



**Republic v Chief Magistrate, Wang’uru & another; Kinywa & another
(Interested Parties); Moh (Ex parte Applicant) (Judicial Review
E009 of 2024) [2025] KEHC 9846 (KLR) (7 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9846 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
JUDICIAL REVIEW E009 OF 2024
EM MURIITHI, J
JULY 7, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

**THE CHIEF MAGISTRATE, WANG’URU 1ST RESPONDENT
DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT**

AND

**JAQUELINE CHRISTY AKINYI KINYWA INTERESTED PARTY
LEAHNJERI NJIRU INTERESTED PARTY**

AND

ISSADIN GABANE MOH EX PARTE APPLICANT

JUDGMENT

Reasons For The Judgment

Background

1. By the Judgment of Court delivered on 30/6/2025, this Court granted the ex parte applicant’s Notice of Motion for Certiorari and Prohibition herein based on the broad principal ground that “The applicant should not have been charged with a second criminal charge based on the same facts before two different courts. Such prosecution is oppressive on the accused and it is an abuse of the criminal process. It would also appear clear that is improperly aimed at harassing the applicant into submission, in view of the criminal case pending at Milimani and the civil suit between the parties on the same subject matter.”



2. The Court directed that the full reasons for the decision in this judgment shall be give and published on the Court Tracking System on 7/7/2025. Herewith the Reasons of the Judgment.

Introduction

The application

3. The application for judicial review for orders of certiorari and prohibition was initiate by a Notice of Motion dated 8th December, 2024 seeking the following orders:
 1. Spent.
 2. That the Applicant be granted leave to apply for an order of certiorari to move into this Court for purposes of being quashed, the decision of the 2nd Respondent to charge the Applicant with the charge of Conspiracy to Defraud Contrary to Section 317 of the Penal Code and Obtaining Money by False Pretenses Contrary to Section 313 of the Penal Code.
 3. That the Applicant be granted leave to apply for an order of prohibition against the 1st & 2nd Respondents from proceeding with the charging and/or hearing and determination and/or prosecuting the Ex parte Applicant herein with the Charge of Conspiracy to Defraud Contrary to Section 317 of the Penal Code and Obtaining Money by False Pretenses Contrary to Section 313 of the Penal Code and/or taking any further actions that will adversely affect the rights and fundamental freedoms of the Applicant.
 4. That the grant of leave to operate as a stay of the proceedings scheduled to commence on the 11th December, 2024 including but not limited to the Applicant taking Plea before the 1st Respondent pending the hearing and determination of this Application and fie substantive Judicial Review Application.
 5. That the Honourable Court be pleased to grant such other or further relief as it may deem fit in the circumstances.
 6. That the cost of this Application be borne by the Respondents.
4. The application was based on the grounds on the face of the application and the Supporting Affidavit of Issadin Gabane Mohamed setting out the applicant's case is that on the 22nd day of August, 2022 the 2nd Respondent made a decision by approving to charge the Applicant herein before the 1st Respondent's Court with the Charges of Conspiracy to Defraud Contrary to Section 317 of the Penal Code and Obtaining Money by False Pretenses Contrary to Section 313 of the Penal Code. He is aware that on the 11th December, 2024, he required to present himself to the 1st Respondent pursuant to charges which had been approved on 22nd August 2024 by the 2nd Respondent and registered in court without his knowledge and neither was he summoned to court to answer to them to plead to the Charges as preferred by the 2nd Respondent herein.
5. He avers that decision to charge him is not only unlawful but the same is unreasonable, procedurally unfair and clearly an abuse of the powers of the 2nd Respondent herein.

The intended Criminal Charges against him ought to be quashed and/or his plea taking scheduled for 11th December 2024 ought to be stayed by this Honourable Court on account that; the intended prosecution is premised on an illegality where the 2nd Respondent has been misled through material non-disclosure of existence of a Criminal Case already lodged against him in Milimani Criminal Case



Number E766 of 2022 and for which the charges are premised on same set of facts, same witnesses and same allegations and which matter the Trial is ongoing.

6. The applicant avers that he has since written to the 2nd Respondent with all the relevant facts and information with a view of having her review her said decision and the same is yet to be responded n hence the urgency of this matter.
7. Further, the 2nd Respondent's decision in arriving at its impugned decision to institute criminal proceedings against me was meant to advance other gains other than the promotion of public good the Respondents are running a mockery of the tenets under Article 48 of *the Constitution*.
8. Lastly, he avers that unless the order of leave sought is granted in the first instance and the resultant stay orders sought is granted, he shall suffer irreparable loss and harm.
9. The 2nd Respondent filed a Replying affidavit and avers that the genesis of the said three criminal cases is that on the 20th January 2022 at Mwea Township the 2nd interested party who is a director of Paleah wholesalers limited entered into a commercial agreement and transferred Ksh 15,300,00/= to 1st interested party who is the director Akish Investment Limited for supply of sugar worth Ksh 15,300,00/= and which it is alleged that the 1st interested party entered into a contact with the Applicant herein and transferred the said amount to the applicant who allegedly duped her and she reported the matter to DCI headquarters Kiambu road hence Milimani MCCR E766 of 2022 where the 1st Interested Party is the complainant. The 2nd Interested Party reported also reported the matter to DCI Mwea East and upon investigation 1st interested party charged Vide Wang'uru MCCR E758 of 2023. The 1st interested party wrote to the 2nd respondent requesting review of evidence citing the ongoing Milimani E758 of 2024 and withdrawal of Wang'uru E766 of 2023 and upon review it was noted that the case were different in nature since the event did not take place at the same time and do not arise the same chain of event hence no nexus between the two matters.
10. Further, the 2nd Respondent avers that on 22nd August 2024 a charge sheet was presented before court and applicant charged vide Wang'uru MCCR E752 OF 2024 and warrants of arrest issued against the applicant who is said to have evaded police arrest. Both matters Wang'uru E758/2023 and E752/2024 were fixed for consolidation and plea taking on 16th October, 2024 however the same did not happen as the Applicant was absent and the warrant of arrest extended to 21st October 2024. The Office of the Director of Public Prosecutions received a request for review of evidence from the Applicant Advocate dated 14th October 2024. Upon review of the evidence in Police files of Milimani MCR E766 of 2022, Wang'uru MCCR E758 of 2023 and Wang'uru MCCR E752 of 2024 it was noted that the set of facts in Milimani MCCR E766 of 2022 are substantially similar with Wang'uru MCCR E752 of 2024 save for the complainants who are the 1st and 2nd interested parties respectively.
11. Moreover, the 2nd respondent avers that the on the 13th December 2024, he Respondent filed a notice motion application seeking withdrawal of Wang'uru MCCR E752 of 2024 Under Section 87(A) of the *Criminal Procedure Code*.
12. Lastly, the 2nd interested party who is the complainant in Wang'uru E752 of 2024 will not be prejudiced by such withdrawal as her claim is only against the 1st interested party.
13. The 1st Interested Party responded by a Replying affidavit setting her case. The interested party is the complainant in Milimani CR. Case No: E766 of 2022, Republic v Issadin Gabane Mohamed where the Applicant herein is charged alongside his company Prime Pile Logistics Limited with the offence of obtaining money by false pretenses amounting to Kshs. 30,450,000/=. She is the accused person in Wang'uru CR. Case No; E758 of 2023 where being the director of Akish Investment Limited she



