



Republic v Director of Public Prosecutions & another; Nyaga & another (Interested Parties); Kanyi (Ex parte Applicant) (Judicial Review Application E073 of 2023) [2024] KEHC 825 (KLR) (Judicial Review) (1 February 2024) (Judgment)

Neutral citation: [2024] KEHC 825 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E073 OF 2023
JM CHIGITI, J
FEBRUARY 1, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

CHIEF MAGISTRATE'S COURT AT MILIMANI 2ND RESPONDENT

AND

JOSPHAT KINYUA NYAGA INTERESTED PARTY

DANIEL WAGURA WAIREGI INTERESTED PARTY

AND

JAMES MWANGI KANYI EX PARTE APPLICANT

JUDGMENT

1. Before this court is a Notice of Motion application dated 15th June, 2023. The Application is said to be brought pursuant to Sections 7A and 78 of the *Civil Procedure Act*; Order 53 rule (3) and (4) of the *Civil Procedure Rule* of 2010; the *Law Reform Act* Cap 26 of the Laws of Kenya, and Section 5(4) of the *Office of the Director of Public Prosecutions Act*, No. 2 of 2013.
2. The ex-parte Applicant seeks for orders:
 1. That an order of certiorari does issue to remove into this Honorable Court and quash the 1st Respondents decision to prefer charges against the Applicant which decision is set out in the



Charge Sheet dated 19th May, 2023 and registered before the 2nd Respondent in Milimani Chief Magistrates Criminal Case No. E349 of 2023.

2. That an order of prohibition does issue directed at the 1st Respondent. its officers and any other authority acting on its instructions from prosecuting or proceeding with the prosecution of the Applicant on the offence of obtaining goods by false pretences contrary to section 313 of the Penal Code in Milimani Chief Magistrates Criminal Case No. E349 of 2023 or any other related charges.
 3. That an order of prohibition does issue directed at the 2nd Respondent prohibiting the 2nd Respondent from hearing, proceeding with or in any way entertaining Milimani Chief Magistrates Criminal Case No. E349 of 2023.
 4. That this Honorable Court be at liberty to make such further and other orders that it deems fit to meet the ends of justice.
 5. That the costs of this Application be provided for.
3. The Application is supported by the grounds in the Statutory Statement, and Verifying Affidavit of James Mwangi Kanyi – both dated 8th June, 2023.
 4. It is the Applicant’s case that he has been maliciously and in bad faith prosecuted, by the 1st Respondent, with the offences of obtaining goods by false pretences contrary to Section 313 of the Penal Code – in Milimani Chief Magistrates Criminal Case No. E349 of 2023.
 5. To the Applicant, the criminal proceedings against him emanate from purely commercial transactions and thus a civil dispute – between his company and the Interested parties, severally.
 6. According to the Applicant, the prosecution against him is irrational, unreasonable, and an abuse of prosecutorial discretion and the court process. Also, that he [Applicant] stands to suffer irreparable harm and injury should the 1st Respondent's proceedings in Milimani Chief Magistrates Criminal Case No. E349 of 2023 not be stayed.
 7. As per the Applicant, the 1st Respondent has previously conceded to an application for similar orders, still by the Applicant, in Milimani Judicial Review Application No. E075 of 2021 (Republic v The Director of Public Prosecutions and Another). The complaint in Milimani Chief Magistrates Criminal Case No. E349 of 2023 emanates from the same commercial transaction.
 8. The Application is opposed by the Respondents and Interested Parties.
 9. The 1st Respondent opposed the application by filing a Grounds of Opposition dated 20th July, 2023 which is grounded:
 1. That the subject matter of the Application and the Petition are live before the Milimani Law Courts vide MCCR/E349/2023 *Republic v James Mwangi Kanyi*.
 2. That contrary to the whimsical allegations as set out by the Applicant in his Application dated 20th June 2023 the lower court matter quoted hereinabove has not been settled out of court as that is a blatant lie as is evidenced by the Investigating Officer’s sworn affidavit dated 20th July 2023 filed alongside these Grounds in Opposition.
 3. That the 1st Respondent, the Director of Public Prosecutions, is an independent Office holder under Article 157(10) as read with Article 248(1) of the Constitution of Kenya, 2010, and consequently, does not require the consent of any person or authority for the commencement



of any proceedings and in the exercise of his powers and functions, does not act under the directions and/or control of any person or authority.

