



Hassan & another v Director of Public Prosecutions & 2 others; Nuh Abdille Hassan t/a Nurex Cargo & Clearing Limited (Interested Party) (Judicial Review Application E284 of 2024) [2025] KEHC 4556 (KLR) (Judicial Review) (7 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4556 (KLR)

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

JUDICIAL REVIEW APPLICATION E284 OF 2024

RE ABURILI, J

APRIL 7, 2025

BETWEEN

DAUD ALI HASSAN 1ST APPLICANT

YUSSUF MOHAMMED ABDULLAHI 2ND APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

CHIEF MAGISTRATE COURT AT MAKADARA 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

AND

NUH ABDILLE HASSAN T/A NUREX CARGO & CLEARING LIMITED INTERESTED PARTY

JUDGMENT

1. Pursuant to leave granted on 31st December 2024, the Applicants herein filed the substantive Notice of Motion dated 2nd January 2025 which is the subject of this Judgment. The motion seeks the following orders:
 - a. That the Honourable Court do issue an order of Prohibition, prohibiting the 3rd Respondent or any other officers acting with his authority, prohibiting him/her and each one of them from proceedings with the conduct and/or prosecution of any criminal case borne out of MCCRmisc Case No. E1715 of 2024; R v E—Light Cargo Limited with regard to the



applicants' pending the full hearing and determination of this application or the further Orders of the court.

- b. That this Honourable Court do issue an order of Certiorari directed to the 1st and 3rd Respondent, by themselves, their servants and/or agents or any other officer acting under their authority to quash the decision by them made on or about 26/ 12/ 2024 to institute and/or commence criminal proceedings against the applicants.
 - c. That this Honourable Court do issue an order of Prohibition directed against the 2nd Respondent, by himself, his servants and/ or Agent or any other judicial officer for the time being seized of hearing or the conduct of MCCRmisc Case No. E1715 of 2024; R v E-Light Cargo Limited from trying and/or carrying on any further proceedings on the matter pending the full hearing and determination of this application or the further Orders of the court.
 - d. That further and in the alternative, the Honourable Court be pleased to issue orders directing officers of the 3rd Respondent, specifically 104573 PC Suleiman Mwatajiri to release personal items belonging to the Applicants being:
 - a. National Identity Cards and/ or Passports and Travel Documents.
 - b. Mobile Phone(s).
 - e. A declaration that the Order granted by the Magistrate Court sitting at Makadara on the 24th of December 2024, allowing officers of the 3rd Respondent to have access, search and recover suspected stolen goods held at the applicants' premises in respect of MCCRmisc Case No. E1715 of 2024; R v E-Light Cargo Limited is and was invalid, made ultra vires, void and of no effect.
 - f. That costs of this application be provided for.
2. The application is supported by a Statutory Statement dated 30th December 2024 and a verifying affidavit sworn on 2nd January 2025 by the 1st Applicant.
 3. According to the Applicants, the 1st Respondent initiated criminal proceedings before the Makadara Chief Magistrates Court on 24th December 2024, seeking a search warrant to allow officers from the Directorate of Criminal Investigations (DCI) at Starehe to access, search and recover suspected stolen goods at their premises, MEMKAM Godown No. 3.
 4. The alleged criminal case is said to have arisen from a dispute between Nuh Abdille Hassan Trading as Nurex Cargo & Clearing Limited and Abdi Mohammed Hassan, with the former alleging that their goods ordered from China had been diverted to the Applicants' premises.
 5. That on the same day, the Magistrate's Court granted the search warrant, allowing DCI officers access to the premises. However, that upon executing the search, the officers allegedly harassed and intimidated the staff while ransacking the warehouse without finding any evidence linking the Applicants to criminal activity. The Applicants claim that the search was unlawful, as the officers exceeded their authority by conducting an illegal search beyond the warrant's scope, violating their right to privacy and property.
 6. It is the Applicants' case, that they were later arrested by the Officer Commanding Station (OCS), Ruaraka Police Station on allegations of stealing by servant under Section 281 of the [Penal Code](#). Further, that they were detained for over 24 hours before being released on cash bail of Kshs. 50,000 each.