is charged with the offence of obtaining money by false pretense amounting to Kshs. 15,300,000. On 17th September, 2024 when Wang'uru CR. Case No: E758 of 2023 was scheduled for hearing, the state sought an adjournment and informed this Honourable Court that the Director of Criminal Investigation through the Investigating Officer wished to consolidate Wang'uru CR. Case No: E758 of 2023 with Wang'uru CR. Case No: E752 of 2024 where warrants of arrest were issued against the Applicant who is the accused person on 22nd August, 2024.

14. Further, upon being informed of the Wang'uru MCCR. Case No: E752 of 2024 and in a blatant attempt to ensure that justice does not prevail the Applicant has resulted to numerous attempts of forum shopping which involves filing the present application. Lastly, in Wang'uru CR. Case No: E752 of 2024 the Applicant is charged with the offence of conspiracy to defraud as the first charge and does not face that similar charge in Milimani CR. Case No: E766 of 2022. This is a distinct offence provided under a different section of the Penal Code requiring proof of distinct ingredients.
15. The 2nd Interested Party opposed the application by a Replying affidavit contending that the overall effect of the application is to invite the court to usurp the powers of the trial court in Wang'uru E752 of 2024 to determine whether the bringing of the charges against the Applicant in that case amounts to a breach of the principle of double jeopardy given the other charges in Milimani E0766 of 2022. The 2nd Interested Party avers the Applicant is a contemnor who is not deserving of this court's audience. He failed to appear before the trial court in Wang'uru E752 of 2024 on 22nd August 2024 whereupon warrants for his arrest were issued against him on the same day. The warrants are still outstanding and have not been lifted by the Court in Wang'uru. The Applicant ought not to be given audience by this court until he has honored the summons and the Warrants dated 22nd August 2024 issued in Wang'uru E752 of 2024. Further, upon becoming aware of the Warrants dated 24th August 2024 issued in Wang'uru E752 of 2024, the Applicant rushed to Kibera High Court and filed Misc. Application dated 17th November 2024 in Kibera High Court Misc Application E188 of 2024 by which he sought and on 19th November 2024 obtained anticipatory bail orders subject to certain conditions.
16. Moreover, the 2nd Interested Party avers that prior to the Application dated 13th December, 2024 the ODPP had in Wang'uru E752 of 2024 filed another Application dated 26th November 2024 where the ODPP had sought withdrawal of the charges. In Wang'uru E752 of 2024 the Applicant herein has filed an Affidavit allegedly sworn on 10th December 2024 (after filing this suit) in support of the Application by the ODPP in Wang'uru E752 of 2024. In the said affidavit the Applicant herein expressly supports the Application by the ODPP to withdraw the charges and himself (the Applicant herein) has included depositions where he seeks exactly the same prayers based on the same grounds that he has put forth in this matter. In particular, the Applicant at paragraph 7 of that affidavit in Wang'uru E752 of 2024 he prays that the charges in the matter against him should be quashed and the plea taking in the matter vacated.
17. Lastly, the 2nd Interested Party avers that the conduct of the officers of the ODPP in concert with the Applicant herein are grossly suspicious and warranting of this court's sanctions. The ODPP had previously in a letter dated 9th April 2024 rebuffed attempts to terminate the proceedings in Wang'uru on account of alleged similarity with proceedings in Milimani E766 of 2022. The ODPP in that earlier letter explained that the events underlying the two cases are dissimilar.
18. The applicant filed further affidavit dated 18th December, 2024 reiterating the averments in his supporting affidavit. A verifying Affidavit and Statutory Statement both dated 15/1/2025 are uploaded on the system on 5/2/2025. The Statement sought the following reliefs:

“ F. Reliefs Sought



83. The Applicant seek the following relief from the Honourable Court namely:
- a) That an order of Certiorari do issue removing into this Court for purposes of being quashed, the decision of the 2 nd Respondent to charge the Applicant with the charge of Conspiracy to Defraud Contrary to Section 317 of the Penal Code and Obtaining Money by False Pretenses Contrary to Section 313 of the Penal Code.
 - b) That an order of Prohibition against the 1 st & 2 nd Respondents from proceeding with the charging and/or hearing and determination and/or prosecuting the Ex parte Applicant with the charge of Conspiracy to Defraud Contrary to Section 317 of the Penal Code and Obtaining Money by False Pretenses Contrary to Section 313 of the Penal Code and/or taking any further actions that will adversely affect the rights and fundamental freedoms of the Applicant.
 - c) That the Honourable Court be pleased to grant such other or further relief as it may deem fit in the circumstances.
 - d) That the cost of this Application be borne by the Respondents.”

Summary of Evidence

19. The analysis of the responses is that for the different reasons the Interested Parties opposed the application for judicial review for the termination of the criminal charges against the accused, the point of congruence being that the matter was pending consideration by the trial court, which is competent to try the criminal case.
20. The DPP pointed to the pending application for termination of the charges against the accused pending before the Wang’uru Court but did not urge which Court should terminate the proceedings.

The Submissions

21. The applicant’ Counsel submissions dated 15/1/2025 raise the issue of validity of the decision to charge and the impropriety of the second charge over the same subject matter before different courts, as follows:

“Your Lordship, the circumstances leading to preferring charges against the Applicant in Wa Guru Criminal Case 0 E 752 of 2024 infringes on the Applicant's Fundamental rights as was found in the case of Republic v. Director of Public Prosecutions & 2 Others: Ayoo [Ex parte Applicant] Judicial Review Miscellaneous Application E049 of 2022 (2023) KEHC 23733(KLR)(Judicial Review) (16 October 2023) (Judgement). Your Lordship, Honourable Justice Chigiti (SC) in its Judgment made Twenty (20) holdings which we submit that you be persuaded with. Your Lordship, in all ea es prosecutors must complete the decision to charge form ODPP 1A and file it in the relevant prosecution file. Your Lordship in respect of the circumstances of this matter, the decision to charge the Applicant was informed through a fundamental Procedural impropriety. Your Lordship the decision to charge the Applicant was arrived at in a manner that offends the rule of law. Your Lordship, we submit that given that everybody has a right to access to information, a constitutional body like the office of the Director of Public Prosecution (the ODPP) while exercising, its power under Article 157 of the Constitution must be at the forefront in, ensuring that suspects of crime were informed in very clear terms how the decision to charge



was arrived at. Your Lordship, in the case of the applicant in respect to the 2nd Respondent's decision to charge him in Wanguru Criminal Case No.E752 of 2024, the Applicant was never informed and has not to date been informed on how the decision to charge him was arrived at all.

