



**Republic v Director of Public Prosecutions & 3 others; Matoke (Exparte Applicant)
(Judicial Review E010 of 2024) [2025] KEHC 8650 (KLR) (19 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8650 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
JUDICIAL REVIEW E010 OF 2024
WA OKWANY, J
JUNE 19, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

**DIRECTOR, DIRECTORATE OF CRIMINAL INVESTIGATIONS 2ND
RESPONDENT**

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

POCS NYANGUSO POLICE STATION 4TH RESPONDENT

AND

JANE NYABOKE MATOKE EXPARTE APPLICANT

RULING

1. This ruling is in respect to the Notice of Motion dated 9th December 2024 wherein the ex-parte Applicant seeks the following orders: -
 1. That an order of Prohibition directed at the Respondents be made to prohibit them jointly and/or severally together with their employees, servants, agents and/or representatives from instituting and/or proceeding with any criminal charges against the Applicant or otherwise prosecuting her on matters relating to the complaint on a contractual dispute between Hezron Makori and the Applicant.
 2. That an order of Certiorari do and is hereby issued to remove into this Honourable Court the decisions of the 4th Respondent to arrest, detain, hold, investigate and/or summon



the Applicant in relation to the civil contractual dispute which is unlawful, irrational and procedurally unfair.

3. That an order of mandamus be and is hereby issued compelling the Respondents to cease any further criminal investigations and/or proposed charges and to act within the confines of the law while addressing the civil contractual dispute.
4. That costs be provided for.
2. The Application is brought under Sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules. It is supported by the grounds set out in the Statutory Statement and the Applicant's Verifying Affidavit sworn on 29th November 2024. The Applicant averred that there was a civil dispute between her and one Hezron Makori over the sale and purchase of sugar cane and that she was not formally summoned to appear for questioning by any police officers, or to record a statement concerning the said matter or charged with any substantive offence regarding the civil dispute.
3. She stated that the Respondents have unlawfully continued to harass her and threaten her with arrest her from 13th October 2023 to date despite being restrained by prior court orders issued on 4th December 2023 and 4th February 2024. She further averred that the Respondents were found to be in contempt of the said orders and a fine of Kshs. 50,000/= imposed on them. She averred that the Respondents' intentions to arrest and prosecute her over a civil contractual dispute amounts to an abuse of their legal mandate and were a breach of her constitutional rights to a fair administrative action under Article 47 and freedom from arbitrary deprivation of liberty under Article 29 of the Constitution.
4. The Respondents filed Grounds of Opposition dated 7th February 2025 in response to the Application wherein they state that the Application is frivolous and an abuse of the court process. They further state that the Application is bad in law and fatally defective because they have not made any decision to arrest or charge the Applicant. They added that the orders sought, if granted, would amount to usurping their respective constitutional mandates and that the Applicant had not demonstrated any abuse of powers.
5. The Respondents stated that the anticipatory bail granted in Miscellaneous Application No. E089 of 2023 required the Applicant to co-operate with the 4th Respondent in the ongoing investigations. They averred that the 4th Respondent was currently investigating a case of obtaining by false pretences reported vide OB No. 09/28/02/2023 by the complainant Hezrone Makori and that it was the Applicant who had failed to present herself at Nyangusu Police Station to clear her name over the same allegations but instead filed the present Application so as to frustrate the investigations. They contend that the orders sought, if granted, will prejudice the complainant. They maintained that the claim that the issues raised are civil in nature could only be ventilated before a trial court and not through a Judicial Review Application. They added that the present case is Res Judicata as they were already determined in the Miscellaneous Criminal Application No. E089 of 2023.
6. In a rejoinder, the Applicant filed a Supplementary Affidavit dated 11th February 2025 in which she averred that she had demonstrated willingness to co-operate with the investigations but that it was the agents of the 4th Respondent who had threatened to arrest her on 13th October 2023. She stated that she sent her legal counsel to the police station, in good faith, in order to demonstrate her willingness to engage in the process but that the Respondent continued making several attempts to arrest her which led her to filing the Miscellaneous Criminal Application before the High Court at Kisii and the present Application.
7. She averred that the allegations of obtaining by false pretences were baseless and that the existing dispute was civil in nature and could only be resolved through a civil trial.



