



**Republic v Director of Public Prosecutions & 2 others; Kariuki
 (Exparte Applicant) (Miscellaneous Application E086 of 2023)
 [2024] KEHC 3047 (KLR) (Judicial Review) (15 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3047 (KLR)

**REPUBLIC OF KENYA
 IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
 JUDICIAL REVIEW**

MISCELLANEOUS APPLICATION E086 OF 2023

JM CHIGITI, J

MARCH 15, 2024

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010
 AND THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015.**

BETWEEN

REPUBLIC APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

CHIEF MAGISTRATES COURT, CRIMINAL DIVISION 3RD RESPONDENT

AND

GEORGE NJOROGE KARIUKI EXPARTE APPLICANT

JUDGMENT

1. The Applicant moved the court through the application dated 7th August 2023 seeking the following orders:

1. That the Honourable Court be and is hereby pleased to grant an order of certiorari to quash the 1st and 2nd Respondents’ decision and the entire charge sheet dated 10th July 2023 in Milimani Chief Magistrates Court, Criminal Case Number E504 of 2023; R – versus – Kevin Otunga & Collins Otieno and 30 Others.



2. That the Honourable Court be and is hereby pleased to grant an order of prohibition, prohibiting the Respondents from proceeding with Prosecution of Criminal Case Number E504 of 2023; R – versus – Kevin Otunga & Collins Otieno and 30 Others.
3. That the Honourable Court be and is hereby pleased to grant an order of prohibition, prohibiting the 1st and 2nd Respondents from investigating, recommending the prosecution or commencing any prosecution of the Ex – Parte Applicant and others charged with him in respect of which Criminal Case Number E504 of 2023; R – versus – Kevin Otunga & Collins Otieno and 30 Others was instituted.
4. Any other order that the Honourable Court may deem fit and expedient to grant.

Ex-Parte Applicant’s Case

2. It is the Applicants case that this Court has Jurisdiction under Articles 23 (3) (f), 47 and 165 of *the Constitution* of Kenya 2010, Order 53 Rule 1 of the Civil procedure Rules, Section 8 and 9 of the of the *Law Reform Act* and Section 7 of the *Fair Administrative Action Act* No 4 of 2015 which provides that where a person is aggrieved by the decision of an administrative body, one can apply for Judicial Review orders through Order 53 of the Civil Procedure Rules or through a Constitutional Petition.
3. Reliance is placed in the case of Republic v Kenya Revenue Authority & 2 others Ex-parte Kungu Gatabaki & 4 others; Jacaranda Hotel Limited (Interested Party) [2020] eKLR held:

“27. Judicial review is now entrenched as a constitutional principle pursuant to the provisions of Article 47 of *the Constitution*, which provides for the right to fair administrative action, and section 7 of the *Fair Administrative Action Act* in this regard provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision. In addition, it was emphasized by the Court of Appeal in Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that Article 47 of *the Constitution* as read with the grounds for review provided by section 7 of the *Fair Administrative Action Act* reveals an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator. Lastly, Article 165(6) of *the Constitution* also provides that this Court has supervisory jurisdiction over any person, body or authority that exercises a quasi-judicial function or a function that is likely to affect a person’s rights.”

4. In the case of Republic v Director of Public Prosecutions & another Ex parte Habiba Mohamed; Ibrahim Sheikh Hussein & another (Interested Parties) (Supra) the court held as follows:

“In the case of Republic vs Inspector General of National Police & 2 Others [2020] eKLR the court stated inter alia;

“31. The above means that the powers conferred to prosecute by the Office of the Director of Public Prosecution are not absolute because they must be exercised in the manner provided above. This also means that any person charged with a criminal offence is actually at liberty to challenge the basis of his/her prosecution if he/she has reason to demonstrate that his/her prosecution is not driven by public interest or is in the interest of justice. The exercise of



power to prosecute by the Director of Public Prosecutions is therefore amenable to judicial review proceedings or any other redress provided by *the Constitution* or statute.”

Reference to this court is therefore within the law and the court cannot be said to be interfering with the legal mandate of the Director of Public Prosecutions but checking on the action of the Director of Public Prosecution in accordance with Article 157(11).”