Your Lordship we have had the opportunity of reviewing the Interested Parties Replying Affidavits which by a large extent raises issues not germane to the Substantive Judicial Reviews Application. Your Lordship the 2nd Interested Party alludes to non-filing of the Substantive Application for Judicial Reviews on account of non-payments, we invite the court to the receipts in the portal of the e filing which clearly demonstrating that at the Leave Application stage the Applicant had filed and paid for the draft Substantive Application and upon leave having been granted the Applicant filed and paid for the said substantive Judicial Preview Application.

Your Lordship, this Honourable Court is clothed with the requisite powers to hear and determine this matter and grant the orders sought upon reviewing the materials placed before it and whether the 2nd Respondent acted within the law in arriving at the decision to charge the Applicant in Wanguru Criminal Case No E 752 of 2024 on some set of facts and evidence as the case the Applicant is facing in Millmani Criminal Case O. 766 OF 2022.

Your Lordship, this Honourable Court can interfere with the Decision of the 2nd Respondent to charge moreover when upon analyzing the totality of the matters placed before it, the court arrives at an irresistible conclusion that the said decision of the ODPP was laced with mala fides and thus an abuse of the powers of the DPP or was being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence against the 2nd Interested Party. Your Lordship, we submit that this is a clear case of abuse of the powers by the 2nd Respondent on account of the following. a. b. c. notwithstanding the clear fact that there was no kind of relationship between the Complaint in Wanguru Criminal Case No. E 752 of 2024, the 2nd Interested Party herein and a clear fact that no monies were paid by the 2nd Interested Party to the Applicant herein, the 2nd Respondent actuated by malice proceeded without colour of right to prefer charges against the Applicant herein. Despite fully aware of the fact that the Applicant is already facing similar charges over the same set of facts, evidence and witnesses in Milimani Criminal Case No E 766 of 2022, the DPP, 2nd Respondent herein still proceeded to prefer charges against the Application herein. Notwithstanding the fact that the Applicant herein had no knowledge of the Wanguru Criminal Case No E752 of 2024 when it was lodged in court, the 1st Respondent proceeded to issue warrants of arrest against the Applicant herein with an application from the 2nd Respondent orally in court the accused was a flight risk while all the time they were fully aware that the accused was filing charges over the same issues in Milimani Criminal Case 0E766 of 2022 and where the Applicant was religiously attending court.

Your Lordship we submit as was held in the case of Manfred Walter Schmitt & A Other-Vs- Republic & Another Nairobi, Crim. Rev. No 569 & 2326 Of 2012 (2013) Kcr Quoted In The Case Of Gordo Gatia Muriuki- Vs- Director Of Public Prosecutio S & 2 Others Co Stitutio L Petitio 0 207 of 2014 that the duty imposed on the judiciary to issue warrants of search and seizure is constitutional safeguard to protect the rights and fundamental freedoms of an individual. The court is not a conveyor belt for issuing warrants when application is made nor must the court issue warrants of search and seizure as matter of course. Your Lordship, we submit that the 1st Respondent in issuing warrants of Arrest against the Applicant herein in Wanguru Criminal Case No.E752 of 2024 without the 2nd



Respondent placing facts before it in the form of either an Affidavit by the Investigating Officer on oath, the 1st Respondent became a conveyor belt and punctured the rights and fundamental freedom of the Applicant herein.

Your Lordship, we thus submit in summary that you proceed and grant the reliefs as sought in the substantive Judicial Review Application in Wanguru Criminal Case No E 752 of 2024, quash the same and proceed to dismiss the charges in Wa Guru Criminal Case No E752 of 2024.”

The 1st Interested Party

22. The 1st Interested Party by Submissions dated contended that the judicial review court is only concerned with the process of decision making and not with the merits of the decision citing Municipal Council of Mombasa-Vs- Republic Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2007(2002) eKLR and Pastoli- Vs- Kabale District Local Government Canal & Others (2008) 2EA on the standards of review of illegality, irrationality and procedural impropriety, and urged as follows:

- “9. My Lord, Clause 3 of the Guidelines on the Decision to Charge, 2019 gives the 2nd Respondent the discretionary power to determine whether evidence availed by an investigator or investigative agencies is sufficient to warrant the institution of prosecution proceedings against an accused person in a court of law. 10. Due to its intrusive nature and potential adverse effect of the decision on the life, liberty or property of an accused person, it is one of the most critical decisions that is made by the 2nd Respondent. The decision maker must exercise due care in making the decision to charge.
11. As the decision is being made, the 2nd Respondent must always remember that there is a need to balance between the rights of an accused person and the rights of victims. It is the duty of the prosecutor to ensure that Fair Administrative Action is invoked during the decision, making process.
12. My Lord in this instant application it is evident that for unknown reasons the Applicant and the 2nd Respondent are working together in ensuring that Applicant does not stand trial in Wang’uru. This is evident because the 2nd Respondent who approved the charges against the Applicant have filed a replying affidavit in support of this judicial review and also filed an application at the trial court seeking to withdraw charges against the Applicant. The Applicant has filed a replying affidavit in the lower court supporting the application for withdrawal of charges.
13. It is the 1st Interested Party’s submissions that the 2nd Respondent is an independent constitutional office with mandate to make a decision to charge and while arriving at this decision, the 2nd Respondent is guided by the guidelines as laid down under Clause 3 of the Guidelines on the Decision to Charge, 2019.
14. The standard required in making the decision to charge is whether there is reasonable and sufficient evidence with prospect of securing a conviction.
15. In this regard, the 2nd Respondent in arriving at the decision to charge the Applicant in Wang’uru Criminal Case No. E752 of 2024 sufficient evidence



was gathered by the DCI, it was reviewed by the 2nd Respondent who upon determining that they would secure a conviction arrived at a decision to charge.

