Republic v Chief Magistrate, Milimani Law Courts; Director of Public Prosecutions & another (Interested Parties); Bajaber & 2 others (Exparte Applicants) (Judicial Review Miscellaneous Application E003 of 2023) [2024] KEHC 478 (KLR) (23 January 2024) (Judgment)

Neutral citation: [2024] KEHC 478 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E003 OF 2023

OA SEWE, J

JANUARY 23, 2024

BETWEEN

REPUBLIC .... APPLICANT

AND

CHIEF MAGISTRATE, MILIMANI LAW COURTS .... RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTIONS .... INTERESTED PARTY

ABDI WARSAME HIRSI .... INTERESTED PARTY

AND

SAMIYA ABDALLA SALIM BAJABER .... EXPARTE APPLICANT

MOHAMED AHMED BAKRY .... EXPARTE APPLICANT

HAMID AHMED BAKRY .... EXPARTE APPLICANT

JUDGMENT

1. Before the Court for determination is the Notice of Motion dated 25th May 2023. It was filed by the ex parte applicants, Samya Abdalla Salim Bajber, Mohamed Ahmed Bakry and Hamid Ahmed Bakry (hereinafter, "the applicants") pursuant to Sections 8 and 9 of the *Law Reform Act*, Chapter 26 of the Laws of Kenya and Order 53 Rules 3 and 4 of the Civil Procedure Rules, 2010. Their prayers were that:

   (a) The Court be pleased to grant a writ of Certiorari to bring to this Court for the purposes of being quashed, the decision of the 1st interested party to commence hearing of extradition proceedings against the applicants in Milimani Chief Magistrate's Miscellaneous Application No. E247 of 2023;

(b) The Court be pleased to grant a writ of Prohibition against the respondent barring it from continuing with the extradition proceedings in Milimani Chief Magistrate's Miscellaneous Application No. E247 of 2023;

(c) The costs of the application be in the cause.

2. The application was based on the grounds that the 1st interested party herein commenced proceedings against the applicants before the respondent upon receipt of warrants of arrest allegedly issued by the Republic of Tanzania; yet the respondent lacks the jurisdiction to issue extradition orders without material disclosure. The applicants further averred that both the respondent and the 1st interested party intend, unless restrained by the Court, to proceed and issue the extradition orders against them, whose direct result will be to obscure the Court's jurisdiction over the underlying contract. Accordingly, the applicants contended that the decision by the respondent amounts to an abuse or excess of power and has been made mala fide with the objective of oppressing, vexing, embarrassing and harassing the applicants; and therefore offends the rules of natural justice.

3. In support of the aforementioned grounds, the applicants relied on the affidavit of the 3rd applicant, Hamid Ahmed Bakry, sworn on 25th May 2023 on his own behalf and on behalf of the 1st applicant. They explained that they were served with a Notice of Motion dated 23rd January 2023 in respect of Milimani Chief Magistrate's Miscellaneous Application No. E247 of 2023 (hereinafter, "the extradition proceedings") and discerned that the intention was to have them (the 1st and 3rd respondents) extradited out of the jurisdiction of the Court and handed over to the jurisdiction of the Republic of Tanzania to face charges in connection with an alleged offence of obtaining money by false pretenses contrary to the provisions of Section 302 of the Penal Code, Chapter 16 of the Laws of the United Republic of Tanzania.

4. The 1st and 3rd applicants further averred that they are citizens of the Republic of Kenya and that the 1st applicant has never set foot or been within the jurisdiction of the Republic of Tanzania; and therefore the extradition proceedings are in total violation of the rules of natural justice. They further explained that the 1st and 2nd applicants are co-directors of M/s Al-Hamumy Limited, a company incorporated in Kenya (hereinafter, "the company"); and that on the 7th March 2018 the 2nd interested party entered into an Agreement of Contract Labour with the said company whose terms, inter alia, entailed a term that the 3rd applicant was to source for building materials and labour for construction of a hospital within Saba Saba area of Mombasa. The contract was to be performed over a period of six to eight months. Ultimately, the hospital, known as Mombasa Breeze Hospital, was constructed to completion and to the satisfaction of all the parties concerned.