5. It is their case that the 1st and 2nd Respondents in this instance have been used oppressively and disproportionately.
6. Further, in the case of *Republic v Al Ruhia Estates Limited & 2 others Ex Parte John Oduor Okwaro & another* [2021] eKLR held that:

“according to *Judicial Review Handbook, 6th Edition* by Michael Fordham at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of “public authority power.”
7. Predicated on the foregoing they believe that his Honourable court has jurisdiction to hear and determine the Application.
8. On the issue Whether or not the orders sought in the Ex-parte Applicant’s Substantive Motion dated 7th August 2023 should be granted, the Ex-parte Applicant was arrested and charged in Milimani Chief Magistrates Court, Criminal Case Number E504 of 2023; R – versus – Kevin Otunga & Collins Otieno and 30 Others over a lawful eviction of Sulemani Abdulshakur Harunani, Karura Investment Limited and their agents from the parcel of land known as L.R Number 12422/319 on the basis of a the ruling issued on 9th March 2023. The ruling established the lawful proprietor of the said property as the Ex-Parte Applicant herein, based on the documentations presented as evidence of proprietorship by him.
9. The Court issued the said order in favour of the Applicant even after further consideration of the Replying Affidavit filed therein in opposition of the said ELC Application by one Inspector Guyo an Investigating Officer from the 2nd Respondent. The court noted that the said report was filled with contradictions and was also biased.
10. The said Order was verified to be genuine vide OCPD Kasarani Letter C/CRI/1/5/VOL.III/21 dated 5th July, 2023. Additionally, the OCPD offered an escort to the auctioneer one Mr. Zachary Barasa who was instructed by the Applicant, to the property for purposes of evicting the trespassers.
11. The verification was also confirmed by the letter of the Sub County Commander addressed to the Regional Police Commander dated 5th July, 2023.
12. The eviction was Inspector Guyo, who arrested him and the auctioneers and later on arraigned them at Milimani law court on 10th July, 2023
13. They were all charged without being interrogated or given an opportunity to explain themselves thus, a denial of and violation and infringement of their fundamental rights and freedoms under the Bill of Rights.



14. Despite the existence of the already concluded case and the verification of the ELC court order as stated above, the 1st and 2nd Respondent still went ahead and charged the Applicant in the criminal court with the offences of conspiracy to defraud and forgery in relation to the same property that was subject to the ELC case, which dispute was already resolved by the court.
15. The decision to institute the said criminal proceedings is an abuse of the court process and tainted with illegality and irrationality, as the said decision was unreasonable and arrived at maliciously noting that it is in contradiction to an already existent and verified court order.
16. The ELC case took precedence as the issue of ownership had already been determined. Consequently, the so-called investigation by the 2nd Respondent appears inconclusive and not balanced.
17. The only proceedings relating to the ELC case is the Application for stay of execution at the Court of Appeal where the Appellate court only heard the Application and issued directions relating to disposal of the case.
18. However, although an order of status quo was initially issued by consent of the parties, the same was never extended upon hearing of the Application and upon request by one of the other Respondent, who had not preferred an Appeal against the said ruling. They argue that there is no stay of execution of the ELC order issued in favour of the Ex-parte Applicant.
19. They also rely on the case of *Bitange Ndemo v Director of Public Prosecutions & 4 others* [2016] eKLR where the court cited the case of *Republic v Attorney General Ex-parte Kipngeno Arap Ngeny* where the court therein held that:

“ a criminal prosecution which is commenced in the absence of factual foundation or basis is always suspect for ulterior motive or improper proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have the prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable case for mounting a criminal prosecution otherwise the prosecution will be Malicious and actionable.”
20. Both under Article 157 (11) of *the Constitution* and Section 4 of the Office of Director of Public Prosecution Act, the discretionary power donated to the DPP to initiate any prosecution is not absolute and where appropriate the court will intervene.
21. To buyress this argument, they rely on the case of *Republic v Director of Public Prosecutions & another Ex parte Habiba Mohamed; Ibrahim Sheikh Hussein & another (Interested Parties)* [2022] eKLR, the court held as follows:

“In as much as the Director of Public Prosecutions has power without regard to any one control of any authority, the powers are fettered by the same Constitution, It obligates him to have consideration of public interest, interest of the administration of justice and he must prevent abuse of legal process. The power is not absolute”
22. The letter by his advocates dated 24th July, 2023 was sent to the 2nd Respondent and received on 27th July, 2023 explaining that the eviction exercise was duly conducted pursuant to a verified court order, after which he requested that the case be dropped. However, the letter has never been responded to date and the charges have never been dropped.
23. The complaint against Inspector Guyo for unlawfully evicting him and the auctioneers he had instructed from his parcel of land; which letter has never been responded to date.



