



Republic v Director of Public Prosecutions; Mukirai (Ex parte Applicant); Muchugi (Interested Party) (Judicial Review Application E004 of 2025) [2025] KEHC 12618 (KLR) (10 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12618 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
JUDICIAL REVIEW APPLICATION E004 OF 2025
FN MUCHEMI, J
SEPTEMBER 10, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

AND

CHRISTOPHER MATHEA MUKIRAI EX PARTE APPLICANT

AND

ALICE NJERI MUCHUGI INTERESTED PARTY

JUDGMENT

Brief Facts

1. In these Judicial review proceedings, in his Notice of Motion dated 21st April 2025, the ex parte applicant seeks the following orders:-
 - a. An order of prohibition be issued to prohibit the respondent from prosecuting the applicant on seventeen counts of forgery and uttering a document with intent to defraud contrary to section 352 and 353 of the Penal Code in Thika CMCR Case No. 4020 of 2023 Republic vs Christopher Mathea Mukirai pending the outcome of Kiambu High Court No. OS 002 of 2021 Christopher Mathea Mukirai and Thika ELC Appeal No. E029 of 2024 Alice Njeri Muchugi vs Christopher Mathea Mukirai, Susan Wambui Wachira, Mary Njeri Mbugua and District Land Registrar Ruiru.



2. The respondent and the Interested Party opposed the application and filed a Replying Affidavit dated 18th June 2025.

The Ex Parte Applicant's Case

3. The ex parte applicant states that on 2nd December 2022, he was charged before Thika Chief Magistrate's Court in CMCR No. E3499 of 2022 on four counts of obtaining money Kshs. 800,000/- by false pretences contrary to Section 313 of the Penal Code, conspiracy to defraud Alice Njeri Muchugi on LR No. Ruiru/Ruiru East Block 2/1962, forging a transfer of land document dated 28th May 2018 for land parcel Ruiru/Ruiru East Block 2/1962 registered under the name of Christopher Mathea Mukirai, Susan Wambui Wachira, Mary Njeri Mbugua and Alice Njeri Muchugi and altering a document with intent to defraud contrary to Section 357(b) of the Penal Code. The ex parte applicant avers that he pleaded not guilty on all the four counts.
4. The ex parte applicant states that on 1st February 2023, the prosecution withdrew the four charges under section 87(a) of the Criminal Procedure Code and the sum of Kshs. 800,000/- restored to Alice Njeri Muchugi's account number 0090292xxxxxx Equity Bank, Juja Branch. On 30th June 2023, Alice Njeri Muchugi filed a claim in Ruiru Chief Magistrate's Court ELC Case No. E117 of 2023 Alice Njeri Muchugi vs Christopher Mathea Mukirai, Susan Wambui Wachira, Mary Njeri Mbugua and District Land Registrar Ruiru. In the said case, she sought for orders of a declaration that LR. No. Ruiru/Ruiru East Block 2/1962 was subdivided, sold and transferred fraudulently by the 1st, 2nd and 3rd defendants; an order that the District Land Registrar, Ruiru Land Registry do cancel, withdraw and remove forthwith all entries entered and registered against the title for the parcel Ruiru/Ruiru East Block 2/1962 and revert ownership of the plaintiff and the defendants jointly reflect the cancellation and that the land sub divided and a portion equivalent to a half transferred to the plaintiff.
5. The ex parte applicant states that on 15th March 2024, the Ruiru Court found that the subject matter LR. No. Ruiru/Ruiru East Block 2/1962 was also the subject matter in Kiambu High Court OS E002 of 2022 which was pending at the High Court for distribution of matrimonial property and the Ruiru Court found that the 1st interested party's suit offended the sub judice law under Section 6 of the Civil Procedure Act and sustained his preliminary objection striking off the suit. Alice Njeri Muchugi subsequently filed an appeal being Thika ELC Appeal No. E029 of 2024 challenging the findings of the court in Ruiru which appeal is still pending for hearing and determination.
6. The ex parte applicant avers that he was subsequently charged in Thika CMCR Case No. 4020 of 2023 with seventeen counts of forgery and uttering a document with intent to defraud contrary to Section 352 and 353 of the Penal Code. The said charges arise from land parcel numbers Ruiru/Ruiru East Block 2/26117, 26118, 26123, 26124, 26131, 26132, 26133, 26148 which are sub divisions out of the mother title number Ruiru/Ruiru East Block 2/1962 and are all in the names of Alice Njeri Muchugi, Susan Wambui Wachira, Mary Njeri Mbugua and himself. The ex parte applicant avers that he pleaded not guilty and the matter is scheduled for mention on 4th February 2025.
7. The ex parte applicant states that the 1st interested party having received Kshs. 800,000/- in Criminal Case No. E349 of 2022 being a refund of her interest in LR No. Ruiru/Ruiru East Block 2/1962 and having elected to pursue civil remedies to assert her rights in said property vide Thika ELC Appeal No. E029 of 2024 has instituted a criminal complaint against him in Thika CMCR Case No. 4020 of 2023 with a tinge of malice and revenge with the aim of unjust enrichment.
8. The ex parte applicant argues that the respondent has singled him out for prosecution in Thika CMCR Case No. 4020 of 2023 yet in Thika ELC Appeal No. E029 of 2024 the 1st interested party