4. That the 1st Respondent subjects each and every matter before him to the evidential test and the public interest tests as outlined in the National Prosecutions policy and the Decision to Charge Guidelines, 2019. That the decision to charge Mr. Kanyi in criminal case MCCR/E349/2023 *Republic v James Mwangi Kanyi* like all cases was subjected to the test and the accused person was found culpable.
5. That the exhaustion doctrine ought to have been the first port of call for the Applicant herein if indeed his allegations as set out in his Application were true. The doctrine, is esteemed judicial lineage in Kenya and has been upheld by the Court of Appeal in *Speaker of the National Assembly v Karume* [1992] KLR 21 where the court held that;

“...Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament that procedure should be strictly followed. Accordingly, any special procedure provided by any law must be strictly adhered to since there are good reasons for such procedures...”

6. That with the above knowledge, if indeed the Applicant genuinely felt that the 1st Respondent was charging him in court for a matter that was allegedly settled out of court then his options before approaching this esteemed high court ought to be:
 - a. To make an application before the lower court handling MCCR/E349/2023 *Republic v James Mwangi Kanyi* and bring that information to the attention of the Honourable Court, which court, would rule on the said motion allowing the Applicant herein to appeal or seek a revision against such a ruling should the need arise, or
 - b. Write to the office of the 1st Respondent and make it known that the Applicant herein and the Interested Party herein have arrived at an out of court settlement, something that the Office of the 1st Respondent herein facilitates through its Diversion Policy, 2019.
7. That this Honorable Court should vacate its orders of stay of the lower court case MCCR/E349/2023 *Republic v James Mwangi Kanyi* as the allegations as set out in the Applicant’s Application do not meet the high standard set by the Court of Appeal in *Gordon Ngatia Muriuki v DPP & 2 Others* [2017] eKLR where the Honourable Court set out instances where a court can issue a stay or freeze proceedings of a court of law exercising criminal jurisdiction in instances:

“...Courts are reluctant to freeze proceedings before a court of law that has jurisdiction to try criminal cases; only in instances where there are trumped up charges (emphasis mine) that cannot be founded in law or the prosecution is not undertaken according to law, or it is actuated by malice and meant to harass the appellant, having no basis at all in law and fact...”



8. That further, this court needs to appreciate the court’s considerations in *Patrick Muturi Ibungi v Inspector General of Police & 2 others; Namoya Interested Party* Petition No. EP40 of 2021 where it was held that:

“...The inherent jurisdiction of this court to stop investigations or a prosecution is to be exercised only in exceptional circumstances...”

9. That the Applicant herein has not shown any exceptional circumstances that require this Honorable Court to stay the matter in the lower court as the receipts that the Applicant relies on in his Application belong to a different transaction and not the subject matter in MCCR/E349/2023 *Republic v James Mwangi Kanyi*.

10. That in the *Commissioner of Police & the Director of Criminal Investigations Department & another v Kenya Commercial Bank Ltd & 4 Others* [2013] eKLR, the Court of Appeal stated resoundingly that:

.... By the same token and in terms of Article 157 (11) of the *Constitution*, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution. See *Githunguri v Republic* [1985] LLR 3090.

It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification.

The court has inherent power to interfere with such investigation or prosecution process. See *Ndarua v R.* [2002] 1EA 205. See also *Kuria & 3 Others v Attorney General* [2002] 2KLR...”

11. That in addition to the paragraph above neither the Inspector General of the National Police Service nor the Director of Public Prosecutions has mishandled any aspect of the lower court matter MCCR/E349/2023 *Republic v James Mwangi Kanyi*.
12. That the 1st Respondent is driven only by his constitutional mandate as enshrined in Article 157 of the *Constitution* of Kenya, 2010 and his constitutional obligation to uphold the public good.
13. That the matter was investigated by competent officers and the decision to charge the Applicant in MCCR/E349/2023 *Republic v James Mwangi Kanyi* was made after following due process.



