was booked in OB No. 22/11/11/2023 regarding unprocedural transfer of motor vehicle Toyota Sienta Registration No. KDB 727X which the Ex-parte Applicant had alleged that it had been bequeathed to him through a Will by his late grandmother Annah Ndiritu Wakarima Wachira. Investigations carried out revealed that there was an ongoing transfer of the vehicle from Peter Ndiritu Wachira to his co-accused Kelvin Kengara Ogoti and he immediately lodged a caveat on the transfer.
7. That he summoned the Ex-parte Applicant to the station which he complied but he declined to record a statement arguing that being the Estate Administrator he had the right to deal with the deceased Estate. Further, investigations carried out established existence of the Succession Cause No. E139 which was lodged as there existed a Will where Mary Wanjira was the one appointed as the executor and one vehicle in issue had been bequeathed to the Interested Party.
8. That the vehicle was sold by the Ex-parte Applicant to Kelvin Kengara Ogoti and the transfer was classified as a forced one since the original logbook was in possession of Zacharia Kihara Wokabi. The Ex-parte Applicant was arrested and released on cash bail. Subsequently, the co-accused was arrested and arraigned while the Ex-parte Applicant failed to turn up and proceeded to initiate the instant proceedings in Nanyuki knowing there is a fundamental court in Nyahururu.
9. The Ex-parte Applicant filed submissions. It is urged that according to In Republic v Kenya Revenue Authority Commissioner Ex-Parte Keycorp Reals Advisory Limited [2019] eKLR it was held that for an Applicant to make a case for leave to commence a judicial review, he/she must show;



- i. Sufficient interest in the matter otherwise known as locus standi.
  - ii. He/she is affected in some way by the decision being challenged.
  - iii. He/she has an arguable case and that the case has reasonable chance of success.
  - iv. The application must be concerned with a public law matter that is the action must be based on some rule of public law.
  - v. The decision complained of must have been taken by public body, that is a body established by statute or otherwise exercising a public function.”
10. That if arrested and charged the Ex-parte Applicant will be deprived of liberty hence he has locus standi to commence proceedings.
  11. On the question of having an arguable case he urged that the charges preferred exhibit bad faith in all aspects as some of the charges relate to action taken by the court and that the Respondent acted without confirming the authenticity of the documents.
  12. On the issue of public law and action being taken by a public body, it is submitted that the Respondents are public bodies governed by the public law and the *constitution* hence their actions must confirm to the *constitution* and they should not use their powers to harass, intimidate and suppress rights of one citizen to advance another’s agenda.
  13. That the application shall be rendered nugatory if leave is not granted to operate as stay since he will be arrested, charged and even remanded if he won’t be able to afford bond or bail. Reliance is placed on *Beatrice Kwamboka v Leader of Majority Party of the Nairobi County Assembly [2016] eKLR*:
 

“Apart from the foregoing the Court must also look at the likely effect of granting the stay to the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not and lean towards a determination which is unlikely to lead to an undesirable outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the Court, so far as possible to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court in exercising discretion, should therefore always opt for the lower rather than the higher risk of injustice.”
  14. It is submitted by the 1<sup>st</sup> Respondent that the Ex-parte Applicant and Interested Party are both beneficiaries in the Succession Cause No. E277 of 2024, the Estate of Anne Kwamboka Wachira but the Criminal Case No. E277 of 2024 concerns dealings in motor vehicle registration No. KDB 727X which belonged to the Estate of the deceased; where the Ex-parte Applicant is charged with;
    1. Stealing motor vehicle, contrary to Section 278A of the *Penal Code*.
    2. Intermeddling with deceased’s property contrary to Section 45(1) of the Succession Act Cap 160 Laws of Kenya.
    3. Obtaining registration by false pretence contrary to Section 320 of the *Penal Code*.
    4. Uttering a false document contrary to Section 353 of the *Penal Code*.
    5. Forgery contrary to Section 345 as read with Section 349 of the *Penal Code*.



15. That a criminal matter and succession matter can proceed concurrently as clarified by Section 193A of the *Criminal Procedure Code* and also held in *Kuria & 3 Others v Attorney General* [2002] eKLR where it was held;

“The normal effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial...”[emphasis added]
16. That criminal proceedings to be stayed, it must be shown that they were brought to achieve an ulterior motive and are an abuse of the court process or the Applicant’s fundamental rights.
17. That the decision to charge the Ex-parte Applicant was not actuated by any malice and not an abuse of prosecutorial powers as safeguard were undertaken to ensure that before the charges were preferred the relevant factors were given serious consideration.
18. I have considered rival submissions on the question whether or not leave should be granted to the Ex-parte Applicant to institute prerogative orders/writs of certiorari and prohibition against the Respondents and whether the stated leave should operate as stay of proceedings in the criminal matter – Nyahururu Criminal Case No. E277 of 2024.
19. The principles of granting such orders are rooted in the *constitution* and also statute, the Civil Procedure Rules. Certiorari is an order that quashes decisions made by a lower court or tribunal or government agencies; while prohibition is a court order that prohibits/forbids doing of something mostly by a public official.
20. To obtain such leave, the Ex-parte Applicant must demonstrate existence of a strong prima facie case with a probability of success. The issue to be considered is whether the argument put forward is meritorious, one that has sufficient evidence that does not require further investigations to support the claim. Prima facie evidence is crucial for initiating the prerogative writs.
21. It is urged that the charges as drawn against the Ex-parte Applicant and another exhibit bad faith. He is being accused of stealing the Interest Party’s car, intermeddling in his late mother’s estate, forgery, obtaining registration by false pretences.
22. The Ex-parte Applicant argues that he is also accused of taking a grant and Kenya Gazette and there is an attempt to revoke the same.
23. It is appreciated that the *constitution* allows the 1<sup>st</sup> Respondent to exercise prosecutorial powers independently but it is also argued that the High Court has power to intervene.
24. The 1<sup>st</sup> Respondent is seized of prosecutorial discretion to charge suspects. And in exercising its mandate he shall not be under control and direction or any authority which ensures a fair and efficient justice system. In that regard whatever action is taken by the Respondents, it must be within the confines of the *constitution*.



25. This is a case where the Ex-parte Applicant seeks to challenge decisions taken by the Respondents in exercise of their discretionary power as public officials. His rights must be balanced against the decision to be taken by the Respondents. In that regard to his constitutional rights and principles of natural justice will call upon the court granting him fair hearing. In the premises leave is granted to the Applicant to institute the prerogative orders.

26. On the questions of leave operating as stay, Order 45 Rule 1 (4) of the Civil Procedure Rules provide thus;

The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise:

Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.

27. In-depth investigations were carried out by the 2<sup>nd</sup> Respondent and a charge sheet filed in the criminal case. Thereafter the 1<sup>st</sup> Respondent embarked upon exercising prosecutorial powers. The court should be cautious in interfering with the decisions to charge and prosecute. In that case, I decline to allow leave granted to operate as a stay of proceedings in Nyahururu Criminal Case No. E277 of 2024.

28. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24<sup>TH</sup> DAY OF MARCH, 2025.**

.....

**L.N. MUTENDE**

**JUDGE**