5. At paragraph 15 of the Supporting Affidavit, the 3rd applicant made reference to two other agreements between the parties. One of them, dated 11th January 2019, was between the company and the 2nd interested party (the 2nd agreement) whereby the 2nd interested party would deposit USD 50,000 secured by a Bank Guarantee to facilitate the provision of air transport services to the Islamic Hajj and Umrah. This agreement was also to be performed in Mombasa. The 3rd agreement, dated 20th April 2019 was to the effect that the 2nd interested party would deposit USD 550,000 with the company to enable him charter flights with M/s FLYNAS (a Saudi Arabian Airline) to transport pilgrims from Kenya to attend the Islamic Hajj.

6. The applicants averred that, in compliance with the terms of the agreements, the 2nd interested party performed his part of the bargain in the 3rd agreement by depositing funds into the company's account with Kenya Commercial Bank of Kenya Limited. Thereafter M/s FLYNAS provided aircraft with a capacity of 868 seats at an agreed charter cost of USD 911,400 but the available passengers to attend

the pilgrimage were only 459, thereby creating a loss of USD 429,450 in respect of which amicable arrangements were put in place by the parties.

7. Thus, at paragraph 24, the 3rd applicant deposed that the relationship between the company and the 2nd interested party is purely one of a commercial nature which ought to be resolved in accordance with the terms of the contracts entered into freely between the parties. They pointed out that the parties agreed to be governed by the laws of Kenya; and therefore the extradition proceedings will only result in a miscarriage of justice. They added that no prejudice will be suffered by either party if the orders sought are issued for it is the only avenue for settling the jurisdictional issue.

8. In response to the application, the 1st interested party filed Grounds of Opposition dated 10th July 2023 contending that:

(a) The jurisdiction of the Court has been improperly invoked as an application for the restriction of surrender of a fugitive by the High Court, which is the import of the instant application, is under Sections 6 and 10 of the *Extradition (Commonwealth Countries) Act*, Chapter 77 of the Laws of Kenya; and ought to be made by way of an application for habeas corpus and not by way of judicial review.

(b) The applicants have not laid proper legal basis for the Court to exercise its jurisdiction to issue any of the judicial review orders sought against the extradition proceedings before the Chief Magistrate's Court at Milimani.

(c) The extradition proceedings were commenced on the basis of proper factual and legal foundation following the review of a formal request by the United Republic of Tanzania to the Republic of Kenya for the extradition of the 1st and 3rd applicants to the United Republic of Tanzania to face charges of obtaining money by false pretences contrary to Section 302 of the Penal Code, Chapter 16 of the Laws of the United Republic of Tanzania.

(d) The applicants' invitation of this Court to quash the decision to commence the extradition proceedings against them and/or to prohibit the continuance thereof is based primarily on the alleged contracts, including the alleged choice of law, the existence of which, by dint of Section 193A of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya, is not a bar to the institution of criminal proceedings, including extradition proceedings.

(e) There does not arise any conflict of law in respect of the extradition proceedings against the applicants and as such the doctrines of 'lex domicilii', 'lex situs' and 'lex loci contractus' cannot aid them as the extradition proceedings are purely criminal in nature.

(f) The applicants could not have contracted themselves outside the jurisdiction of the extradition court nor of the criminal jurisdiction thereof, nor out of a proper request for extradition as that would not only be against public policy, but would also be unconstitutional and therefore illegal.

(g) The instant application amounts to an invitation to the Court to unjustifiably usurp the powers and or jurisdiction of the extradition court as vested under Sections 2 and 9 of the *Extradition (Commonwealth Countries) Act* as the issues raised by the applicants in support thereof are matters which belong to the jurisdiction of the extradition court which is best clothed to consider the same and decide whether or not any of the applicants should be extradited as sought.

(h) The instant application is premature as the extradition court is yet to make any finding as to whether or not any of the applicants should be extradited as sought, which decision would be dependent on the applicants' response to the application for extradition.

(i) The application is founded on a misapprehension and/or misinterpretation of the law relating to extradition.

(j) The application not only amounts to a deliberate and unjustified delay of the extradition proceedings, but is also vexatious, frivolous and amounts to an abuse of the legal process.