has maintained that Susan Wambui Wachira, Mary Njeri Mbugua and himself obtained her land Ruiru/Ruiru East Block 2/1962 by fraud and have violated his right to fair administrative action and constitutional right from discrimination. The ex parte applicant further states that the respondent has subjected him to criminal prosecution in Thika CMCR No. 4020 of 2023 on a matter which is the subject of matrimonial property dispute and ownership of title in a land dispute which are all civil in nature.

The Interested Party's Case

9. The interested party states that judicial review proceedings in criminal matters are only sustainable in exceptional circumstances, where there is demonstrated abuse of legal process, infringement of constitutional rights or where the prosecution has been initiated for an improper motive. The interested party argues that the present application has not met the threshold for intervention by the court through judicial review, and no evidence has been tendered to demonstrate that the intended prosecution is malicious, oppressive or an abuse of process.
10. The interested party states that the assertion that the subject matter in Thika CMCR No. 4020 of 2023 concerns matrimonial property is untrue as she has disputed the existence of any matrimonial relationship with him and further the matter is not one falling under matters that can be considered in administrative law for prerogative orders. The interested party further states that the existence of a parallel civil dispute does not bar the institution or continuation of criminal proceedings where criminal liability is independently discernible.
11. The interested party states that after being charged with the offences of forgery and making documents without authority, the ex parte applicant included the properties in the matrimonial case with the aim of defeating justice yet the property is not among the properties listed in Thika ELC Case No. E029 of 2024. The interested party asserts that the decision to charge a person with a criminal offence is a constitutional mandate of the Director of Public Prosecutions under Article 157 of *the Constitution* and the ex parte applicant has failed to demonstrate that the DPP acted without evidence, acted irrationally or was driven by extraneous considerations. His innocence is a matter to be determined by the trial court and asking the court to make a determination on the point is untenable.
12. The interested party states that she did not withdraw the matter in Thika CMCR No. E3499 of 2022 where the ex parte applicant was charged with four counts. The charges were brought afresh as they lied to the court that they had settled the matter with her. The ex parte applicant then left the country to avoid prosecution and was arrested at the airport when he returned.
13. The interested party states that the issues raised by the ex parte applicant can be adequately ventilated in the criminal trial and he shall not suffer prejudice if the proceedings in the pending civil matters proceed in the ordinary course of justice.
14. The ex parte applicant filed a Further Affidavit dated 29th July 2025 and states that the charges brought against him in Thika CMCR 4020 of 2023 are in bad faith, are irrational and aimed to assist the interested party to settle scores with him over civil and matrimonial property dispute cases both at Kiambu High Court and at the ELC Court in Thika.
15. The ex parte applicant further states that the interested party had failed to explain she failed to reverse to him Kshs. 800,000/- which he deposited in her account to settle her complaint in Thika CMCR Case No. E3499 of 2022 or why she never complained to the trial court that the case withdrawal was fraudulent.
16. Parties disposed of the application by way of written submissions.



The Ex parte Applicant's Submissions.