24. The refusal to drop the charges against the Ex-parte Applicant or and the failure to take disciplinary action against Inspector Guyo which shows that the Respondents have an ulterior motive and malice in sustaining the charges preferred against the Applicant as read alongside that fact that an investigation report by the National Land Commission that highlights the rightful owners of the property and recommends the prosecution of the Directors of Karura Investment Limited and its accomplices who were the persons being evicted from the land.
25. They are of the strong persuasion that the Court ought to issue the Orders sought as the eviction of the complainants in the Criminal case was lawful and the ownership of the property had already been established in a court ruling.
26. Further to the above, Article 157 (11) of *the Constitution* of Kenya states that:
- “In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of legal process (emphasis added)”
27. Reliance is placed in the case of *Republic v Al Ruhia Estates Limited & 2 others Ex Parte John Oduor Okwaro & another* [2021] eKLR held:
- “It is trite 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. Therefore, 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.”
28. He also relies on the case of *Pastoli v Kabale District Local Government Council and Others* [2008] 2 EA 300 cited with approval in the case of *Republic v Law Society of Kenya Disciplinary Tribunal & another Ex Parte Muema Kitulu* [2018] eKLR, the Applicant’s Application has met the threshold set in the said case for grant of judicial review orders.
29. The Honourable Court in the said case held as follows;
- “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.”



30. He argues that the following acts constitute illegality: -
- a. The decision of the 1st and 2nd Respondents to institute charges against the Ex-Parte Applicant and 31 others in Criminal Case Number E504 of 2023; R v Kevin Otunga & Collins Otieno and 30 Others, is illegal based on the fact that the Environment and Land Court, a court of competent jurisdiction, in ELC Number E50 of 2022; George Njoroge Kariuki v Sulemani Harunani & Karura Investments Ltd, gave the Ex – Parte Applicant the go ahead to evict persons from his parcel of land based on the documentation presented to court which the 2nd Respondent terms as forgeries.
 - b. The said decision is illegal for being in stack contradiction with the decision of the Environment and Land Court.
 - c. The 2nd Respondent, through the Investigating Officer, one Inspector Guyo, filed a detailed affidavit at the ELC Court in which he made the same allegations of forgery, however, the court pointed out contradictions and bias in the said report by the 2nd Respondent’s officer and proceeded to grant the Ex-Parte Applicant an order of eviction. The said ruling remains in force to date and has not been set aside.
 - d. To that extend, the 1st and 2nd Respondents decision and the entire charge sheet in Criminal Case Number E504 of 2023; R v Kevin Otunga & Collins Otieno and 30 Others, are illegal.
31. He argues that the following acts constitute irrationality, unreasonableness and Procedural Impropriety: -
- a. The decision of the 1st and 2nd Respondents to institute charges against the Ex-Parte Applicant and 31 others in Criminal Case Number E504 of 2023; R v Kevin Otunga & Collins Otieno and 30 Others, is unreasonable therefore irrational.
32. This is premised on the following summary of the background surrounding the case;
- a. On 9th March 2023, the ELC delivered a ruling in which it ordered that the Ex - Applicant evict persons from his parcel of land known as L.R. Number 12422/19. The court further ordered that the Officer Commanding Kasarani Police Division to provide security during the eviction exercise to ensure that law and order is maintained.
 - b. The court also granted 7 days stay of execution of the said order. Subsequently, one of the Respondents in the said case moved to the Court of Appeal and filed an Application seeking stay of execution of the orders of ELC Court pending the hearing and determination of its intended appeal.
 - c. The Honourable Registrar of the Court of Appeal on 13th March 2023 at around 9.55 am dispatched directions to parties on how they were supposed to comply with directions of the court in terms of exchanging documents. This direction set the final day for exchanging documents to be 25th March 2023 thereafter parties would be notified on when to appear before the court for hearing of the said application.
 - d. Shockingly, another set of directions was issued later that day requiring parties to appear before the Court of Appeal on 15th March 2023 for hearing, this was before parties had complied with directions issued earlier.
 - e. The Applicant nonetheless appeared before the Honourable Court and raised a complaint on how the matter had been listed for hearing. The court at that point and with the consent of



all parties issued an order of status quo against the eviction orders to allow parties to comply with the directions issued.