16. The trial court at Wang'uru which is equally an independent institution deriving its mandate from *the constitution* while issuing the warrants of arrest on 22nd August, 2024 was satisfied that the Applicant had ignored and/ failed to honour summons to appear for plea taking.
17. The Applicant has continued disregarding court orders from the trial court whereby despite knowing that there are active warrants of arrest, he has failed to avail himself before Wang'uru Law Courts. He has instructed a counsel who has on numerous occasions failed to avail his client claiming that he is hospitalized allegations which have not been substantiated.
18. In an attempt to mislead this Honourable Court so as to arrive at the wrong conclusion, the Applicant has alleged that he is facing similar charges in Milimani Law Courts. It is crucial at his juncture to dissect the charges leveled against the Applicant in the two courts.
19. We humbly submit that Milimani CR. Case No: E766 of 2022 is significantly different from Wang'uru CR. Case No: E752 of 2024. This is based on the fact that the two cases have different complainants, the amount of money in question is different, and the time and place where the offences are alleged to have occurred is equally different. This is evidenced by the annexed charge sheets in the 1st Interested Party's replying affidavit marked as "JCAK-2/1, '7CAK-3"t and a letter from the 2nd Respondent marked as "JCAK-4" 20. In Wang'uru CR. Case No: E752 of 2024 the Applicant is charged with the offence of conspiracy to defraud as the first charge and does not face that similar charge in Milimani CR. Case No: E766 of 2022. This is a distinct offence provided under a different section of the *Penal Code* requiring proof of distinct ingredients.
21. It is trite law that the doctrine of double jeopardy protects an individual from being punished twice for an offence which has previously been acquitted or convicted. Neither of the cases mentioned hereinabove has been concluded and the Applicant has not been acquitted in any of them. Therefore, the Applicant defending himself in the two cases will not offend the doctrine of double jeopardy as alleged.
22. It is on these grounds that we submit that the Applicant has not reached the threshold for granting the judicial review orders as sought. Furthermore, the Applicant is in contempt of court for failing to adhere to orders issued and hence undeserving of the Court's audience."

The 2nd Interested Party

23. The 2nd Interested Party by Submissions dated 17/4/2025 raised an objection that the substantive Notice of Motion for judicial review herein was filed outside the 21 days granted by the Court upon grant of leave on 30/12/2024, and without leave sought and granted to extend time, citing County Executive of Kisumu v County Government of Kisumu & 3 Others [2017] eKLR.



24. On the merits, the 2nd Interested Party emphasized the differences between the two criminal proceedings at Wang'uru and Nairobi, as follows:

“Whether the 2nd Respondent acted in contravention of the provisions of *the Constitution* and Fair Administrative Act by approving the charges in Wang'uru Criminal case Number 752 of 2024

20. The 2nd Respondent is mandated by *the Constitution* under Article 157 (6) 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;
21. That upon receiving a complaint from the 2nd interested Party and in line with its mandate, the 2nd Respondent conducted the investigations, obtained sufficient evidence and found that the Applicant had a case to answer therefore giving rise to Wang'uru MCCR 752 OF 2024.
22. The ODPP, 2nd Respondent is conferred with constitutional authority under Article 157 (10) to act independently in making decisions as to who is to charge and who not to be charged. The 2nd Respondent powers are insulated by *the Constitution* and statute to act independently without subjecting themselves to anybody's directions or control, external factors or influence or even seek consent or authority from anybody. Therefore, in approving the charges against the Applicant, the 2nd Respondent acted with the scope of its work and as per its mandate.
23. In an event that there is proof of abuse of powers as alleged in the application herein, the Court can intervene only where there is proof and must be done cautiously as stated in *County Executive of Kisumu v County Government of Kisumu & 8others* [2017] eKLR "Where there is proof of abuse of power by the commission or the DPP in exercise of their duties thereby acting in breach of any constitutional or statutory powers, it is the duty of the court to intervene and correct the situation by setting aside such action or breaches. However, courts must act also with extreme caution not to unreasonably gag the operations of such independent state agencies or organs so as to give them room for effective operation. (See *Paul Nganga Nyaga vs Attorney General and 3 Others* (2013) eKLR) where the court stated that: "This court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they acted in contravention of *the Constitution*".
24. The allegations by the Applicant that the decision to charge him in Wang'uru MCCR 752 OF 2024 was made in violation of the provisions of *the Constitution* and the Fair Administrative Act and in malice with influence from 2nd Interested Party are unsubstantiated. There is totally no proof of the said allegation and the Applicant has not attempted to prove that his rights have been violated or threatened to be violated. The 2nd Interested Party submits that the decision to charge the Applicant was properly made and in line with the relevant laws. Whether the charges in Wang'uru Criminal Case No. 752 of 2024 are similar to the charges in *Milimani E766 of 2022* therefore amount to a breach of the principle of double jeopardy.



25. The Applicant herein seeks that the charges in Wang'uru be quashed on the basis that they breach the principle of double jeopardy alleging that he is facing similar charges in Milimani 766 of 2022. The Black Law Dictionary defines double jeopardy as: the fact of being prosecuted or sentenced twice for substantially the same offence. The principle of double jeopardy is recognized in our Constitution the Supreme Law of the land under Article 50 (2) (0) of [the Constitution](#) which provides: "Every accused person has the right to a fair trial which includes the right not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted".
26. The above provision is operationalized by Section 138 of the CPC which provides that: "A person who has been once tried by a court of competent jurisdiction for an offence and convicted or acquitted of that offence shall while the conviction or acquittal has not been reversed or set aside not be liable to be tried again on the same facts for the same offence.
27. The next question is whether the charges in Wang'uru Criminal Case number 752 of 2024 and Milimani 766 of 2022 are similar. The 2nd Interested Party submits that the said charges are not similar as alleged by the Applicant. In particular, the charge in 766 of 2022 is "Obtaining money by false pretenses contrary to Section 313 of the [Penal Code](#). Particulars being that "Between the 23/1/200 and 25/1/2022 with the intent to defraud obtained a sum of Kshs. 30,450,000/- (Thirty Thousand Four Hundred and Fifty Thousand from Jacqueline Christy Akinyi Kinywa by falsely pretending that you were in a position to supply her with 6000 *50 Kilograms of sugar a fact you knew to be false.
28. While the Applicant is faced with 2 charges Wang'uru 752 of 2024 being, the charge of conspiracy to defraud Paleah Wholesalers of Kshs. 15,300,000/- on 24th January 2022 and a second charge of falsely obtaining money (Kshs 14,850, 000) from New Paleah Wholesaler Ltd on 24th January 2022 (see annexure "LN-5 of the 2nd Interested Party Replying Affidavit). From the copy of the charge sheet availed by the Applicant in respect of Milimani E766 of 2022 as annexure "IGM-3" under paragraph IQ of his Verifying Affidavit, it is clear there is no similar charge in Milimani E766 of 2022.
29. The charges are evidently not similar, they differ as they involve different offences under different provisions of the law, the complainants in the 2 cases are different (in Milimani 766 being Jacqueline Akinyi while in Wang'uru being Paleah Wholesalers, the events leading to the offence were committed at different times and the chain of events are different; a position that the 2nd Respondent had previously confirmed via their letter dated 9th April, 2024.
30. In *Mary Ngechi v Ethics & Anti-Corruption Commission & another* [2019] KEHC 4668 (KLR), the Court stated that "From the face of it, the two sets of charges both in ACC 19/10 and 20/10 are not similar in terms of the statement of the offence and particulars. In other words, the ingredients are not the same. The applicant must prove that she has been convicted or acquitted of similar offence