17. The ex parte applicant refers to Section 193A and the case of Petition No. 442 of 2013 Musyoki Kimanthi vs Inspector General of Police & 2 Others [2014] eKLR cited with approval in the case of Commissioner of Police & Others vs Kenya Commercial Bank & Others and submits that while Section 193A of the Criminal Procedure Code allows concurrent litigation of civil and criminal proceedings arising from the same issues and while it is the prerogative of the police to investigate crime, the power must be exercised responsibly and in good faith. The ex parte applicant submits that he has shown that the charges in Thika Criminal Case No. 4020 of 2023 is substantially similar to the claim of fraud in Thika ELC Appeal No. 029 of 2024 and they all arise out of LR. No. Ruiru/Ruiru East Block 2/1962 and subsequent sub divisions thereof. Further, the ex parte applicant submits that he refunded Alice Njeri Muchugi Kshs. 800,0000/- after withdrawing Thika Criminal Case No. E3499 of 2022 however she still sued him for ownership of the suit property. The suit property is also subject to matrimonial proceedings in Kiambu HCCC OS No. 002 of 2021. The ex parte applicant refers to the case of High Court at Meru Criminal Petition No. E014 of 2021 Hudson Mutugi Francis & 2 Others vs Director of Public Prosecutions cited in Republic vs Chief Magistrate's Court at Mombasa ex parte Ganijee & Another [2002] 2 KLR and submits that the criminal case is actuated by malice and aimed at settling personal scores rather than any genuine desire to punish him for a crime. The ex parte applicant relies on the case of Stanley Munga Githunguri vs Republic [1985] KLR 91 and submits that the High Court has inherent power to stop a prosecution that amounts to an abuse of the court process.

The Respondent's Submissions

18. The respondent relies on the cases of Kenya National Examination Council vs Republic ex parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR and submits that a decision to charge the ex parte applicant was made in the year 2023 in Thika Chief Magistrate's Criminal Case No. 4023 of 2023 and it is currently active in court as it has a hearing date of 21st July 2025 and thus the order for prohibition is overtaken by events. Further, the respondent argues that it is not enough to merely state that the rights of the ex parte applicant have been violated and infringed without specifically stating the nature of violations of such rights.
19. The respondent argues that Article 157(6)(a) of *the Constitution* mandates the Director of Public Prosecutions to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed. The Director of Public Prosecutions does not require the consent of any person or authority for the commencement of criminal proceedings and in exercise of his powers or functions, shall not be under the direct control of any person or authority.
20. The respondent submits that judicial review is concerned with the decision making process and not the merits of the decision. The ex parte applicant has not demonstrated that in making the decision to prefer criminal charges against him, either the Director of Public Prosecutions or any member of staff of the office of the Director of Public Prosecutions has acted without or in excess of the powers conferred upon them by the law or have infringed, violated, contravened or in any manner failed to comply with or respect and observe the foregoing provisions of *the Constitution* of Kenya 2010.
21. The respondent argues that the ex parte applicant has been charged with offences known to law and the prosecution has sufficient evidence to sustain the respective charges. The issues meant to vindicate the ex parte applicant should be canvassed in the criminal court and fairly determined and not in the judicial review court. Further, the ex parte applicant has not demonstrated any issues for the court to



determine his presumption of innocence and his fundamental rights and freedoms are guaranteed and guarded by *the Constitution* and do not vanish by their prosecution before a competent court of law.

22. The respondent further refers to Section 193A of the Criminal Procedure Code and submits that nothing stops Thika Criminal Case No. 4023 of 2023 from proceeding to its logical conclusion even if there are other pending civil cases in which the ex parte applicant is a party.

The Interested Party's Submissions.

23. The interested party submits that judicial review is not concerned with the merits of the impugned decision, but with the decision making process. Relying on the cases of *Kimani vs DPP & 3 Others* (Judicial Review Application E062 of 2023) [2024] eKLR and *Commissioner of Lands vs Kunste Hotel Limited* [1997] eKLR, the interested party argues that the ex parte applicant has not demonstrated that the DPP's decision to charge him was unlawful, irrational or made in bad faith.
24. The interested party refers to Article 157(6) & (10) of *the Constitution* and submits that the DPP is mandated to institute and undertake criminal proceedings and the DPP does not require the consent of any person or authority in exercising its mandate. The interested party argues that the ex parte applicant has not provided any evidence that the DPP acted irrationally, with bias or had an improper motive in charging him. The interested party further submits that she was not involved in the withdrawal of Thika CMCR No. E3499 of 2022 which was allegedly compromised without her consent and when she raised the same to the court, the charges were brought afresh.
25. The interested party refers to the case of *Teresia Wanjiku Mbau & Another vs Director of Public Prosecutions & Another* [2013] eKLR and submits that the existence of civil proceedings does not bar criminal prosecution. The interested party further submits that the complaint lodged to the DPP was made promptly upon discovery of the alleged transactions and the decision to charge was made independently by the DPP pursuant to Article 157(6) of *the Constitution*. There is no evidence of any collateral or ulterior motive, nor is there any factual basis to conclude that the criminal proceedings are being used as leverage in the civil matters. To support her contentions, the interested party refers to the case of *Republic vs Energy & Petroleum Regulatory Authority & 2 Others ex parte Talib Zein Salimin & another; Daniel Gichuhi & 3 Others (Interested Parties)* [2021] eKLR.