7. The Applicants further depose that allegation against them revolve around goods supposedly held on behalf of Nurex Cargo & Clearing Limited. However, that no employment relationship exists between them and the Interested Party complainant, thus invalidating the charge. They further asserted that their company, E-Light Cargo Limited, is a distinct legal entity and that there is no basis for the criminal charges being preferred against them.
8. The Applicants also assert that the entire process, including their arrest and detention, amounted to abuse of power, violating the principles of natural justice, fairness, and due process. They maintain that the case against them is malicious and lacks evidence, as there was no contractual link between them and the Interested Party. They also allege that officers from the 3rd Respondent had interfered with their business by confiscating work phones and obstructing their banking activities.
9. The Applicants seek the court's intervention to prevent further unlawful actions against them, arguing that continued interference will cause irreparable harm to their business, which cannot be compensated by damages.

Responses

10. The 1st and 3rd Respondents filed grounds of opposition dated 14th January 2025 together with a Replying Affidavit sworn on 29th January 2025 by PC Suleiman Mwatajiri.
11. The Respondents contend in deposition that the Applicants have failed to provide evidence that the search warrant issued in MCCRmisc Case No. E1715 of 2024 was obtained illegally or in bad faith. They assert that the 3rd Respondent was properly investigating allegations that Abdi Mohamed Abdullahi fraudulently diverted company assets by misrepresenting business operations. It is their case that the investigation links him and the Applicants to E-Light Cargo & Clearing Limited.
12. The Respondents further contend that Abdi Mohamed Abdullahi, who was the manager of the Interested Party's China office, had fraudulently changed the company's name from Nurex Cargo to E-Light Cargo. Further, that this name change was used to divert goods meant for Nurex Cargo to E-Light Cargo, and the manager informed clients that the company had changed its name. The 3rd Respondent is said to have also discovered that Abdullahi gave firm instructions to shipping agents not to deal with anyone from Nurex Cargo and provided clients with new bank account details for payments and a new location to collect goods.
13. The Respondents also urge that the Applicants were released from custody on 27th December 2024, on a cash bail of Ksh. 50,000, as the 25th and 26th of December 2024 were public holidays and instructed the applicants to report to Makadara Law Courts on 3rd January 2025.
14. The Respondents also depose that the Applicants' claims of harassment and constitutional violations are unsubstantiated, as they have not provided supporting evidence. They emphasize that the 1st Respondent has sole prosecutorial discretion, and any legal challenge to the charges should be made before the trial court, not through judicial review. It is also their case that there is no procedural impropriety that would warrant the court's intervention.
15. The Interested Party filed a Replying Affidavit sworn on 17th February 2025 by Nuh Abdille Hassan the complainant in which Mr. Hassan urges that he has submitted credible evidence that demonstrates that the Applicants are working with Abdi Mohamed Abdullahi who is the master mind of the complaint under investigations.



16. Further, that the Applicants are the foot soldiers of Abdi Mohamed Abdullahi and they have participated in distributing cargo that was meant for the interested party, his company and demanding for payment from his clients.
17. It is also the Interested Party's case that the Applicants through a company called E-Light Cargo Clearing Company Limited are approaching clients misrepresenting themselves and giving an impression that they are from Nure Cargo & Clearing Limited and obtaining money from them leading to allegations of stealing by his company.
18. He further depones that the instant application is made in bad faith and is intended to delay the investigations and possible charges to be pressed against them. It is urged that the mere fact that the intended or on-going investigations and possible criminal proceedings are in all likelihood bound to fail is not a ground for interfering with those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits of a case.

Further Affidavit

19. The ex parte Applicants also filed a further affidavit sworn on 15th January 2025. They depose that the 3rd Respondent's officers misdirected the court during the application for a search warrant as to the ownership of the suit premises belonging to Top Way Cargo Limited and not E-Light Cargo Limited.