8. The parties were directed to canvass the Application by way of written submissions which I have considered.
9. The Applicant submitted that this Court has the jurisdiction to grant Judicial Review orders pursuant to Articles 22, 23 (3) (f), 165 (6) and (7) of the Constitution, Sections 8 and 9 of the Law Reform Act Cap 23 and Order 53 of the Civil Procedure Rules. It was submitted that the Application challenges the Respondents' decision to criminalize a civil contractual dispute. Reference was made to the cases of *Githunguri vs. Republic* (1986) KLR 1 and *Republic vs. DPP & Another Ex Parte Kamani & 2 Others* (2015) eKLR where the courts observed that the criminal process should not be used to enforce civil remedies and that where there exists an issue of a contractual or civil nature, the parties should resort to the civil remedies and not the criminal process. It was submitted that a dispute over alleged failure to performance a contract did not automatically translate into criminal fraud.
10. On the issue of Res Judicata, the Applicant cited the case of *John Florence Maritime Services Limited & Another vs. Cabinet Secretary for Transport and Infrastructure & 3 Others* (2015) eKLR where the court held that Res Judicata does not apply where the causes of action in the two cases are distinct. The Applicant noted that the Miscellaneous Application before the High Court in Kisii dealt with anticipatory bail which is a different issue from the prayers sought in the present Judicial Review Application.
11. The Applicant cited several authorities for the proposition that police officers should carry out their mandate within the confines of the law. It was submitted that the 4th Respondent's actions were illegal, irrational and procedurally unfair and thus warranted the granting of orders of certiorari to quash their decision to arrest, detain, hold, investigate and/or summon her in relation to the civil dispute, an order of mandamus to compel them to cease further criminal investigations over the civil dispute and to direct them to act within the law and an order of prohibition against the Respondents to stop them from instituting and proceeding with any criminal charges arising from the contractual civil dispute.

Analysis and Determination

12. I have considered the pleadings filed herein and the parties' respective submissions. I find that the main issue for determination is whether the Application is merited. In determining this issue, the Court will be required to establish whether the Respondents have acted in excess of their powers in relation to the alleged civil dispute between the Applicant and the complainant.
13. As a preliminary issue, the Applicant described herself as an Advocate of the High Court of Kenya for the last four decades practising, as such, in the Law Firm of Njagi Nyaboke & Company Advocates.
14. The 1st Respondent, on the other hand, is the Director of Public Prosecutions (DPP) who exercises prosecutorial authority against any person before any court, except a court martial. The powers of the 1st Respondent are established by Article 157(6) & (10) of the Constitution to 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 which entails the public prosecution of cases forwarded by all investigation agencies including the Police, Ethics and Anti-Corruption Commission, Directorate of Criminal Investigations (DCI), Banking Fraud Investigations Units (BFIU), and cases taken over from private prosecutors.
15. The 2nd Respondent is the Director of Criminal Investigations (DCI) established under the National Police Service Act 2011 (NPS Act) which derives its authority from Article 243 of the Constitution. Its core function is to investigate crimes. Section 28 of the NPS Act establishes the DCI and places it under the command and control of the Inspector General of Police. Section 35 of the NPS Act



provides for the functions of the DCI which are, inter alia, to collect and provide criminal intelligence; undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others; maintain law and order; detect and prevent crime; apprehend offenders; and to execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of the Constitution.