9. In addition to the Grounds of Opposition aforementioned, the 1st interested party relied on a Replying Affidavit sworn on 12th July 2023 by Chief Inspector Nelson Munga, a police officer attached to the Interpol, National Crime Bureau (NCB) at the Directorate of Criminal Investigations Headquarters. He explained that on the 22nd September 2022, he received a request from the Interpol, National Crime Bureau (NCB) Dodoma, through the NCB Nairobi, to trace and apprehend the 1st and 3rd applicants, who were believed to be residing in Mombasa, Kenya. On the 25th September 2022, pursuant to the said request, he arrested the 1st and 3rd applicants in Mombasa and placed them in custody pending their extradition.

10. Chief Inspector Munga further averred that, on the 10th January 2023, the United Republic of Tanzania made a formal request to the Republic of Kenya for the extradition of the 1st and 3rd applicants. On the basis of that formal request, the 1st interested party issued requisite authority to proceed with the extradition proceedings; whereupon Milimani Chief Magistrates Miscellaneous Application No. E247 of 2023 was filed and warrants obtained against the respondents therein. The 1st and 3rd applicants were accordingly re-arrested and presented before the extradition court but were later released on bail pending the hearing and determination of the substantive extradition application. Thus, it was the averment of Chief Inspector Munga that the extradition proceedings were commenced on the basis of proper factual foundation as set out in paragraphs 8 to 12 of the Replying Affidavit and the documents annexed thereto.

11. On his part, the 2nd interested party relied on his Replying Affidavit sworn on 29th May 2023. His position was that he had been wrongly sued in this matter since there is absolutely no claim or cause of action against him. He averred that vide their invoice dated 30th April 2019, the applicants agreed to supply him with hospital equipment worth USD 895,298; and that pursuant thereto, he promptly sent the first payment of USD 490,000 on 30th April 2019. He thereafter made additional payments in cash of USD 165,000 and USD 70,000 through bank transfer; but that the equipment was never supplied as agreed. He accordingly filed a complaint with the Tanzania Police Force and the matter was taken to court in Dar-es-Salaam, Tanzania. Ultimately, orders were issued for the arrest of the applicants which were sent to Kenya for execution in respect of charges of obtaining money by false pretences.

12. Thus, the 2nd interested party averred that the proceedings in Milimani Chief Magistrates Miscellaneous Application No. E247 of 2023 are regular as the applicants have been given a chance to participate therein. He denied having entered into any other agreement with the applicants apart from the one for supply of hospital machines. He therefore denied having signed any of the three agreements relied on by the 1st and 3rd applicants; and added that he has since obtained the opinion of a forensic document examiner which has confirmed that his signature on those documents was forged. He consequently prayed for the dismissal of the application.

13. the 3rd applicant thereafter filed a Supplementary Affidavit, with the leave of the Court, in response to the 2nd interested party's averments. He questioned the decision of the document examiner, contending

that the documents forwarded for examination are different from those relied upon by the applicants and therefore do not pass the evidentiary test of forgery. He added that, in any event, the Kenyan courts ought to have been granted an opportunity to test the subject agreements and determine whether or not they were forged before the decision to commence the extradition proceedings was taken. He consequently reiterated his initial averments and urged that their application be allowed.

14. The application was argued by way of written submissions, pursuant to the directions given herein on 17th July 2023. The applicants relied on their written submissions dated 4th August 2023. They recapitulated the factual basis of the application and urged the Court to disregard the assertions of forgery by the 2nd interested party. On jurisdiction, the applicants relied on United India Insurance Co. Ltd v East African Underwriters (K) Ltd [1985] KLR 998, in which the Court of Appeal set out the applicable principles, to support the submission that the exclusive jurisdiction clause should be respected because the parties themselves freely fixed the forum of the settlement of their dispute. They urged the Court to uphold the jurisdiction of the Courts of Kenya to determine the underlying dispute by allowing the instant application as prayed.

15. The 1st interested party relied on the written submissions dated 7th August 2023 and proposed the following issues for determination:

    (a) Whether or not the subject extradition proceedings were properly commenced;

    (b) The effect of the alleged contracts between the applicants and the 2nd interested party; and,

    (c) Whether or not there exists any basis for this Court to intervene as sought.