- f. The Application for stay was eventually listed for hearing on 27th June 2023. The matter was heard and towards the end, the other Respondent who had not lodged an appeal sought an extension of the orders of status quo which was not issued. Consequently, on 7th July 2023, the Ex - Applicant directed an auctioneer Mr. Zachary Barasa Wakhungu, to evict the trespassers from his parcel of land.
- g. On the same day, the OCPD Kasarani having verified the orders of ELC court and the status at the Court of Appeal, escorted Mr. Zachary Barasa Wakhungu and the Ex-Parte Applicant to the impugned land and duly evicted the trespassers from the said parcel of land.
- h. The eviction exercise was successful, however, on the same day at around midday, officers of the 2nd Respondent, led by Inspector Guyo, raided the Ex-Parte Applicant's property, harassed the Auctioneer and his team arresting and locking them up at Muthaiga Police Station. The Ex - Applicant was equally arrested and locked up at Muthaiga Police Station.
- i. The Ex-Parte Applicant, the auctioneer and his team were subsequently charged at Milimani Law Courts on 10th July 2023 with offences relating to conspiracy to defraud the Respondents, Forgery and Trespass.
- j. The upshot is that the said decision to charge the Ex-Parte Applicant and the rest is without basis, unreasonable, unfair and irrational considering the fact that the Ex - Parte Applicant were acting on the strength of a court order.
- k. The Ex - Parte Applicant lodged a complaint against Inspector Guyo for misconduct at the 2nd Respondent which was duly copied to the 1st Respondent but no action has been taken.
- l. The Ex - Parte Applicant equally requested the 1st Respondent to review the decision to charge him but he's yet to receive any feedback. Based on the foregoing, the orders sought should be granted.

1st & 3rd Respondent's

33. The 1st and 2nd Respondents oppose the same on the following grounds;
 - a. It is their case that the Ex-parte Applicants ought to have filed their matter in a Constitutional and Human Rights High Court and not a Judicial Review Court.
 - b. They argue that the Director of Public Prosecutions is a fair and impartial Constitutional Office holder empowered by Article 157 of *the Constitution* of Kenya, 2010.
 - c. That the 1st Respondent only recommends cases for prosecution once the evidential test, the threshold test and the public interest tests as set out in the ODPP Decision to Charge Guidelines and the National Prosecution Policy have been met.
 - d. Allowing the application would be contrary to Article 50 (2)(e) of *the Constitution* of Kenya, 2010.

The 3rd and 4th Respondents' case

34. On their part the 3rd and 4th Respondent's filed grounds of opposition dated 8th September, 2023. It is their case that;



- a. 9th March, 2023, the court in Nairobi ELC Misc. Application No. E50 of 2022 issued an order allowing the ex-parte applicant to evict certain persons from his parcel of Land in Muthaiga.
 - b. 5. The Exparte applicant proceeded to instruct an auctioneer who, accompanied by police officers, moved into the property and escorted the security officers who were on site out of the said property.
 - c. The Ex-parte applicant alleges that the 2nd Respondent thereafter arrested the ex parte applicant's representatives and the auctioneer on the material day charging them with the offence relating to conspiracy to defraud, forgery and forcible entry and trespass vide Milimani Chief Magistrates Court, Criminal Case Number E504 of 2023- Republic versus Kevin Otunga and Collins Otieno and 30 others.
35. Section 35 of the [National Police Service Act](#) provides that;
- “The Directorate shall—
- a) Collect and provide criminal intelligence;
 - b) Undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others;
 - c) Detect and prevent crime;
 - d) Apprehend offenders;
 - e) Maintain criminal records;
 - f) Conduct forensic analysis;
 - g) Execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of [the Constitution](#);
36. It is their case that, Judicial Review proceedings are concerned with the decision making process but not the merit of the case.
37. It is not up to a Judicial Review court to determine whether the evidence gathered by the 1st and 2nd Respondent is sufficient to support the charge presented to the 3rd Respondent because that is the preserve of the trial court.
38. Article 157 of [the Constitution](#) has bestowed prosecutorial power upon the 1st Respondents and as such this office and its officers are expected to use their expertise in determining which case to prosecute and which one not to prosecute.
39. The 3rd and 4th Respondents acted with illegality, irrationality and procedural impropriety.
40. The 2nd Respondents availed sufficient evidence to the 1st Respondents to charge the Ex-parte applicant and his co-accused with the conspiracy to defraud, forgery and forcible entry and trespass before the 3rd Respondent.



