



Republic v Inspector General of Police & 2 others; Shivachi & 2 others (Interested Parties); Malonza & another (Exparte Applicants) (Judicial Review E067 of 2023) [2024] KEHC 160 (KLR) (Judicial Review) (18 January 2024) (Judgment)

Neutral citation: [2024] KEHC 160 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW E067 OF 2023
JM CHIGITI, J
JANUARY 18, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

AND

MACKENTRIC SHIGHALI SHIVACHI INTERESTED PARTY

EDNA AWINO AWUOCHE INTERESTED PARTY

AGNES AYOO ODINDO INTERESTED PARTY

AND

SIMON SAILI MALONZA EXPARTE APPLICANT

S.S MALONZA ADVOCATES LLP EXPARTE APPLICANT

JUDGMENT

1. Before this court is a Notice of Motion dated 27th June, 2023 and a Statutory Statement, and a Verifying Affidavit both dated 20th June, 2023 for Orders:
 - i. That an order of prohibition directed at the Respondents, their officers and/or any other person/authority acting on its instructions restraining them from harassing, intimidating,



arraigning, charging and/or in any other manner commencing and/or continuing criminal proceedings against the Applicants before any court within the Republic of Kenya with any criminal offences relating to the off-plan purchase of property in proposed Suna Road Estate under the Urban Renewal Programme by Interested Parties.

- ii. That an order of certiorari directed at the Respondents to remove the proceedings before the DCIO Lang'ata Police Station for the purposes of being quashed, and to quash the charges and/or charge sheet related to or arising out of the dispute related to the off-plan property purchase deposit over the proposed Suna Road Estate under the Urban Renewal Programme.
 - iii. That an order of certiorari, calling for and quashing the decision of the Director of Public Prosecution, if any, to approve and/or prefer criminal charges against the Applicant over the dispute related to the off-plan property purchase deposit over the proposed Suna Road Estate under the Urban Renewal Programme.
 - iv. That the court be at liberty to make such further and other orders as it deems fit to meet the ends of justice.
 - v. That costs of this Application be provided.
2. In sum, the Ex-Parte Applicants were contracted by Nairobi Metropolitan Services to recruit investors to purchase housing in an off-plan model in Suna Housing Project, within Woodley locality.
 3. The Interested Parties enter into an agreement with the 2nd Ex-Parte Applicant for a Three (3) bedroomed house in the project, at a cost of Kes. 2,100,000/- Only.
 4. On 17th May, 2022 the Interested Parties made a deposit of Kes. 100,000/- towards the purchase price, and the balance was to be paid during the progress of the project.
 5. On the promise that the project would begin in July, 2022 the 1st Interested Party on 15th June, 2022 paid the balance of Kenya Shillings Two Million (Kes. 2,000,000/-) Only vide his standard Chartered Bank Account Number 0100252250000 to the 1st Ex-Parte Applicant's NCBA Bank Account Number 4604300015.
 6. The project failed to commence as promised. The Interested Parties vide a letter dated 4th July, 2022 and receipted on 27th July, 2022 formally wrote to the 2nd Ex-Parte Applicant expressing their intention of withdrawing from the project.
 7. The 2nd Ex-parte Applicant gave assurance that they would get their deposit within sixty (60) days, less a cancellation penalty of 10%, to which the Interested Parties had no objection.
 8. Cheques dated 24th February, 2023 were drawn by the 2nd Ex-parte Applicant to the Interested Parties, which cheques bounced upon presentation to the Standard Chartered Bank for reason of insufficient funds.
 9. The Interested Parties wrote a demand letter dated 29th March, 2023 to the 2nd Ex-Parte Applicant demanding for the said funds. The demand was responded to through the email of 17th April, 2023 wherein the 2nd Ex-Parte Applicant requested for time to allow them to pay on or before 2nd May, 2023.
 10. On the 3rd May, 2023 the 2nd Ex-Parte Applicant sent another email praying for lenience, further promising to settle the owing sum on or before 19th May, 2023. To the Interested Parties, the assertion that the 2nd Ex parte Applicant was in the process of obtaining consent before the money is released is hogwash and must fail.