In the case of Nicholas Kipsigei Ngetich and six others vs R (2016) eKLR the court had this to say on double jeopardy based on the doctrine of autrefois acquit or convict; "the rule against double jeopardy does not forbid the state from presenting different offences at consecutive trials even though they came out of the same occurrence. The test is whether such a course has led to fundamental unfairness".

....

31. The charges in the 2 cases being different though related, the Applicant had the option of applying for consolidation for the trial Court to consider hearing the matters together since they arise from the same transaction as correctly held in the Nicholas Kipgei Ngetich case (supra); In the instant case, no objection was ever raised until 2018 after the conclusion of ACC 20/19. After having perused the two charge sheets, it is clear that the offences are wholly related in that they all arose out of the same transaction. At its best, the court should have on its own motion or invitation of either party to consolidate the two cases.
32. The charges in the Milimani case and Wang'uru being not similar as demonstrated herein above, the prayers sought in this application cannot be granted. Whether the instant Application herein is an abuse of the Court process.
33. The 2nd Interested Party submits that the Application herein is an abuse of the Court process for the following reasons.
 - a. That the allegations that the charge against the Applicant is similar to a previous charge is a basis for pleading "not guilty" under Section 279 of the [Criminal Procedure Code](#). Such plea is available to be made and interrogated before a trial court but the Applicant chose not completely appear before the trial Court
 - b. The Applicant has on several occasions failed to appear before the Wang'uru Court on unsubstantiated grounds leading to the issuance of the warrants on 22/8/2024.
 - c. Upon learning of the warrants of arrest in Wang'uru MCCR 752 OF 2024, the Applicant rushed to Kibera and made an Application for orders of anticipatory bail which was granted on conditions. The Applicant did not comply with the conditions for the anticipatory orders granted and therefore the same lapsed.
 - d. The Applicant then filed the instant suit seeking stay of the proceedings in Wang'uru 752 of 2024 and the substantive motion seeking Certorari orders quashing the decision of the 2nd Respondent to charge the Applicant in 752 of 2024.
 - e. The Applicant deliberately suppressed the foregoing facts and the reality of his several failed attempts to subjugate and circumvent the court process.
34. Further the 2nd Respondent officers having conduct of the matter, are working in concert to scuttle the trial of the Applicant.



35. The 2nd Respondent despite conducting investigations, subsequently charging the Applicant and further confirming that the charges in Milimani 766 of 2022 and Wang'uru 752 Of 2024 are dissimilar; they have now recently been suspiciously working to have the charges withdraw as demonstrated in:
- i. Application dated 13th December 2024 filed in Wang'uru £752 of 2024 annexure "LNN-3" of the 2nd Interested Party Replying Affidavit.
 - ii. Application dated 26th November 2024 filed in Wang'uru £752 of 2024 annexure "LNN-4" of the 2nd Interested Party Replying Affidavit. That ODPP's Application and the Affidavit in Wang'uru were filed after this court declined the Applicant's ex parte prayer to have the proceedings in Wang'uru E752 of 2024 stopped.
 - iii. The 2nd Respondent's ill-motive is also evident in their Replying Affidavit sworn on 1611212024 where they fully support the instant application herein
36. The Applicant herein has filed an Affidavit allegedly sworn on 10th December 2024 (after filing this suit) in support of the Application by the ODD PP in Wang'uru E752 of 2024. In the said affidavit the Applicant herein expressly supports the Application by the ODPP to withdraw the charges and himself (the Applicant herein) has included depositions where he seeks exactly the same prayers based on the same grounds that he has put forth in this matter.
37. The 2nd Respondent's application before the trial Court seeking similar prayers is still pending, the judicial review application herewith is therefore improper and prematurely before this Court.
38. From the foregoing, it is evident that the Applicant has been on forum shopping mission and in concert with the 2nd Respondent to defeat justice. For the reasons stated herein above, the Applicant has approached this Court with "unclean hand", the application therefore is an abuse of the Court process and the Court should not aid the Applicant in his mission to defeat the course of justice."

25. Judgment was reserved.

Issue for determination

26. Whether the Notice of Motion judicial review orders of Certiorari and Prohibition may be granted.

Determination

Preliminary

27. The application for leave to file the Notice of Motion for judicial review was granted on 30/12/2024 and the order directed that the "substantive notice of motion be filed within 21 days from today." The 2nd Interested Party complains that the Applicant filed the substantive Motion outside the 21-day period on the ground that the payment therefor was made on 23/3/2025.



28. The court has power to extend time under order 50 rule 6 of the Civil procedure Rules as follows:

“6. Power to enlarge time [Order 50, rule 6]

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

29. The Court notes that payment receipts Receipt No.: RA-0370484 Receipt Date: December 9, 2024 has two items F-01288 Substantive notice of motion for 10,575.00 and F-01219 Application Under certificate of Urgency for 2,250.00. The receipt for payment on 23/3/2025 is shown as Receipt No.: RA-0668048 Receipt Date: March 23, 2025 Invoice Ref. E4CVQGEU F-01289 for All other applications for 1,500.00.

30. The accepts that the Notice of Motion was paid for on filing of the application for leave on 9/12/2024 and the Court does not find merit in the objection on the filing of the substantive motion outside 21 days permitted by the Court in accordance with the Rules.

31. Indeed, the matter of delay in filing the Notice of Motion was not raised when the Motion came up for hearing on 13/2/2025 before the Court in the presence of Counsel Mr. Wanyanga for the Applicant, Mr. mamba for DPP, Mr. Kamau for 1st Interested Party and Ms. Ngumbao for the 2nd Interested Party and directions for hearing were given as follows:

“ Court

1. DPP has filed Replying Affidavit of 16/12/2024.
2. 2nd Interested Party’s Replying Affidavit of 11/2/2025.
3. 1st Interested party to file Replying Affidavit within 14 days.
4. Applicant to file, if necessary supplementary Affidavit within 7 days of service by the 1st Interested Party.
5. Hearing by oral submissions on 1/4/2025.”