41. Reliance is placed in the Court of Appeal’s judgment in the case of *Municipal Council of Mombasa v Republic & Umoja Consultants Limited*, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR as follows:

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”

42. They also rely on *Primrose Management Limited v Chairman of The Business Premises Rent Tribunal & Anor* [2015] eKLR and by Waki J, in the case of *Republic v County Council of Kwame & Anor Ex parte Kondo & 57 others Msa HCMCA No. 384 of 1996*.
43. The Ex-parte applicant is trying to shield himself from the investigation process commenced by the 1st and 2nd Respondents and further presented to the 3rd Respondent.
44. They further rely on 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. This position was appreciated in *Republic v 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”.

“Accordingly, the order that commends itself to me is that the Notice of Motion dated 30th October, 2014 is unmerited. In the result, the Motion fails and is hereby dismissed with costs to the Respondents.”

45. The Supreme Court of India in the case of *State of Maharashtra & others v Arun Gulab Gawali & others* Criminal Appeal No. 590 of 2007 (27 August, 2010) to the effect that:

“12. The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the



Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor it can 'soft-pedal the course of justice' at a crucial stage of investigation/ proceedings. The provisions of Articles 226, 227 of *the Constitution* of India and Section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as 'Cr.P.C.') are a device to advance justice and not to frustrate it. The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of power of the Court, but the more the power, the more due care and caution is to be exercised in invoking these powers.”

46. The role of judicial review in criminal cases is limited. Once the Court is satisfied that the grounds for prohibiting a criminal trial have not been established, it cannot go ahead to try and determine the innocence or otherwise of an accused person.
47. Odunga, J emphasized this point in *Republic v Attorney General & 4 others Ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji* [2014] eKLR when he stated that:

“Judicial review applications do not deal with the merits of the case but only with the process. In other words, judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are bona fides and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant.

Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.”



48. There exists ample avenue for compensation on malicious prosecution and we rely on the case of Ex-parte Ewart Frey Salins (2018) eKLR and Republic v inspector General of police & 2 others ex-parte Jimi Richard Wanjigi (2019) eKLR where it was held that;

“ 24. Further, that if it turns out that the proceedings were unwarranted, there exists an avenue for compensation for malicious prosecution and that because of this the power of quashing or prohibiting is used sparingly.

Analysis and determination:

49. Upon considered the respective cases by the parties herein and the attendant rival submissions, the following issues commend themselves to this court’s attention in order to dispose of this suit:

1. Does this court have jurisdiction?
2. Is the Applicant entitled to the orders sought?

Jurisdiction of the court:

50. This Court has the jurisdiction under Article 165(3)(5) of *the Constitution* to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Where it is brought to the attention of the Court that certain illegal acts, omissions, commissions, departures, deflections, processes or legal manipulations are being undertaken which are not in accordance with *the Constitution* and the law this court has to intervene at the earliest opportune moment in the spirit of promoting the rule of law. The court must at this point embrace and invoke its jurisdiction so as to redeem the dignity of the victims of the infraction in question.

51. Section 7 of the *Fair Administrative Action Act* No 4 of 2015, provides that where a person is aggrieved by the decision of an administrative body, one can apply for Judicial Review orders through Order 53 of the Civil Procedure Rules or through a Constitutional Petition. I am satisfied that this court has jurisdiction to hear and determine this suit.

Whether the orders sought in the Ex-parte Applicant’s Substantive Motion dated 7th August 2023 should be granted?

52. Judicial review jurisdiction was discussed in the Ugandan case of Pastoli v Kabale District Local Government Council & Others, [2008]2 EA 300, that:

“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: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision 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....

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: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is 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. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876).”