16. The 1st interested party pointed out that the extradition proceedings were commenced on the basis of the proper factual and legal foundation following the review of the formal request by the United Republic of Tanzania as highlighted in the Replying Affidavit filed by the 1st interested party. The 1st interested party reiterated his stance that his role was simply to issue Authority to Proceed in accordance with Section 7 of the Extradition Act; having ascertained that the request against the applicants met the requirements of Section 7(2) and (3) of the Act.

17. The 1st interested party proceeded to address the Court on the effect of the alleged contracts, and the fact that Section 193A of the Criminal Procedure Code envisages concurrent prosecution of civil and criminal proceedings; the issue of dual criminality of the envisaged offence; the jurisdiction of the extradition court and the place of trial, among other issues that ought to fall within the ambit of the extradition proceedings. The 1st interested party also made submissions as to the jurisdiction of this Court as a judicial review Court. He relied on the ruling of the Court delivered herein on 30th June 2023 and the case of Saisi & 7 Others v DPP [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment) to buttress the submission that the Court can only interfere with his decision where it is shown that under Article 157(1) of the Constitution the proceedings have been instituted for reasons other than enforcement of criminal law or in abuse of the court process. Thus, the 1st interested party prayed for the dismissal of the application.

18. The 2nd interested party relied on his written submissions dated 14th September 2023 and thereby proposed one main issue for determination, namely, whether the Court should proceed to hear and determine the application that is premised on forged documents. The 2nd interested party placed reliance on the Document Examiner's report exhibited at pages 5 to 48 of his Replying Affidavit and pointed out that the applicants did not produce any other report by another expert to contradict those findings in the report. He accordingly placed reliance on the following authorities in urging the Court to find that forged documents can never be relied upon in evidence:

(a) Kajiado HCCC No. 31 of 2018: Sambayon Ole Semera v Kalka Flowers Limited & Another;

(b) Nairobi Civil Appeal No. 55 of 2016: Five Forty Aviation Limited v Erwan Lanoe;

(c) Nairobi Civil Appeal No. 246 of 2013: Arthi Highway Developers Limited v West End Butchery & 6 Others;

(d) Nairobi Civil Appeal No. 64 of 1985: Patel v Singh.

19. I have given careful consideration to the application in the light of the responses filed thereto by the interested parties as well as the written submissions filed herein, including the authorities relied on by learned counsel. The application is expressed to have been brought under Sections 8 and 9 of the *Law Reform Act*. In particular, Section 8 provides:

(1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari.

(2) In any case in which the High Court in England is, by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.

(3) No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5) of this section.

(4) In any written law, references to any writ of mandamus, prohibition or certiorari shall be construed as references to the corresponding order, and references to the issue or award of any such writ shall be construed as references to the making of the corresponding order.

(5) Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal.

20. It is plain then that the reliefs envisaged by the above provisions are not writs as indicated in the applicant's prayers but orders. It is also worth mentioning at the outset, and I did point this out in my ruling dated 30th June 2023, that the instant applicant has nothing to do with the validity of the contracts or the authenticity of the documents relied by the applicants; chiefly because the fundamental focus of a judicial review process is not the merits but the process employed in arriving at the impugned decision or action. Accordingly, the issues for determination herein are:

(a) Whether the decision by the 1st interested party to commence the extradition proceedings against the ex parte applicants can be faulted in terms of illegality, irrationality or procedural impropriety;

(b) Whether sufficient cause has been shown for prohibiting the respondent from proceeding with the hearing and determination of the extradition application.

21. Needless to underscore the fact that, in spite of its anchoring in *the Constitution*, judicial review remains a supervisory jurisdiction. The Supreme Court reiterated this truism in Saisi & 7 others v Director of Public Prosecutions & 2 Others (supra) as follows:

> 76...it is the court's firm view that the intention was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature

of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in section 11(1) and (2) of the *Fair Administrative Action Act*. Third, the court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in section 11(1)(e) and (h) of the *Fair Administrative Action Act*. The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this court held in the case of Kenya Vision 2030 Delivery Board v Commission on Administrative Justice, Attorney General and Eng Judah Abekah, SC Petition 42 of 2019; [2021] eKLR, in matters involving the exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised."

22. In the premises, the applicants had to demonstrate that the decision complained of is tainted with illegality, irrationality or procedural impropriety, or is otherwise disproportionate, given the circumstances of their case. Hence, in the case of Pastoli v Kabale District Local Government Council and Others [2008] 2 EA 300 it was held:

    In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

23. Likewise, in Kenya National Examination Council v Republic, Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR, the Court of Appeal held:

    ...Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons..."