Having all participated in the hearing of the Notice of Motion herein, the respondents and Interested Parties must be taken to have waived any objection as to late filing of the substantive application.

32. In the spirit of *the Constitution* as this Court is enjoined to observe under Article 20 (4) (b) of *the Constitution*, it would be prejudicial to turn away an otherwise meritorious and competent application for relief only on consideration of a delay in filing of the substantive Notice of Motion upon Grant of Leave. The Court must interrogate the merit of the application to determine whether there is substantive merit in the application.

33. In addition, the substantive issue of merit which relates to alleged violation of rights of the applicant, in terms of Article 22 of *the Constitution* requires that the Court deals with the application on its merit, and that in terms of Article 22(3) of *the Constitution* that “(b) formalities relating to the proceedings,



including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation”.

34. The Court considers that the interest of justice, in view of the nature of the issue of alleged violation of rights, the justice of the case in terms of Order 50 rule 6 of the Civil Procedure Rules calls for invocation of the provision that “the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require”.
35. Moreover, there is some uncertainty as to the procedure for filing of judicial review applications following the publication of The Fair Administrative Action Rules, 2024 [Legal Notice 165 of 2024](#), (Commenced on 11 October 2024), which by Rule 11(1) provides that “An application for judicial review shall be by way of an originating motion accompanied by a supporting affidavit” and there is no provision for leave to file application for judicial review orders. The applicant herein cited constitutional as well as the [Fair Administrative Action Act](#) in support of his application commenced by application for leave suggesting filing pursuant to Order 53 of the Civil Procedure Rules.

Application for Certiorari and Prohibition

36. The scope of the judicial review orders of certiorari, prohibition and mandamus was discussed in the Court of Appeal case of Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR.
37. The Court has considered the application for judicial review orders of Certiorari and Prohibition herein, the responses by the Respondent and Interested Parties and the respective written submissions by the parties. The High Court as a Constitutional Court and the Judicial Review Court has authority under Article 165 (6) to review the proceedings of a trial court in terms that:

“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

The object of the supervisory jurisdiction is, as alluded in the sub-Article (7) setting the power to call for the subordinate court’s record and make any order or give any direction it considers appropriate, “to ensure the fair administration of justice.”

Impugned decision to charge

38. Although the present application seeks judicial review primarily against the 2nd Respondent for his decision to charge, as an administrative action, the existence of the criminal proceedings before the 1st respondent trial court, in consequence of the decision to charge, imports the jurisdiction under Article 165 (6) and (7) of [the Constitution](#).
39. The Court respectfully notes the High Court decision of Republic v Director of Public Prosecutions & 2 others; Ayoo (Exparte Applicant) [2023] KEHC 23733 (KLR) cited by the Applicant which, inter alia, held:
 - “12. The well-intended guidelines and the decision to charge in Form ODPP 1 could not be said to be in conformity with section 6 of the Fair Administrative Actions Act if all that the ODPP did was to complete the decision to charge form ODPP 1A before shuttling the accused person to court.



13. Once the decision to charge was made, then the status of the potential accused person changed. He was now a vulnerable person who was materially or adversely affected by the administrative action in the decision to charge and he had a right to be supplied with such information as may be necessary to facilitate his or her application for a review within the space of the right to fair hearing under article 50 of *the Constitution*.
 14. The Guidelines on the Decision to Charge, 2019, must be aligned to the call for an early disclosure of information contained in the decision to the affected person if the same was to be counted as a tool that would form part of the social transformation through access to justice dream. The right to fair hearing would not be complete without that kind of dialogue.”
40. The decision is a further emphasis on the proposition that the decision to charge is a matter of grave moment and should not be taken lightly and all statutory procedural protections must be observed in prosecutions mounted in good faith for the purposes of genuine prosecution of crime and punishment of offenders. When the statutory procedures of decision taking are not followed, the decision taken is clearly ultra vires.

Abuse of the Court process

41. By own admission in the Replying Affidavit sworn on 1612/2024 in response to this case, the 2nd Respondent DPP concedes that charges in the cases filed at Nairobi Law Courts and Wang’uru Law Courts are similar as follows:

“

- “ 12. That upon review of the evidence in Police files of Milimani MCR E766of 2022, Wang’uru MCCR E7S8of 2023 and Wang’uru MCCR E7S2of 2024 it was noted the following:
- a. That the set of facts in Milimani MCCR E766 of 2022 are substantially similar with Wang’uru MCCR E752 of 2024 save for the complainants who are the 1st and 2 d interested parties respectively.
 - b. That subject matter of charges in both files is ksh15,300,000/= and allowing both the 1st and 2nd interested parties to pursue their claim independently is an abuse of the process of the court.
 - c. That it our view that the Applicant and the 2nd interested party did not have a commercial agreement hence 2nd Interested party cannot claim for from Applicant.
 - d. That the essential ingredient for the offence of conspiracy to commit a felony cannot be proven as there is no evidence of concerted acts showing intention or agreement between the Applicant and the Interested party to induce the 2nd Interested to party with her money. (Annexed herein are copies of witness statement for 1st interested party and 2nd Interested part marked MV-6 and MV-7 respectively)



- e. That 2nd interested party is therefore a stranger to agreement and transaction between the Applicant and the 1st interested party and was therefore not defrauded by both.
- f. That if both matters are allowed to proceed independently, it will offend the doctrine of double jeopardy, against the Accused Person, and also amount to abuse of the legal process.
- g. That it's in the best interest of Justice that the Wang'uru MCCR E752 of 2024 be terminated to allow for the Milimani MCCR E766 of 2022 proceed to its logical conclusion having that four (4) witness have already testified. (Annexed hereto is a copy of a letter from ODPP Regional Coordinator- Central marked MV-8)."

This being a public prosecution by the DPP, the Court cannot second guess the DPP as to the facts of his case against the applicant, which in any event are not subject of trial before this Court.

42. Article 157 of *the Constitution* grants the DPP the constitutional prosecutorial mandate, which must be exercised in accordance with the principles set out in sub-article 157(11) of *the Constitution*, as follows:

“(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.”