16. The 3rd Respondent is an office established by Article 245 of the Constitution of Kenya and Section 8A of the National Police Service Act. The functions of the IG of Police are outlined under Section 10 of the Act which entail, inter alia, the exercise of command over the National Police Service and the lawful administration, control and managing of the National Police Service as a disciplined Service.
17. The 4th Respondent is the Officer Commanding Station for Nyangusu Police Station in Kisii County established under the National Police Service Act.
18. The gist of the Applicant's case was that the Respondents have unlawfully used their constitutional and statutory powers to threaten her with arrests and have acted with impunity by harassing her and disobeying court orders. The Applicant is apprehensive that the Respondents might arbitrarily deprive her of her liberty and security. She therefore seeks judicial review remedies in the nature of prohibition, mandamus and certiorari to bar the Respondents from continuing to harass her. She further seeks the intervention of this court to direct the Respondents to comply with the interim orders issued by the High Court at Kisii and to quash any decisions to charge her in relation to the civil dispute between her and the complainant.
19. The powers of this Court in Judicial Review are meant to guard against the abuse of power by public officers in instances where they act outside or in excess of their legal mandates when discharging their functions. Judicial Review provides avenues for remedies that act as a safeguards to public interests, constitutionalism and the rule of law. While they provide a legal mechanism for protecting the public at large, Judicial Review remedies cannot be granted arbitrarily or in contravention of the principles of institutional independence and separation of powers.
20. I have considered the grounds set out in support of the Application and the duties of the Respondents who are, as already demonstrated, institutions established under the Constitution. While this Court is cognizant that its primary duty is to ensure the fair administration of justice and uphold the Rule of Law, it must be appreciated that the Offices of the Director of Public Prosecutions and the Director of Criminal Investigations alongside the other Respondents are independent in nature and that their duties can only be interfered with or scrutinized where there is a clear demonstration that they have acted outside their legal mandate or in excess of their legal mandate.
21. Article 157 (10) of the Constitution provides thus: -
 - (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.
22. Sub-Article 11 further provides the manner in which the ODPP shall carry out its functions: -
 - (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.
23. Article 244 of the Constitution provides that:

The National Police Service shall--



- (a) strive for the highest standards of professionalism and discipline among its members;
 - (b) prevent corruption and promote and practice transparency and accountability;
 - (c) comply with constitutional standards of human rights and fundamental freedoms;
 - (d)
24. Article 245 provides for the independence of the Inspector General of Police who exercises command over the 2nd, 3rd and 4th Respondents as follows: -
245. Command of the National Police Service
- (4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to-
 - (a) the investigation of any particular offence or offences;
 - (b) the enforcement of the law against any particular person or persons; or
 - (c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.
25. When dealing with an Application such as the present one, the Court must be cautious and must exercise restraint in order to avoid interfering with the lawful functions of the Respondents as outlined above cited provisions. The ODPP, the DCI and police officers are independent public authorities who must not arbitrarily be deprived of their powers to carry out their duties to investigate and to prosecute cases. In *Diamond Hasham Lalji & another vs. Attorney General & 4 others* [2018] eKLR, the Court of Appeal explained the independence of the ODPP thus: -
- “(41) Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases... Although the standard of review is exceptionally high, the court’s discretion should not be used to stultify the constitutional right of citizens to question the lawfulness of the decisions of DPP.
 - (42) The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision.”
26. This Court is also cognizant of the fact that its discretion to grant the orders, such as the orders sought herein, can only be exercised in a manner that does not require it to delve deep into the merits and/ or demerits of the dispute that have given rise to the JR proceedings herein. Indeed, in *Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd* Civil Appeal No. 185 of 2001 the Court of Appeal held thus:-
- “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...”