24. It is also pertinent to mention that, although in the course of a process review, the Court is at liberty to engage in some measure of an analysis of the merits of the impugned decision to enable it ascertain

whether or not the decision is fair or rational, that process is limited. Accordingly, in the Saisi Case, the Supreme Court pointed out that:

> For the court to get through an extensive examination of section 7 of the, there had to be some measure of merit analysis. That was not to say that the court had to embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly in the circumstances of the case without examining those circumstances and measuring them against what was reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. It was to be limited to the examination of uncontroverted evidence. The controverted evidence was best addressed by the person, body or authority in charge. There was nothing doctrinally or legally wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter. Rather a failure to do so, out of a misconception that judicial review was limited to a dry or formalistic examination of the process only led to intolerable superficiality. That would be against article 259 of *the Constitution* which required the courts to interpret it in a manner that inter alia advanced the rule of law, permits the development of the law and contributes to good governance."

25. Article 157 of the Constitution is explicit as to the mandate of the 1st interested party. In particular, Sub-article (6) thereof states, in part:

> The Director of Public Prosecutions shall exercise State powers of prosecution and may—
>
> a. 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;"

26. With specific regard to extradition proceedings, Section 7 of the *Extradition (Commonwealth Countries) Act* provides:

(1) Subject to the provisions of this Act relating to provisional warrants, a fugitive shall not be dealt with in any manner under this Act except in pursuance of the written authority of the Attorney-General, issued in pursuance of a request made to the Attorney-General by or on behalf of the government of the designated Commonwealth country in which such person is accused or was convicted.

(2) There shall be furnished with any request—

(a) in the case of a fugitive accused of an extradition offence, an overseas warrant issued in the requesting country;

(b) in the case of a fugitive unlawfully at large after conviction of an extradition offence, a certificate of the conviction and sentence in the requesting country, and a statement of the amount (if any) of that sentence which has been served, together (in each case) with particulars of the fugitive concerned and of the facts upon which and the law under which he is accused or was convicted, and evidence sufficient to justify the issue of a warrant of arrest.

(3) On receiving a request, the Attorney-General may issue an authority to proceed, unless it appears to him that a warrant of surrender in that case could not lawfully be made, or would not in fact be made, under this Act.

27. Accordingly, although Section 7(3) of the *Extradition (Commonwealth Countries) Act*, states that the mandate is that of the Attorney General, as far back as 2015 the High Court entertained no doubt as to who, between the Attorney General and the DPP had the mandate to handle extradition requests after the promulgation of *the Constitution* of Kenya, 2010. Hence, in Samuel Kimuchu Gichuru & another v Attorney General & 3 others [2015] eKLR, Hon. Lenaola, J. (as he then was) held:

> Outrightly therefore, all the prosecution powers that were previously bestowed upon the Attorney General were taken away and given to the DPP and it is the DPP who is charged with the conduct of any and all criminal proceedings...In that regard, I have already determined that indeed extradition proceedings are criminal in nature and I must state that again the Honourable Magistrate correctly rendered himself when he wrote;
>
>> "It should be noted that the Attorney General did not delegate the power to issue the authority to proceed but it was taken away from him by *the Constitution* and given to the Director of Public Prosecutions who was merely exercising it in this case.
>
> *The Constitution* of Kenya being the supreme law should be read to conform and construed with the alterations, adaptations, qualifications and extensions as may be necessary.
>
> This is one case where I find that the adaptation and alterations are necessary to conform with *the Constitution* on the functions of the office of the Director of Public Prosecutions. Section 57(3) of the Director of Public Prosecutions Office Act gives the acts done by the Director of public Prosecutions."

28. The above position was upheld by the Supreme Court in Director of Public Prosecutions v Okemo & 4 others (Petition 14 of 2020) [2021] KESC 13 (KLR) (Crim) (5 November 2021) (Judgment) (with dissent - W Ouko, SCJ) and therefore the 1st respondent's decision cannot be faulted on that score.

