



Republic v Director of Public Prosecutions & 2 others; Wambui (Ex parte Applicant); Muriithi (Interested Party) (Judicial Review Application E003 of 2023) [2025] KEHC 9978 (KLR) (10 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9978 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
JUDICIAL REVIEW APPLICATION E003 OF 2023
EM MURIITHI, J
JULY 10, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

OFFICE OF THE ATTORNEY GENERAL 3RD RESPONDENT

AND

MACHARIA WAMBUI EX PARTE APPLICANT

AND

JOSAPHAT WARUI MURIITHI INTERESTED PARTY

RULING

1. The is a ruling on an application for leave to file judicial review proceedings dated 28/7/2023 seeking the following specific reliefs:

- “ 1. That this application be certified urgent and heard *ex parte* in the first instance.
- 2. The application seeks leave to apply for Judicial Review by way of an order of Certiorari to remove into the Honourable Court the respondents decision to summon, arrest and or prosecute the applicant on issues connected and related to sale of land transaction LR no Kllne/Saganal5654 measuring 0.20HA & LR no Kiine/Saganal5762 measuring 1.62H vide agreements dated 15/06/2022



and! or the retainer/engagement agreement dated 20/07/2022 between the *ex parte* applicant and the interested party(his client therein)

3. That the leave be granted to the *ex parte* applicant apply for Judicial Review by way of an order of prohibition directed at the respondents prohibiting further summons, arrests or prosecution of the applicant on issues connected and related to sale of land transaction LR no Kiine/Saganal5654 measuring 0.20HA & LR no Kiine/Saganal5762 measuring 1.62H *vide* agreements dated 15/06/2022 and! or the retainer/engagement agreement dated 20/07/2022 between the *ex parte* applicant and the interested party (his client therein)
 4. That leave granted in prayer 2 and 3 above do operate as stay from further summons, arrest or prosecution of the *ex parte* applicant on issues connected and related to sale of land transaction LR no Kiine/Sagann5654 measuring 0.20HA & LR no Kiine/Sagann5762 measuring 1.62H *vide* agreements dated 15/06/2022 and! or the retainer/engagement agreement dated 20/07/2022 between the *ex parte* applicant and the interested party(his client therein)
 5. The cost of this application to abide outcome of the substantive motion.”
2. The application is supported by a Statutory Statement of Facts, Supporting Affidavit and Verifying Affidavit all of 28/7/2023, and a Further Affidavit of 31/5/2024.
 3. The application is opposed by the Respondents’ Replying Affidavit of 6/8/2024 and the Interested Party’s Replying Affidavit of 10/6/2024.
 4. The parties have also filed Submissions setting out their respective cases. The Court cannot, however, deal with the detailed merits of the case, which must await full hearing of the dispute, if the leave to file the substantive Notice of Motion for judicial review orders be granted.
 5. At this stage, the issue before the Court is whether the court will grant the *ex parte* applicant leave to file judicial review proceedings for Certiorari and Prohibition as prayed, based on the materials presented before the court in the application, ordinarily *ex parte* but also in discretion of the court by inter partes hearing by an order of court under Order 53 (Rule 1 (4) of the [Civil Procedure Rules](#).
 6. The test for the grant of leave as settled by the Court of Appeal in [Uwe Meixner & another v Attorney General](#) [2005] KECA 292 (KLR) is whether the applicant has demonstrated an arguable case for the grant of the reliefs. There is no requirement to adduce a prima facie case and an arguable case does not mean a case that must eventually succeed upon hearing.
 7. Indeed, as shown in The [Fair Administrative Action Rules, 2024](#) Legal Notice 165 of 2024, the reform in this area of supervisory jurisdiction of the High Court is that there is no longer a requirement for leave to file an application for judicial review which is now to be filed by way of an Originating Motion as prescribed in Rule 11 (1) thereof, as follows:

“ 11. Originating motion

1. An application for judicial review shall be by way of an originating motion accompanied by a supporting affidavit.”



8. The applicant has principally packaged an arguable case at paragraph 13 of his Further Affidavit 31/5/2024 as follows:

“ 13. Moreover, the said alleged offence cannot be borne as the transaction arose under advocate-client Relationship wholly governed by a duly executed valid remuneration agreement dated 20/7/2022 pursuant to provisions of Section 45 of the *Advocates Act* between the applicant and the complainant thereon diminishing any allegation of lack of rights .and the same is only but an attempt of deployment of criminal justice apparatus to achieve a civil remedy against the applicant a fact well known by the respondents herein.”