53. In the case of Republic v Director of Public Prosecutions & another Ex parte Habiba Mohamed; Ibrahim Sheikh Hussein & another (Interested Parties) (Supra) the court held as follows:

“In the case of Republic v Inspector General of National Police & 2 Others [2020] eKLR the court stated inter alia

“31. The above means that the powers conferred to prosecute by the Office of the Director of Public Prosecution are not absolute because they must be exercised in the manner provided above. This also means that any person charged with a criminal offence is actually at liberty to challenge the basis of his/her prosecution if he/she has reason to demonstrate that his/her prosecution is not driven by public interest or is in the interest of justice. The exercise of power to prosecute by the Director of Public Prosecutions is therefore amenable to judicial review proceedings or any other redress provided by *the Constitution* or statute.”

Reference to this court is therefore within the law and the court cannot be said to be interfering with the legal mandate of the Director of Public Prosecutions but checking on the action of the Director of Public Prosecution in accordance with Article 157(11).”

54. This court has the discretion to decide whether the prosecution is malicious or driven by considerations other than those set out in the decision to charge guidelines. The Applicant has failed to demonstrate how The National Prosecution Policy Powers of the 1st and 2nd Respondents in this instance have been used oppressively and disproportionately.

55. This position was appreciated in Republic v 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”.

56. The applicant has not proven how the investigations and the criminal proceedings have been brought for ulterior motives or for achievement of some collateral.

57. 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.”

58. The fact that there exists a civil suit is not a bar to any criminal proceedings or investigations.
59. Section 193A of the Criminal Procedure Code 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.”
60. 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](#).
61. 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 offender’s conduct or omission.
62. 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.
63. I am satisfied that the victims have an interest in the outcome of the investigations. Allowing the Application will deny the complainants to their right to fair hearing as guaranteed under Article 50 of [The Constitution](#).
64. The power to investigate crime is an integral 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 Applicant seeks to do.
65. The Applicant 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 put the cart before the horse.
66. The applicant is also seeking orders prohibiting the Respondents from proceeding with Prosecution and prohibiting the 1st and 2nd Respondents from investigating, recommending the prosecution or commencing any prosecution of the Ex – Parte Applicant and others charged with him in respect of which Criminal Case Number E504 of 2023; R – versus – Kevin Otunga & Collins Otieno and 30 Others.
67. In Republic v Principal Kadhi, Mombasa Ex-parties Alibhai Adamali Dar & 2 others; Murtaza Turabali Patel (Interested Party) [20221 eKLR, the Court rendered itself thus:

“The Order of “Prohibition” issues where there are assumptions of unlawful jurisdiction or excess of jurisdiction. It's an order from the High Court directed to an inferior tribunal or body as in this case the Kadhi’s Court. Its functions is to prohibit and/or forbids



encroachment into jurisdiction and further to prevent the implementation of orders issued when there is lack of jurisdiction."

"Although prohibition was originally used to prevent tribunals from meddling with cases over which they had no jurisdiction, it was equally effective and equally often used, to prohibit the execution of some decision already taken but ultra vires. So long as the tribunal or administrative authority still had power to exercise as a consequence of the wrongful decision, the exercise of that power could be restrained by prohibition. Certiorari and prohibition frequently go hand in hand, as where certiorari is sought to quash the decision and prohibition to restrain its execution. But either remedy may be sought by itself."

68. The applicant does not demonstrate how he is entitled to the order of prohibition.
69. The trial Court is a Chapter 10 organ of the Constitution that is vested with the jurisdiction to preside over criminal matters.
70. It is a seasoned court that has the power to adjudicate over the trials before it within the Article 50 of the Constitution. The Applicant has not demonstrated how the court has acted illegally or without jurisdiction
71. The trial court is under a duty to promote, promote and fulfill the rule of law under Article 3 and 20 of the Constitution and this will be realized if the investigations and the prosecution proceed.

Disposition:

72. The application is misconceived and the ex parte Applicant has failed to prove to the court that he is entitled to the orders sought within the principles of *Pastoli v Kabale District Local Government Council & Others*, [2008] 2 EA 300,

Order:

The Notice of Motion 7th August 2023 lacks merit and the same is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH MARCH 2024.

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J. CHIGITI (SC)
JUDGE