27. From the facts of this case, I note that no decision has so far been made by, the 1st Respondent, to prosecute the Applicant herein. The Applicant claims that she was threatened with arrests and subsequent prosecution by the agents of the 3rd and 4th Respondents which did not materialize only because they were unable to carry out her arrest. At paragraph 31 of her submissions, she outlined the particulars of the abuse of their Respondents' legal powers as follows: -
- a. Persistent attempts to arrest the Applicant despite court orders staying such arrests.
 - b. Forceful commandeering and impounding of the Applicant's vehicle which had no relation to the subject of the investigation.
 - c. False imprisonment of the Applicant's ailing sister and driver to coerce her appearance.
 - d. Harassment and intimidation of persons unconnected to the alleged offence.
 - e. Blatant disregard for court orders issued on 4th December 2023 and 4th February 2024.
28. In their Response, the Respondents stated that it was the Applicant who refused to co-operate with their investigators and disobeyed the Kisii High Court orders that required her to avail herself, in person, for interrogation. As I have already stated elsewhere in this ruling, the business of this Court, at this stage, is not to determine the merits of the dispute that led to the filing of the suit. What the Court must determine is whether the Respondents have overstepped their mandate to investigate the alleged complaint within the legally permitted parameters.
29. It is clear to me that a complaint was lodged, by a complainant, which complaint warranted an investigation by the agents of the 4th Respondent. This Court is therefore reluctant to grant orders directing the Respondent to cease from conducting any necessary investigations as that would amount to usurping the Respondents' authority thus interfering with their independence.
30. While the Court appreciates that it cannot fold its hands or turn a blind eye to instances of abuse of authority by public institutions such as the Respondents herein, the court still holds there must be tangible material presented before it to demonstrate the manner in which the Respondents have acted in excess of their powers. In this regard, I find that mere allegations of apprehensions would not be sufficient to shift the burden of proof to the Respondents.
31. From the facts of this case, I find that the issue of impending arrest would only materialize where the agents of the Respondents have concluded their investigations and found that an offence was committed that warrants a prosecution. As the facts stand currently, no evidence was tendered by the Applicant to show that she was arbitrarily arrested or maliciously prosecuted. I note that the Applicant did not also demonstrate that she had presented herself, personally, to assist the police in concluding the investigations as directed by the High Court at Kisii.
32. It appears to this Court that the only reason the agents of the 3rd and 4th Respondents were even seeking to arrest the Applicant was because she failed to avail herself for questioning as stated in their Grounds of Opposition. The Applicant confirms this position when she averred, in her Supporting Affidavit, that she only sent her legal counsel to represent her at the Nyangusu Police Station. I find that the Applicant's actions were contrary to the orders issued by Hon. Lady Justice T.A. Odera that required her to personally avail herself alongside her legal counsel for questioning.
33. I further note that the said orders by Odera J. required that the anticipatory bail would remain in force only until the Respondents made a decision to formally arrest and charge the Applicant. I find that the decision to arrest and charge the Applicant has not yet been made, in which case, this court cannot determine whether or not the Respondents acted within their mandate.



34. It is this Court's position that the inherent powers vested upon this Court to issue Judicial Review orders can only be exercised where the Applicant demonstrates that allowing the Police to continue investigating the alleged complaint would be against the public interest and would violate her constitutional rights. I find that if indeed there was a criminal intent arising from the contractual dispute between the Applicant and the alleged complainant, then this Court would fail in its role of championing for justice by curtailing and frustrating the role of the agents of the 2nd, 3rd and 4th Respondents.
35. In the final analysis therefore, I find that no cogent evidence was presented by the Applicant to demonstrate the alleged abuse of power by the agents of the 2nd, 3rd and 4th Respondents. I say so because no decision has so far been made to arrest and prosecute the Applicant so as to warrant the granting of the prayers sought herein. I find that the orders sought are not only premature but also unfounded.
36. Consequently, I find no merit in the Application and hereby dismiss it. I direct that the Applicant shall, within 7 days from the date of this ruling, avail herself personally to the Officer Commanding Station, Nyangusu Police Station, for interrogation and direct the Respondents to ensure that they carry out their mandate only within the confines of the Constitution and Statute.
37. I make no orders on the costs of the Application.
38. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 19TH DAY OF JUNE 2025.

W. A. OKWANY

JUDGE