14. That in compliance with the law, after the officers of the Inspector General of the National Police Service had conducted their investigations the police file was forwarded to the 1st Respondents then exercised their Constitutional duty to decide to charge or not charge.
 15. That the officers of the 1st Respondents. The 1st Respondents perused the evidence on record and decided to charge the accused person based on the evidence at hand.
 16. That the receipts attached to the application do not apply to the subject matter charges in MCCR/E349/2023 *Republic v James Mwangi Kanyi*.
 17. That this application and the petition therein are an attempt by the Petitioner/Applicant herein to appeal the 1st Respondent's decision to charge.
 18. That the Constitution of Kenya, 2010 jealously safeguards the 1st Respondent's independence on the decision to institute criminal charges.
 19. That there is little to no likelihood that the officers of the 1st Respondents have been compromised as they are both servants of justice.
 20. That the lower court is well equipped to adjudicate criminal matter MCCR/E349/2023 *Republic v James Mwangi Kanyi*.
 21. That we request that the matter be allowed to proceed before the lower court as the record is before that court and as the trial court they are well suited to adjudicate the matter.
 22. That the Applicant is attempting to stop the 1st Respondents from enforcing their constitutional and statutory duties.
 23. That it is in the public interest that complaints made to the police and the 1st Respondent is allowed enforce its mandate.
 24. That we oppose the award of costs to the Applicant.
 25. That we vigorously oppose the granting of any of the orders sought by the Applicant.
 26. That the Applicant will not be prejudiced in any way if the orders sought are not granted.
10. The 2nd Respondent filed their Grounds of Opposition dated 10th July, 2023; on the grounds that:
1. That Judicial Review proceedings are special proceedings and as such this court does not have the jurisdiction to make a determination of this matter. The ex –parte applicant ought to have filed a petition under the Constitutional and Human Rights Court.
 2. That the Application herein is intended to curtail the statutory obligations and duties of the 2nd Respondents herein.
 3. That the Applicant is inviting this court to trespass into the arena specifically reserved for the criminal trial process and ought not to usurp the constitutional or statutory mandate of the 2nd Respondents.
 4. That the criminal charges presented by the 1st Respondents to the 2nd Respondent were brought without any ulterior motive nor is there any impropriety on the part of the 2nd Respondent as there is evidence adduced by the Interested Parties to charge the ex parte Applicant with the offence of obtaining goods by false pretenses.



5. That this Honorable Court would be usurping the statutory mandate of the 2nd Respondents if it were to take up that role as proposed by the Applicants.
 6. That the Applicants have failed to show how the acts complained of are tainted with illegality, irrationality and procedural impropriety.
 7. That the Applicant in essence, seek that this Honorable Court directs a Public officer to exercise or not to exercise his/her statutory discretion in a particular manner hence usurp the said officer's authority.
 8. That the judicial review orders should not be granted and as such the application herein should be dismissed with Costs to the Respondents as the applicant ought to channel his grievances through a constitutional petition.
11. In further response to the Application, the 1st Respondent filed an irregular undated and unsigned document being Replying Affidavit of No. 75579 CPL Geoffrey Mwangi.
 12. Additionally, in opposing the Application, the Interested Parties filed their Replying Affidavit dated 20th June, 2023 sworn by Josphat Kinyua Nyaga on behalf of the Interested Parties.
 13. The Interested Parties contends that the ex-parte Applicant conned them to supply to his company/him hardware materials on credit on diverse dates: 27th, 28th, 31st August, 2020; and 2nd, 3rd, 4th, 10th September, 2020.
 14. The Interested Parties avers that they supplied goods worth Kes. 11,288,050.00 from the 2nd Interested Party, and Kes. 3,534,169 from the 1st Interested Party.
 15. That the ex-parte Applicant issued various post-dated cheques to pay for the supplies; but the cheques were dishonored for having insufficient funds in the ex-parte Applicant's and in his company's bank accounts.
 16. According to the Interested Parties, at no point when they were entering into the agreement was it agreed that their payments were pegged on a contract with any third party; and neither is there a nexus with any dealings with third party.
 17. That it took almost three (3) years, giving time to settle the monies due, before the Interested Parties finally reported the matter to the police. It was realized that the ex-parte Applicant had used the same tricks on other unsuspecting persons to defraud them. As per the Interested Parties, the instant case is a mean used by the ex-parte Applicant to delay his criminal case prosecution.
 18. In advancing their cases, parties filed their respective written submissions. The Applicant's submissions are dated 8th August, 2023; the 2nd Respondent's submissions undated; while the Interested Parties submissions dated 14th November, 2023.