11. The Interested Parties moved Kibera Law Courts vide Miscellaneous Application Number E340 of 2023 and obtained warrants to access bank and M-Pesa statements of the accounts involved in the transactions.
12. The 1st Ex-Parte Applicant was summoned to Lang'ata Police Station on the 15th June, 2023 wherein the Interested Parties and their counsel were present.
13. The 1st Ex-Parte Applicant wired to Counsel for the Interested Parties Kenya Shillings Five Hundred and Seventy Thousand (Kes. 570,000/-) Only, being part of the deposit that he was holding, with an undertaking that the balance of the deposit would be paid in due course.
14. That the allegations by the 1st Ex-Parte Applicant that he was coerced to make the said part payments are baseless and therefore depicts him as a dishonest person.

Issue for Determination

15. The issue for determination that arises is: Whether the Application merits granting of the orders sought.

Analysis and Determination

16. I have looked at the Application, the submissions, the law applicable, and the case law around the issues. Parties entered into a contract that was a breach. There was an effort to redeem the positions towards was intended in the contract. The matter is pending investigations. The Applicant is aggrieved, and feels like the Respondent has converted the investigations in the criminal process into a civil debt collector. This court will not delve into the merits or otherwise of the case.
17. Section 35 of the [National Police Service Act](#) sets the duties out the Directorate of Criminal Investigations as below;

“To collect and provide criminal intelligence; undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber-crime among others; maintain law and order; detect and prevent crime; apprehend offenders; maintain criminal records; conduct forensic analysis; execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of [the Constitution](#); co-ordinate country Interpol Affairs; investigate any matter that may be referred to it by the Independent Police Oversight Authority; and perform any other function conferred on it by any other written law.”

18. In the case of Francis Matheka & 10 others v Director of Public Prosecutions & another (2015) eKLR. The Court held as follows:

“With respect to the applicants' innocence, that is an issue for the trial Court. To determine the same would amount to this Court on a judicial review application usurping the powers of the trial Court and that is not the jurisdiction conferred on this Court in these kinds of proceedings. It must be remembered that justice must be done to both the complainant and the accused and where there is evidence upon which the prosecution can reasonably mount a prosecution, it is not for the High Court in a judicial review proceeding to inquire into the sufficiency or otherwise of such evidence since the High Court ought not to usurp the role of the trial court in determining the merits of the criminal case.”



19. This position was appreciated in Republic vs Commissioner of Police and Another ex parte Michael Monari & Another (2012) eKLR where it was held:

“The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”.
20. The fact that the ex parte Applicant transferred KES 570,000 to counsel of the Interested Parties as instructed, and further wrote a commitment to pay KES 2,100,000 is not a bar to any criminal proceedings or investigations. The fact that the DCIO Langa'ta Police Station clothed himself with role of adjudication of disputes accords with Article 159 of *the Constitution*.
21. Section 193A of the Criminal Procedure Code on provides that, “notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”
22. This court is cognizant of the fact that there is need to uphold victims’ rights and this court is under a duty to promote access to justice which includes the rights of victims as highlighted under the *Victim Protection Act*.
23. Section 9(2) (a) of the Victims Protection Act provides that victims assist the courts to obtain a clear picture of what happened (to them) and how they suffered as a result of the offenders’ conduct or omission.
24. Victim participation should meaningfully contribute to the justice process. Article 50 of *the Constitution* provides for the right to fair hearing. Victims of crime are entitled to the right to fair hearing and they do precipitate in proceedings. This was settled by the Supreme Court in the case of Joseph Lendrix Waswa v Republic [2020] eKLR.
25. The victims of an offense lodged a complaint with the police who initiated investigations.
26. By filing a Replying Affidavit and submissions in opposition of the Application before this court, I am satisfied that the Interested Parties have an interest in the outcome of the investigations. Allowing the Application will deny the Interested Parties their right to fair hearing.
27. The power to investigate crime is an important component of the rule of law; it is no wonder the police are under a duty under the National Police Act, to investigate crimes whenever they reported. To stop the police from investigating crimes would usher in anarchy. That would appear to be what the Applicants seeks to do.
28. The Applicants will have his day in court in the event the Director of Public Prosecution decides to charge him with the appropriate offences once the investigations are over. The Applicant has also failed to tender any evidence nor produced a charge sheet that would have informed the court on whether the Applicant will be charged. The Applicant has put the cart before the horse.
29. I find no illegality, irregularity, or procedural impropriety in the manner in which the Respondents have conducted themselves, and I hold so.



Disposition:

30. The Applicants have failed the tests of judicial review.

Order:

The Notice of Motion dated 27th June, 2023 lacks merit and the same is dismissed with costs.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 18TH DAY OF JANUARY 2024.

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J. CHIGITI (SC)

JUDGE