Submissions

20. The application was canvassed by way of oral submissions on 18th February 2025.
21. The Applicants' counsel in his submissions submitted that the case is an abuse of the criminal justice system as the alleged crime is not supported. Further, that no contract of employment is annexed by the Interested Party. Counsel also submitted that officers of the 1st Respondent ought to have ensured proper investigations.
22. He submitted that the Applicants were kept in custody for over 24 hours, and no reason was given for the arrest. That they were subsequently released on a cash bail of Kshs. 50,000/-. He relied on the case of Ohara vs Chief Constable and the case of Daniel Waweru Njoroge & 17 Others vs AG [2015] eKLR.
23. It was also Mr. Lempaa's submission that the respondents were on a fishing expedition and that the court should also direct release of the personal items of the applicant confiscated by the 3rd respondent without lawful cause. He relied on LLEC [2011] eKLR – Advisory Opinion and Owners of Mv Lilian's vs Caltex (K) [1989] 1 on jurisdiction.
24. On the company being a separate entity, he relied on the case of Philomena Mbete Mwilu vs DPP & Another on review of the decision of DPP. He also submitted that there must be reasonable ground for mounting a prosecution and relied on Alielo vs R [2004] eKLR.
25. Ms. Arunga counsel for the 1st and 3rd Respondents submitted that no illegality has been established or evidence of acting in excess of powers to warrant prohibition. She relied on R vs DCI & 2 others JR E037/2021 Mombasa HC Mativo J, Paragraph 28 on the duty of the investigating officer to take possession of any document. She also submitted that the police have a duty to assist both the complainant and the accused by ensuring justice, law and order and further that there is no evidence of breach of the law and the Constitution by the police or excess of the mandate. It was her submission that their actions were authorized by law and the court.
26. Mr. Agoi on the other hand submitted that there was evidence submitted to the police to show that the Applicants' perpetrated the offence reported. It was his submission that the matter should go to trial



for all parties to be heard and to defend themselves. He relied in the case of R vs DPP & 2 others ex parte Francis Nyahwe Maina & Another [2015] eKLR and submitted that at this stage, it does not matter if the case is likely to succeed or not, as long as the Respondents operate within the constitutional mandate which should not be usurped by the court.

27. Mr. Lempaa in a rejoinder submitted that there was no reasonable suspicion and as such had this court intervened and issued ex parte orders, the applicants would have taken plea.

Analysis and Determination

28. I have considered the application and affidavits in support, the annexures, responses, evidence, case law and oral submissions made by counsel. The following issues arise for determination:

- i. Whether the search warrant issued on 24th December 2024 was lawful and valid;
- ii. Whether the actions of the 3rd Respondent's officers in executing the search warrant and arresting the Applicants were lawful;
- iii. Whether the Applicants are entitled to the judicial review reliefs sought.

Whether the search warrant issued on 24th December 2024 was valid

29. The law governing the issuance of search warrants is the [Criminal Procedure Code](#) which provides under Sections 118, 118A and 119 as follows:

118. Power to issue search warrant

Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law.

118A. Ex-parte application for search warrant

An application for a search warrant under section 118 shall be made ex-parte to a magistrate.

119. Execution of search warrants

A search warrant may be issued on any day (including Sunday), and may be executed on any day (including Sunday) between the hours of sunrise and sunset, but the court may, by the warrant authorize the police officer or other person to whom it is addressed to execute it at any hour.

30. In the present case, the validity of the search warrant issued by the Magistrates' Court in Miscellaneous Criminal Application No. E1715 of 2024 on 24th December 2024 is a central issue.



31. As seen under Section 118 of the *Criminal Procedure Code* (CPC), a search warrant may be issued by a Magistrate if there are reasonable grounds to believe that a crime has been committed and that evidence relating to that crime is likely to be found in a specific location.
32. An application for a search warrant must be made on oath by a police officer or any other authorized person, providing sufficient facts or information that show reasonable suspicion of criminal activity. The application should clearly specify the premises to be searched and the items sought to be seized. The Magistrate, upon reviewing the application and the supporting facts, may issue a search warrant if the requirements under Section 118 are met.
33. In the present case, the 1st Respondent, the Directorate of Criminal Investigations (DCI), applied for a search warrant on 24th December 2024, stating that goods meant for Nurex Cargo had been diverted to the Applicants' premises. The Magistrates' Court, having considered the application and satisfied that reasonable grounds existed to suspect criminal activity, issued the search warrant, granting the officers permission to search MEMKAM Godown No. 3.
34. No challenge has been made by the Applicants on the procedures followed leading up to issuance of the search warrant. This court also notes that the search warrant was issued upon compliance with the provisions of the law under which it was obtained and as such, it is lawful and valid.