The Law

Whether the ex parte applicant has established a case for judicial review to warrant the grant of the orders sought.

26. The ex parte applicant's case is in effect that the respondent and the interested party are misusing their power to discriminatorily prosecute him. It is trite law that the powers and discretion given to the police and the prosecution ought to be exercised lawfully and in good faith and purely for the vindication of the commission of a criminal offence and the criminal justice system. It is argued that where the same are being exercised for the achievement of some collateral purpose other than its legally recognized aim, the Court would be entitled to and must intervene.

27. In *Kuria & 3 Others vs Attorney General* [2002] 2 KLR 69, the High Court held:-

The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score settling or vilification on issues not pertaining to that which the system was even formed to perform....A stay (by an order of prohibition) should be granted where



compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious.....The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the court's) independence and impartiality (as per Section 77(1) of the Kenya Constitution in relation to criminal proceedings and Section 79(9) for the civil process. The invocation of the law, by whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilization is far from that which the courts indeed the entire system is constitutionally mandated to administer.....In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute.

28. The circumstances which the court takes into consideration in deciding whether or not to halt a criminal process were set out by Musinga J (as he then was) in *Paul Stuart Imison Another vs The Attorney General & 2 Others* Petition No. 57 of 2009 in the following manner:-

The instances in which a court can declare a prosecution to be improper are well considered in *Macharia vs Attorney General & Another* (2001) KLR 448. A prosecution is improper if:-

- a. It is for a purpose other than upholding the criminal law;
- b. It is meant to bring pressure to bear upon the applicant/accused to settle a civil dispute;
- c. It is an abuse of the criminal process of the court;
- d. It amounts to harassment and is contrary to public policy;
- e. It is in contravention of the applicant's constitutional right to freedom

29. The DPP derives its prosecutorial power from both *the Constitution* and the *Office of the Director of Public Prosecutions Act*. Whereas Article 157(10) of *the Constitution* provides that the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority, Article 157(11) provides:-

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.

30. Thus the discretion given to the DPP is not absolute and must be exercised within certain laid down standards provided under *the Constitution* and Section 4 of the *Office of the Director of the Public Prosecutions Act*. It is therefore clear that where the discretion is being exercised with a view of achieving certain extraneous goals other than those legally recognized under *the Constitution* and the *Office of the Director of Public Prosecutions Act*, that would in my view constitute an abuse of the legal process and would entitle the court to intervene and bring to an end such wrongful exercise of discretion.

31. In this case, the ex parte applicant states that he was earlier charged alongside three (3) others in Thika Chief Magistrate's Court in CMCR No. E3499 of 2022 with four counts namely obtaining money,



Kshs. 800,000/- by false pretenses contrary to Section 313 of the Penal Code, conspiracy to defraud Alice Njeri Muchigi the Interested Party herein No. Ruiru/Ruiru East Block 1/1962, forging a transfer of land document dated 28th May 2018 for land parcel number Ruiru/Ruiru East Block 1/1962 registered under the name of Christopher Mathea Mukirai and Alice Njeri Muchugi and altering a document with intent to defraud contrary to Section 357(b) of the Penal Code, which he pleaded not guilty on all counts. The prosecution withdrew the case under Section 87(a) of the Criminal Procedure Code and the ex parte applicant deposited the sum of Kshs. 800,000/- in the interested party's bank account number 0090292xxxxxx Equity Bank Juja Branch. The ex parte applicant argues that having paid the interested party her money Ksh.800,000/= the seventeen charges brought against him subsequently are malicious. The interested party argues that she did not participate in the withdrawal of the said charges. It is trite law that a discharge under Section 87(a) of the Criminal Procedure Code does not operate as a bar to subsequent proceedings against an accused person on account of the same facts. It is notable that the ex parte applicant has not been charged with obtaining money by false pretenses may be for the reason that he compensated the interested party. He now faces charges of forgery and uttering a document with intent to defraud contrary to Section 352 and 353 of the Penal Code.