9. For the Respondents, the DPP’s Submissions dated 16/5/2025 emphasized the Police and DPP’s right to investigate and prosecute crime notwithstanding the amenability of the facts or some of the relevant facts to a civil suit claim pursuant to section 193A of the *Criminal Procedure Code*, as follows:

“Investigations are a core function of the National Police Service as provided under Article 245 of the *Constitution* of Kenya. 2010 and the *National Police Service Act*. To intervene at this stage would amount to this Honourable Court encroaching upon the statutory and constitutional duties of another state organ. contrary to the principle of separation of powers. Accordingly. we respectfully submit that this Court should refrain from interfering with ongoing investigations and allow the police service to discharge its functions without undue obstruction.

Your Lordship. it is our submission that by dint of section 193A of the *Criminal Procedure Code*, there is nothing that bars criminal and civil proceedings to run concurrently where the matters in issue are the same.”

10. The Interested Party’s Replying Affidavit sworn on 10/6/2024 admits retainer of the advocate to perform certain professional task but asserts commission of fraud and forgery offences in the course of the drawing of the contract and performance of the retainer, and urges at paragraph 29 of his replying Affidavit that “in view of advances in technology and the disparity between the various engagement agreements provided by the *ex parte* Applicant, it is in the interest of justice that teh purported original document be produced before this court and if possible subjected to a hand writing expert.”

11. Counsel for the Interested Party by Submissions dated 16/5/2025 urged that on the evidence the application is deficient as –

“7. .. Applicant brings judicial review proceedings with a view to determining contested facts. The Ex- parte Applicant seeks the court to determine the validity of the 1st Respondent’s decision to charge him with a criminal offence on the basis of the facts presented by the Respondent. He has not placed before the court evidence to show any defect in the investigations or the decision to charge him.

8. Further, the Ex- parte Applicant has not demonstrated that the decision to charge him was irregular, unfair, unreasonable or irrational. Though the Applicant alleges he was harassed with a view to being coerced to vary the retainer agreement, there is nothing before court in support of this allegation.”

12. The determination of the veracity of the respective contentions of the parties lie with the Court that hears the substantive motion.



13. The Court considers that the applicant has demonstrated an arguable case that the alleged offence arise from the performance of a contract of retainer as an advocate for the Interested Party. The arguable case need not be one that must succeed at the hearing. On his part the Interested Party has demonstrated a need to establish by investigations the issue of fraud and forgery of retainer agreement as well as payment of sums of money in purported performance of the retainer by the advocate /applicant.
14. Consequently, while the Court finds an arguable case, it must balance the interest of the applicant against the public interest in the investigation and punishment for crime and the Interested Party's interest and right, as a complainant, to have the issue of fraud and forgery on him investigated and redressed.
15. The Court makes a principled distinction between the investigations into a crime and the prosecution for the offences revealed by the investigations, the former as preliminary process that may or may not lead into the latter. The Court considers that the investigations should continue despite grant of leave to seek judicial review; but the criminal prosecution which may occasion irreversible prejudice shall be stayed pending the hearing of the substantive judicial review application.
16. The order of the Court shall, therefore, be tailored to allow the filing and hearing of the *ex parte* applicant's challenge on his investigation and prosecution for the offences in the trial Court, and at the same time permit any further investigations, if necessary, in the alleged crimes to continue but subject to a stay of the trial proceedings pending hearing and determination of this judicial review application.

Orders

17. Accordingly, for the reasons set out above, the Court finds merit in the application for leave to file judicial review application for Certiorari and Prohibition as prayed.
18. The substantive Notice of Motion for the judicial review orders shall be filed within 21 days in accordance with Order 53 Rule 3 (1) of the [Civil Procedure Rules](#).
19. The grant of leave shall operate as a stay of the criminal trial proceedings before the trial Court.
20. In the interests of an expeditious determination of this matter where application of leave was lodged two years ago on 28/7/2023, the stay of proceedings shall be granted for a period of ninety (90) days only, when the Court expects the application shall have been heard and determined.
21. For avoidance of doubt, the Police are at liberty to proceed with any necessary investigations into the matter of the alleged fraud and forgery of the documents in the matter.
22. The cost of this application shall be in the Cause.
23. Mention on 31/7/2025 for directions as to the hearing of the Notice of Motion.

Order accordingly.

DATED AND DELIVERED THIS 10TH DAY OF JULY 2025.

EDWARD M. MURIITHI

JUDGE

Appearance

Mr. Macharia Wambui advocate, Ex parte Applicant.

Mr. Mamba for the DPP.



Mr. Kiongo for the Attorney General for the 2nd and 3rd Respondent.

Ms. Mwikali for the Interested Party.=