43. The circumstances of this case, where there is already before the trial court an application for withdrawal of the criminal charges and termination of the prosecution, which application was made before the court before the filing of this Judicial review application and only formalized on the direction of the trial court on 24/11/2024, and being based on the same grounds of existence of similar trial before the Milimani Court, Nairobi and being aimed at the same result, the withdrawal or termination of the criminal charges subject of this judicial review proceedings, the Court in accordance with the principle of supervisory jurisdiction considers that there exists a reasonable cause for its intervention.
44. In this case, when the prior application (it is not correct that the application to withdraw the charges was made after the filing of this judicial review application as urged by the applicant as the application was first made orally on 24/11/2024) for withdrawal of the criminal case is approved, the object of this application seeking enforcement of constitutional jurisdiction under Article 165 (6) of *the Constitution* shall have been achieved.
45. The principal constitutional issue raised by the Applicant as set out in this judicial review application is that the substance of the charges before the trial court herein have been previously filed against him before another court, and that is the same basis on which the DPP wishes to withdraw the criminal charges in the pending application before the trial court.
46. As shown in the trial Court Record of 21/11/2024, the application for withdrawal of the Charges was made and in a ruling on the same date, the Court deferred consideration of the application as follows:

“ruling Court:

I have considered the application by the prosecution as well as the submissions by the defence counsel for Jacqueline, the accused Jacqueline and the complainant Leah.



I note that warrant of arrest in this matter were issued way back on 22/11/2024. The accused has not bothered to attend court despite the matter having been listed for mention severally. Today the prosecution is applying to withdraw the matter in the absence of the accused who has disobeyed this court's order to attend court as required. The Investigating Officer has not also attended today to explain why he has not availed the accused. I therefore make the following orders as court orders are not made in vain:

1. That before any direction and or orders are given with regard to the withdrawal, the accused must appear in court on the next date the court will set.
2. Summon to issue to the DCIO Mwea East to avail the accused.
3. That the prosecutor should file and serve a formal application for withdrawal on all parties concerned including the complainant herein and the accused in CR E758 of 2023 one Jacqueline Christy Akinyi.
4. That the said application to be filed and served within 3 days. The respondent will have 3 days to file and serve their response

Mention for direction on 11/12/2024.

Warrant of arrest to accused are extended”

Hon F. Mutuku- P.m

21/11/2024”

47. Although the applicant may achieve the same result of termination of the criminal trial through the application by the DPP seeking termination of the Charge based on the principle of double jeopardy, (whether or not applicable *stricto sensu*), the constitutional court cannot suffer the rights of an applicant to be held in abeyance to wait for the trial Court to address the applicant's situation at the hearing of the application to withdraw the charges. The applicant is entitled to a fair trial, a right which is not liable to limitation, in terms of Article 25 (c) of *the Constitution* and it should not, therefore, be put on hold to await the appearance of the applicant before the trial court.
48. The apparent concern by the trial court that the Prosecution was seeking to withdraw the charges before the applicant had presented himself for plea and a warrant of arrest had been issued against him is valid. However, in the circumstances of this case, where the applicant had secured anticipatory bail pending arrest, which the applicant might, rightly or wrongly, have thought it prevented the issuance of a warrant off arrest, and in view of the effect of the new charges on the right of the accused to a fair trial, the rule of practice and procedural requirement that an accused pleads to a charge to commence the proceedings in a case before an application to withdraw, or other application in the proceedings may be taken, must be subjugated to the greater constitutional directive under Article 20 (2), (3) and (4) of *the Constitution* that “Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom; that in applying a provision of the Bill of Rights, “a court shall (a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and (b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom” and that in interpreting the Bill of Rights, “a court, tribunal or other authority shall promote (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and (b) the spirit, purport and objects of the Bill of Rights.”



49. It is a clear case of abuse of process, if the DPP were to be allowed to proceed with two criminal cases against the same person for the same or similar offences before two different courts over the same subject matter. This is what is apparent in this case, and the High Court in exercise of its supervisory jurisdiction must put a stop to it. It is inconvenient that the stoppage of the lower court trial happens when there is pending application for termination of the case by the DPP and a warrant of arrest upon failure to attend Court. However, this constitutional court must find that the obvious abuse of the Court process and resultant infringement of the rights of the applicants must be vindicated without further ado. The applicant should be hauled to court to take plea to a charge which should not have been filed and which the DPP has now sought to terminate in view of the previously filed charges against the accused applicant over the same subject matter.
50. And being aware of the civil proceedings for recovery of money allegedly paid by the Interested Parties to the Applicant, the Court is despite the provisions of section 193A of the *Criminal Procedure Code*, justified in feeling that the second criminal trial, which is initiated by the 2nd Interested Party at Wang'uru Law Courts and prosecuted by the same DPP as in the criminal case at Nairobi Law Courts, is a pressure point for the applicant's settlement of the civil dispute.
51. Case-law authorities abound for the proposition that a prosecution aimed at exerting pressure towards settlement of a civil claim between the complainant and the accused and other similar ulterior motives is an abuse of process. See the decisions discussed by this case in Nairobi Petition No. 523 OF 2014, Christina Gakuhi Kubai v. DPP & 2 Ors.:

“The Prosecutorial Mandate and Abuse of the Legal Process

38. I agree with the position that the police and the DPP have respectively constitutional investigation and prosecutorial powers under Articles 245 and 157 of *the Constitution*. Article 157 (10) of *the Constitution* provides for the independent prosecutorial powers of the DPP in terms as follows:

“(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.

39. Although both powers of investigations and prosecution are to be exercised independently without direction or control from any person, this does not preclude the High Court as a constitutional court from terminating investigations and prosecution undertaken in breach of rights and fundamental freedoms, public interest or in abuse of the legal process. The position was first established in Kenya by the High Court (Madan Ag. CJ., Aganyanya & Gicheru, JJ.) in *Githunguri v. Republic* (1986) KLR 1 and affirmed subsequently by the Court of Appeal (Tunoi, Githinji & Deverrel, JJA.) in *Joram Mwenda Guantai V The Chief Magistrate, Nairobi*[2007] eKLR when it held that the High Court has an inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court as follows:

“Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. It was succinctly put in *Stanley Munga*



Githunguri vs Republic [1985] KLR 91 that if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious the Judge has the power to intervene and that the High Court has an inherent power and a duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court. This dictum is now an everyday edict in our courts and we are indeed surprised that the learned Judge was shy to so declare.”

40. It is true that courts have generally held this view of law as regards the court’s power to intervene in appropriate cases. For instance, in a ruling for conservatory order to stay prosecution in Nairobi Petition No. 442 of 2016, Shivji Jadva Parbat and 2 Ors. v. The Hon. Attorney General and 2 Ors., this Court observed that –

“22. It is clear that the police have general powers of investigation of crime under Article 245 (4) (a) of *the Constitution* and the DPP a general power to prosecute offenders subject only to *the Constitution* and the requirements of public interest under Article 157 (11) of *the Constitution*. The test appears therefore to be whether there is demonstrated a reasonable justification to commence investigation and prosecution for a crime. Where however, it can be shown that the prosecution is being carried out some purpose ulterior to the objects of the criminal process to enforce the law and to prosecute offenders, as to amount to what *the constitution* in Article 157 (11) calls abuse of the legal process, the court must intervene to halt such abuse.”