Issues for Determination

19. I have considered the Application, the responses thereto, annexures, submissions by learned counsel, and the cited authorities. The following issue crystalizes for determination: Whether the prerogative reliefs of certiorari and prohibition sought can be granted as prayed, in the circumstances.

Analysis and Determination

20. It is important at this stage to set out the applicable principles and circumstances under which the Court will grant order prohibiting the commencement or continuation of a criminal trial process.



21. In this respect, the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office.
22. The merits of the case, and particularly whether the criminal proceedings have a likelihood of success, or that the Applicant has a good defence is also not a ground for halting criminal proceedings by way of judicial review, in light of the purpose and limits of judicial review.
23. However, if an applicant demonstrates that the criminal proceedings constitute an illegality or abuse of process, this Court will not hesitate in putting a halt to such proceedings, as that fall squarely within its mandate as a judicial review Court.
24. The cases of *Peter Ngunjiri Maina v DPP & 2 Others* (2017) eKLR, and *R v DPP & 2 Others Ex parte Nomoni Saisi* (2016) eKLR identified various scenarios that would require interrogation to warrant a review of the unfettered discretion of the Director of Public Prosecutions as follows:
 - a. Where there is an abuse of discretion;
 - b. Where the decision-maker exercises discretion for an improper purpose;
 - c. Whether decision-maker is in breach of the duty to act fairly;
 - d. Whether decision-maker has failed to exercise statutory discretion reasonably;
 - e. Where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;
 - f. Where the decision-maker fetters the discretion given;
 - g. Where the decision-maker fails to exercise discretion;
 - h. Where the decision-maker is irrational and unreasonable.”
25. In this regard, the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court as recognized by section 193A of the *Criminal Procedure Code*, unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognized aim.
26. These principles have been restated in various judicial decisions. The role of the different players in the criminal process was recognized in *Republic vs Commissioner of Police and Another ex parte Michael Monari & Another*, [2012] eKLR where it was held that:

“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. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. 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”.



27. In *Joram Mwenda Guantai vs The Chief Magistrate*, [2007] 2 EA 170, the Court of Appeal explained the applicable principles as follows:

“It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings... 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. 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 the High Court has the inherent power and the 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.”

28. The Court of Appeal in *Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others*, [2013] eKLR also held as follows on concurrent criminal a civil proceeding on the same issues:

“While the law (section 193A of the *Criminal Procedure Code*) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings” It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court. This is case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations”

29. The circumstances when a Court can intervene in a criminal prosecution was also the subject of the decision in *R vs. Attorney General exp Kipngeno Arap Ngeny*, High Court Civil Application No. 406 of 2001 wherein it was held that:

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.

30. The question that therefore need to be answered by this Court is whether the criminal proceedings against the ex-parte Applicant were brought in abuse of the 1st Respondent’s powers, were unreasonable or were motivated by improper motives.



31. In this respect, it is not disputed that there were contractual dealings over the subject matter of the prosecution, which is the dishonored cheques meant to pay for the supplies of hardware materials.
32. The ex-parte Applicant has not disputed receiving the hardware supplies from the Interested Parties, but he has maintained that he has paid a substantial amount of the demanded monies. It is also notable that the 1st Respondent and the Interested Parties brought evidence of the basis of the prosecution of the ex-parte Applicant.
33. From the foregoing, to my mind, it is proper to make a conclusion that the 1st Respondent in making the decision to prosecute the ex-parte Applicant was reasonable and rational – in exercising their prosecutorial powers and within their mandate.
34. The ex parte Applicant has in this respect sought orders of certiorari and prohibition. The Court of Appeal held in *Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji* Njoroge Civil Appeal No. 266 of 1996 inter alia as follows as regards the nature of the two judicial review orders:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice.

However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.... Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

35. The prosecution of the ex-parte Applicant by the 1st Respondents has been found by this Court to be proper: reasonable, rational, and legal. The order sought of certiorari to quash the said prosecution is thus unmerited. Consequently, an order of prohibition stopping any further prosecution of the ex-parte Applicant in the said criminal case is also unmerited.

Order:

The Notice of Motion dated 15th June, 2023 lacks merit and the same is dismissed with costs.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 1ST FEBRUARY 2024

.....

J. CHIGITI (SC)

JUDGE