29. In terms of the reasonableness of the decision, it is instructive to bear in mind the indubitable facts set out in the affidavit of CI Nelson Munga, that initially a request was made by INTERPOL National Crime Bureau, Dodoma, through the NCB Nairobi for the tracing and apprehension of the 1st and 3rd applicants. Thereafter, on the 10th January 2023, the United Republic of Tanzania made a formal request to the Republic of Kenya for the extradition of the 1st and 3rd applicants on the basis of a valid Warrant of Arrest issued by a court of competent jurisdiction in Dar-es-Salam.

30. CI Munga annexed a copy of the extradition request to the Replying Affidavit along with a copy of the international Warrant of Arrest dated 17th January 2023, issued by Hon. R. Kabate, Principal Senior Magistrate Kisutu, Dar-es-Salaam in proof of the 1st interested party's assertions. The documents confirm that charges of obtaining by false pretences, contrary to Section 302 of the Penal Code, Chapter 16 of the Laws of the United Republic of Tanzania, have already been filed against the 1st and 3rd applicants.

31. I am satisfied therefore that sufficient justification was made out to warrant the decision taken by 1st interested to initiate the extradition proceedings. As to whether there is sufficient evidence to warrant extradition in the face of the underlying contracts, the allegations of forgery and all the other merit issues raised herein by counsel, that will be an issue for the court seized of the extradition proceedings to determine. Indeed, the Supreme Court aptly explained this in Saisi & 7 Others v the DPP thus:

> 88. It is our considered opinion that these are not issues concerning the propriety or otherwise of the decision by the DPP to charge them. These appear to

be serious contentions of fact, evidence and interpretation of the law better suited to be examined by a trial court. Certainly, not for the High Court while exercising its judicial review jurisdiction. In Hussein Khalid and 16 others v Attorney General & 2 others, SC Petition No 21 of 2017; [2019] eKLR this court held that it was not for the High Court as a constitutional court to go through the merits and demerits of the case as that is the duty of the trial court. Similarly, and as we have held hereinabove, it not for the judicial review court to undertake the merits and demerits of a matter based on controverted evidence and contested interpretations of the law.

89. We are emphatic that the High Court, whether sitting as a constitutional court or a judicial review, may only interfere where it is shown that under article 157(11) of *the Constitution*, criminal proceedings have been instituted for reasons other than enforcement of criminal law or otherwise abuse of the court process. We reproduce the words of this court in Hussein Khalid and 16 others v Attorney General & 2 others [supra] as follows;

> 105. It is not in dispute that every statutory definition of an offence comprises ingredients or elements of the offence proof of which against the accused leads to conviction for the offence. Inevitably, proof or otherwise of elements of an offence is a question of fact and that largely depends on the evidence first adduced by the prosecution and where the accused is placed on his defence, the accused evidence in rebuttal. This in our view is an issue best left to the trial court as it will not only have the benefit of the evidence adduced but will weigh it against the elements of the offence in issue. It is not automatic that once a person is charged with an offence (s) he must be convicted. Every trial is specific to the parties involved and a blanket condemnation of the statutory provisions is in our view overreaching. The presumption of innocence remains paramount." [Emphasis added]

32. By parity of reasoning, it cannot be presumed that an extradition order will automatically ensue from the impugned proceedings. The applicants will be accorded an opportunity to present their case for consideration by the subordinate court before final orders can issue. I therefore have no reason to fault the procedural aspects of the extradition proceedings thus far.

B. On whether the extradition proceedings should be halted by way of an order of Prohibition:

33. According to Halsbury's Laws of England (4th edn) paragraph 128:

> The order of prohibition is an order issuing out of the High Court of Justice and directed to an ecclesiastical or inferior temporal Court, or to the Crown Court, which forbids that Court to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land."

34. Having found that the extradition proceedings were properly instituted before a court of competent jurisdiction, it would follow that no justification has been made for the issuance of an order of

prohibition. To the contrary, the proceedings are in accord with Article 50(1) of the Constitution which anchors the right of the applicants be afforded a hearing before an impartial court before any order for their extradition can be made.

35. In the premises, I find no merit in the applicant's Notice of Motion dated 25th May 2023. The same is hereby dismissed. Granted the nature of the proceedings, it is hereby ordered that each party shall bear own costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD DAY OF JANUARY 2024

OLGA SEWE

JUDGE