41. Most recently, in Director of Public Prosecutions v. Justus Mwendwa Kathenge & 2 others [2016] eKLR delivered on 25th November 2016, the Court of Appeal has restated the principle that the powers of the DPP to prosecute are not absolute, and may be halted in cases of abuse of process, and held that:

“From the days of Githunguri [(1986) KLR 1], the prosecutorial powers, then exercised by the Attorney General, was held to have limits; that it must never be abused, never exercised oppressively, maliciously or against the public interest. The Court in that decision emphasized that, where it was clear that the power to prosecute was being misused, the court, under its inherent jurisdiction would stop such prosecution as it would amount to an abuse of the process of the court. This holding has since been consistently followed. See also Mohammed Gulam Hussein Fazal& another v The Chief Magistrate Court, Nairobi & another H.C. Misc Application No 367 of 2005, and Peter George Antony D’costa v A.G & Another, Petition No. 83 of 2010.”

42. Similarly in Australia, the High Court of Australia in Williams v Spautz [1992] HCA 34; 174 CLR 509; 66 ALJR 585; 107 ALR 635; 61 A Crim R 431 long held that abuse of process is a ground for termination of criminal proceedings as follows:

“15. It is well established that Australian superior courts have inherent jurisdiction to stay proceedings which are an abuse of process



(5) *Clyne v. N.S.W. Bar Association* [1960] 104 CLR 186, at p 201; *Barton v. The Queen* [1980] HCA 48; (1980) 147 CLR 25, at pp 96, 107, 116; *Jago*. Although the term 'inherent jurisdiction' has acquired common usage in the present context, the question is strictly one of the power of a court to stay proceedings. That power arises from the need for the court to be able to exercise effectively the jurisdiction which the court has to dispose of the proceedings. The existence of that jurisdiction has long been recognized by the House of Lords (6) *Metropolitan Bank v. Pooley* (1885) 10 App. Cas 210; *Connelly v. D.P.P.* (1964) AC 1254; *Reg. v. Humphrys* (1977) AC 1. The jurisdiction extends to both civil and criminal proceedings. As Lord Morris of Borth-y-Gest observed in *Connelly v. D. P.P.* (7) (1964) AC, at p 1301.

"(A) court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process."

43. The position in England and Wales is no different. At paragraphs 4-48 and 4-49 p. 347, Archibold, *Criminal Pleading, Evidence and Practice*, 2006 ed. notes as follows:

"Abuse of Process

(a) Jurisdiction

General

In *Connelly v. DPP* [1964] A. C 1254-1355, Lord Devlin added a fifth ground to the list set out in *ex p. Downes*, ante viz. where particular Criminal proceedings institute an abuse of the courts process, see also Lord Pearce at pp. 1361, 1364 and Lord Reid at p. 1296, but cf, Lord Morris at pp 1300-1302 and Lord Hodson at pp. 1335-1338 what all their Lordships do seem to agree upon is that the court has a general and inherent power to protect its process from abuse. This power must include power to safeguard an accused person from oppression or prejudice: Lord Monis, ante; Lord Devlin at p. 1347; Lord Pearce, ante.

The views expressed in *Connelly*, ante, were considered, obiter, in *DPP v. Humphrys* [1977] AC 1, HL. Only Lords Dilhorne, Salmon and Edmund-Davies considered the point. Lord Salmon and Lord Edmund-Davies concurred with the views expressed by Devlin and Lord Pearce in *Connelly*, while Lord Dilhorne supported the narrower approach adopted by Lord Morris and Lord Hodson.

"I respectfully agree with [Lord Dilhorne] that 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 power to intervene. Fortunately such prosecutions are hardly ever brought but the power of the court to prevent them is, in my view, of great constitutional importance and should be a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the court of the power to which I have referred “(per Lord Salmon at p. 46C-F).

44. In addition, Article 157 of *the Constitution* of Kenya which gives the DPP the power to institute and undertake criminal proceedings in respect of any offence is subject to sub-Article (11) as follows:

“(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.”

Section 193 A of the *Criminal Procedure Code*, which provides that the institution of civil proceedings does not preclude the State from instituting and maintaining criminal proceedings against a party with respect to an issue which is also directly in issue in a pending civil suit is, as a statutory stipulation, similarly subject to abuse of process principle of Article 157 (11) of *the Constitution*.”

52. If as conceded in the Submissions by the Counsel for the 2nd Interested Party that “31. The charges in the 2 cases being different though related, the Applicant had the option of applying for consolidation for the trial Court to consider hearing the matters together since they arise from the same transaction”, there is no explanation why the applicant should be put to the prejudice of another trial at a different court station, which is over hundred miles apart from the Nairobi Law Courts where the previously instituted charges are to be tried. There is no explanation why the charges in the case subject of this application were not filed in the same criminal case at Nairobi by necessary amendment.
53. This Court, therefore, finds that the filing of the second case against the applicant at Wanguru despite the pendency of a previous trial at Nairobi Law Court is an abuse of the criminal process of the Court and a violation of the applicant’s fair trial rights, and consequently, the decision to charge the applicant and the proceedings at Wang’uru Law Court will be quashed and further prohibited by appropriate judicial review orders.

Orders

54. Consequently, the Court granted the ex parte applicant’s Notice of Motion for judicial review in terms of –
1. An Order of Certiorari to quash the decision of the 2nd Respondent to charge the applicant with the charge of conspiracy to defraud contrary to section 317 of the *Penal Code* and Obtaining money by false pretences contrary to section 313 in Wang’uru Law Court criminal Case No. MCCR/E752 of 2024.



2. An Order of Prohibition to prohibit the 1st and 2nd Respondents from proceeding with charging and/or hearing and determination and or prosecution of the Ex parte Applicant herein with the charge of conspiracy to defraud contrary to section 317 of the Penal Code and obtaining money by false pretences contrary to section 313 of the Penal Code in Wang'uru Criminal case NO. MCCR/E752 of 2024.

55. There shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED ON THIS 7TH DAY OF JULY 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Wanyanga for the Applicant.

Mr. Mamba for the DPP.

Mr. Kamau for the 1st Interested Party

Ms. Ngumbao for the 2nd Interested Party.