Whether the actions of the 3rd Respondent's officers in executing the search warrant and arresting the Applicants were lawful;

35. Having established the validity and legality of the search warrant, the next issue is the lawfulness or otherwise of the actions of the officers of the 3rd respondent in executing the said search warrant.
36. The Applicants argue that the execution of the search warrant by the 3rd Respondent's officers was unlawful, in that, the officers are accused of having exceeded the scope of the warrant by conducting an unlawful search.
37. Under Section 118(2) of the *Criminal Procedure Code*, a search warrant must specify the particular premises to be searched and the items that are to be seized.
38. This means that if the officers' actions went beyond these specified limits, the search could be deemed unlawful.
39. It is also the Applicants' case that the search involved harassment and intimidation of their staff and that the warehouse was ransacked without any evidence being found linking the Applicants to criminal activity. This, they argue, violated their constitutional right to privacy and property, as guaranteed under Article 31 of the *Constitution* of Kenya, which protects against unreasonable searches.
40. The Applicants also claim that the search was conducted beyond the authorized scope. In response, the Respondents maintain that the search was executed in good faith, in accordance with the warrant and under the authority granted by the court.
41. The ex parte Applicants' allegations are indeed grave allegations against the 3rd Respondent's officers, claiming that the applicants' constitutional rights were violated through harassment and intimidation of their staff and search of premises where search warrants had not been issued. However, no evidence of these alleged violations was availed to court. No staff or even the apparent actual owners of the said warehouse has sworn an affidavit before the court to complain that the search warrants were executed in a manner that violated their constitutional rights and as such, what remains is mere assertions by the applicants. The entity introduced in the further affidavit Top Way Cargo Limited which is not a



- party to these proceedings has not complained of its warehouse being violated, these proceedings not being representative proceedings.
42. In the *Anarita Karimi Njeru v Republic* [1979] KECA 12 (KLR) case, it was held that a party seeking a constitutional remedy is required to set out with reasonable precision that which is complained of, noting to stipulate which constitutional provisions have been infringed and how they have been infringed.
43. Further, in *Leonard Otieno vs Airtel Kenya Limited* [2018] eKLR, it was held that:
- “It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not a mere technicality; rather, it is essential to a proper consideration of constitutional issues.”
44. The Applicants have also raised the issue of being detained for more than 24 hours without being informed of what they are being charged with and without being taken to court. They have also claimed that the 3rd Respondent’s officers are holding their personal belongings unlawfully. In response, the 1st and 3rd Respondents contend that the Applicants were arrested on 24th December 2024 and as 25th and 26th December 2024 were public holidays, they could not be presented to court within 24 hours and they were therefore released on a police cash bail of Kshs.50,000 on 27th December 2024 with instructions to report to Makadara Law Courts on 3rd January 2025.
45. Article 49(1)(f) the Constitution guarantees Rights of arrested persons as follows:
- (1) An arrested person has the right—
- (f) to be brought before a court as soon as reasonably possible, but not later than—
- (i) twenty-four hours after being arrested; or
- (ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day.
46. Examining the calendar for 2024, am in agreement with the 1st and 3rd Respondents’ position that the Applicants could not have been arraigned in court on 25th and 26th December 2024 as these two days were not ordinary court days as they were Christmas and Boxing Holidays.
47. On the Applicants’ claim that they were not informed of what they had been charged with, I find this hard to believe, as the applicants in their own affidavit refer severally in their application, affidavit and Statutory Statement of being charged with the offence of stealing by servant and the documents they have annexed show the charge that the respondents intended to charge them with. The cash bail receipt issued on 27/12/2024 shows the charge to be conspiracy to defraud. The applicants have persisted that there is no evidence of employment with the complainants. However, this court cannot direct the DPP on what charge to frame against the suspect, depending on the outcome of investigations. The matter was still under investigations and only after completion would the DPP direct prosecution on a particular charge.
48. Furthermore, a charge can be amended in the course of criminal proceedings therefore the question of stealing by servant and evidence of employment is neither here nor there.