32. The ex parte applicant further argues that the interested party has instituted a civil suit against him in Ruiru Chief Magistrate's Court ELC Case No. E117 of 2023 Alice Njeri Muchugi vs Christopher Mathea Mukirai, Susan Wambui Wachira, Mary Njeri Mbugua and District Land Registrar Ruiru. The court in Ruiru found that the subject matter LR. No. Ruiru/Ruiru East Block 2/1962 was also the subject matter in Kiambu High Court OS E002 of 2022 which was pending at the high Court for distribution of matrimonial property and thus the suit offended the sub judice law under Section 6 of the *Civil Procedure Act*. The interested party subsequently filed an appeal in Thika Environment and Land Court being ELC Appeal No. E029 of 2024 which appeal is still pending hearing and determination. The ex parte applicant has been subsequently charged in Thika CM Criminal Case No. 4020 of 2023 with seventeen counts of forgery and uttering a documents with intent to defraud contrary to Section 352 and 353 of the Penal Code. The said charges arise from matters regarding L.R. No. Ruiru/Ruiru East Block 2/26117, 26118, 26123, 26124, 26131, 26132, 26133, 26148 which are sub division parcels out of the mother title number Ruiru/Ruiru East Block 2/1962. Looking at the record, it is my considered view that the ex parte applicant has not demonstrated how the charges against him have been maliciously instituted or how the interested party has singled him out by prosecuting him. There is no evidence on record to show that the respondent in making the decision to charge him, acted illegally or that he was charged for other reasons other than enforcement of the law. In any event the ex parte applicant shall be afforded an opportunity to defend himself against the charges leveled up against him during trial.
33. Furthermore, Section 193A of the Criminal Procedure Code allows for the criminal proceedings in Thika Criminal Case No. 4023 of 2023 to proceed to its logical conclusion despite the fact that these exists other pending civil cases in which the ex parte applicant is a party. Courts in several decisions have held that it is within the law to have proceedings run simultaneously with criminal charges over the same facts or in regard to the same property. It was held in the case of Alfred Lumiti Lusib vs Pethad Pank Shantilal & 2 Others (2010) eKLR that: -

“The law is clear that the pendency of civil suit is not a bar to criminal proceedings It implies therefore that the trial of a tortfeasor in criminal prosecution need not be affected by the pending civil action against him. A civil suit cannot be stayed because of the prosecution of a tortfeasor, nor in his subsequent conviction....”



34. The conclusion one can draw from the foreign decision is that civil criminal proceedings can run parallel to each other and that neither can stand in the way of the other unless either of them is being employed to perpetuate ulterior motives or as an abuse of the court process.
35. Under article 157, the Director of Public Prosecutions has the constitutional mandate to investigate and undertake prosecutions in the exercise of the discretion conferred upon him. It is also important to note that the purpose of Criminal law is to maintain and strengthen the rule of law and good order law. It is a critical pillar in society and should be allowed to function without interference unless it is being used to oppress citizens and at this point, the court will take its course and stop such abuse.
36. The ex-parte applicant has a duty to demonstrate to this court that the Director of Public Prosecutions or the interested party have ulterior motives in the parts played by each one of them in the pending criminal case. The Interested Party made her report to the police of the actions of the exparte applicant. The police investigated the complaint and the Director of Public Prosecutions preferred charges against the exparte applicant based on the evidence presented to him. The exparte applicant under Article 50(2) of *the constitution* has a constitutional right to fair hearing whereas he will present his defence to the charges. Prosecution must not necessarily end in conviction. It could be an acquittal. The outcome will depend on the evidence presented before the criminal court vis a vis the defence of the accused.
37. It is not in doubt that the criminal charges and the ELC case as well as the Matrimonial case are based on the same subject matter, that is, L R Ruiru/Ruiru East Block 2/1962. However, the legal burden of proof is totally different in civil proceedings as opposed to the criminal case. The two kinds of proceedings are distinct and none can be said to be sub-judice of the other.
38. Judicial review remedies are discretionary and may be denied even where the requisite grounds exist since the court has to do the balancing act by weighing one thing against another to determine whether the remedy sought is the most suitable in the circumstances. The applicant has failed to demonstrate that the respondent's actions in charging him in Thika a criminal case No. 4020 of 2023 is illegal, irrational or procedurally improper or that the investigations were motivated by malice.
39. Consequently, I find that these judicial review proceedings are not successful. I hereby dismiss this case with costs.
40. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 10TH DAY OF SEPTEMBER 2025.

F. MUCHEMI

JUDGE