49. On the issue of seizure of the Applicants' property, in the case of Republic v OCS Nairobi Central Police Station & 2 Others, Ex parte Applicant: Sixtus Gitonga Mugo [2020] KEHC 7039 (KLR) the court observed as follows:

“The applicant has not demonstrated that there was no factual basis to justify the seizure of the exhibits. There is nothing to show that the exhibits do not form part of the intended prosecution evidence. As stated earlier, it is not the function of this court to weigh the veracity of the evidence or to assess which exhibits are relevant to the investigations. That would amount to this court descending into the arena of the trial court. An investigation should be commenced or continued if there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by a suspect. It has not been established that the facts presented in this case do not disclose an offence known to the law.

50. Just as is the case herein, although the Applicants argue that the 3rd respondent's officers have unlawfully seized their personal belongings, they have not demonstrated that there was no factual basis to justify the seizure of the items to assist the police in their investigations. Further, there is nothing to show that the exhibits do not form part of the intended prosecution evidence.

Whether the Applicants are entitled to the judicial review reliefs sought.

51. The 3rd Respondent, through the Directorate of Criminal investigations and its officers draw their authority to investigate from Article 245 of the *Constitution* and Section 35 of the *National Police Service Act*. Under Sections 24 and 35 of the *National Police Service Act*, 2013, the functions of the police include undertaking investigations, apprehending offenders as well as detecting and preventing crime. In the exercise of the powers of investigations and arrest, the 3rd Respondent or his officers are functionally independent and can only take directions to investigate from the 1st Respondent, the DPP.
52. The above position was restated by the Court of Appeal in Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others [2018] eKLR citing the Supreme Court of India decision in State of Maharashtra & Others v. Arun Gulab & Others, Criminal Appeal No. 590 of 2007, where the Court stated:

“The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction to the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings. The provisions of Articles 226, 227 of the *Constitution* of India and Section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as “Cr.P.C.”) are a device to advance justice and not to frustrate it. The power of judicial review is discretionary; however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of power of the Court, but the more the power, the more due care and caution is to be exercised in invoking these powers.”



53. In *Bernard Mwikya Mulinge v Director of Public Prosecutions & 3 others* [2019] eKLR, Odunga J (as he then was) expressed himself as follows: -

“As has been held time and time again, the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions (DPP) to investigate and undertake prosecution in the exercise of the discretion conferred upon that once under Article 157 of the *Constitution*. The mere fact therefore that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not ipso facto a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. An applicant who alleges that he or she has a good defence in the criminal process ought to ventilate that defence before the trial court and ought not to invoke the same to seek the halting of criminal proceedings undertaken bona fides since judicial review court is not the correct forum where the defences available in a criminal case ought to be minutely examined and a determination made thereon...”

54. In *Kipoki Oreu Tasur vs. Inspector General of Police & 5 Others* [2014] eKLR the Court stated that:

“The criminal justice system is a critical pillar of our society. It is underpinned by the *Constitution*, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated...”

55. In *Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another* [2012] eKLR the Court 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....”

56. The above decisions reiterate the 3rd Respondent’s duty to conduct investigations into complaints and subsequently, if there is enough evidence, the 1st Respondent to charge the person accused of the offence. It is this court’s humble opinion that the 3rd Respondent’s actions through its officers was within the mandate provided under the *Constitution* and the law.
57. Courts have consistently held, and rightly so, that they should not interfere with the constitutional responsibility of the 1st and 3rd Respondents to investigate crimes and initiate criminal proceedings, as long as these actions are carried out in a justifiable manner. This position was adopted in the case of *Michael Monari & Another vs Commissioner of Police & 3 Others*, Misc. Application No. 68 of 2011.
58. The 3rd Respondent being independent and an office established under the *Constitution*, the Court can only interfere with or interrogate its actions or those of its officers where there is threatened or actual violation of rights and freedoms guaranteed by the *Constitution* or contravention of the *Constitution*.



59. In Paul Ng'ang'a Nyaga vs Attorney General & 3 Others [2013] eKLR, it was held that:

“... this court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they have acted in contravention of the *Constitution*.”

60. In light of the above and for the reasons given in this Judgement, I find that the application dated 2nd January 2025 is not merited and it is hereby dismissed with no orders as to costs.

61. This File Is Closed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 7TH DAY OF APRIL 2025

R.E. ABURILI

JUDGE

