



Kimani v Director of Public Prosecutions & 3 others (Judicial Review Application E062 of 2023) [2024] KEHC 3269 (KLR) (Judicial Review) (3 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3269 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E062 OF 2023**

JM CHIGITI, J

APRIL 3, 2024

BETWEEN

FREDRICK KIMEMIA KIMANI EXPARTE APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

THE CHIEF MAGISTRATE’S COURT, MILIMANI 2ND RESPONDENT

THE DIRECTORATE OF CRIMINAL INVESTIGATIONS 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. The application that is before this court is dated 30th May, 2023 wherein the Applicant seeks the following judicial review reliefs;
 - a. An Order of Certiorari to bring into this Honorable Court and quash the decision of the 1st Respondent or officers subordinate to him, and or the National Police Service , to charge the applicant with the offences of Conspiracy to defraud contrary to section 317 of the penal code, Forgery contrary to Section 345 as read with Section 349 of the Penal Code, Computer Forgery contrary to Section 25 (1) of the Computer misuse and Cybercrime Act 2018, Personation Contrary to Section 382 (2) as read with Section 349 of the Penal Code, Procuring Registration of land by false Pretense Contrary to Section 320 of the Penal Code, Giving False Information to a person employed in the Public Service Contrary to Section 129 (a) of the Penal Code in Milimani Chief Magistrates Criminal Case No. E341 of 2023, Republic versus Fredrick Kimemia Kimani & Another



- b. An Order of Prohibition directed at the 1st Respondent or through officers' subordinate to him, prohibiting him from carrying on with the further prosecution of the Applicant in Milimani Chief Magistrate's Criminal Case Number E341 of 2023 or any other proceedings that may be instituted on the same basis and touching on the subject matter of the impugned investigations.
- c. An Order of Prohibition directed at the 3rd Respondent or through officers' subordinate to him prohibiting him from carrying on with any further investigations touching on the applicant Fredrick Kimemia Kimani or his company Cirtex Kenya Limited or in any way interfering with the ownership of the subject land L.R. NO 24968/2 I.R. 179264 measuring 20.7 Acres or thereabouts.
- d. An Order of Prohibition to prohibit the 2nd Respondent from taking evidence, conducting proceedings or carrying on with the trial of the Applicant in Milimani Chief Magistrate's Criminal Case No. E341 of 2023 Republic Vs Fredrick Kimemia Kimani & Anor or any other criminal proceedings that may be instituted on the same basis and touching on the Applicant relating to the subject matter of the impugned investigations and/or allowing the 1st and 3rd Respondents to prosecute any other criminal case relating to the property known as Land Reference Number 24968/2 I.R. 179264 measuring 20.7 Acres or thereabouts Against the Applicant.
- e. Costs of the Application be borne by the respondents.

Ex- Parte Applicant's Case;

- 2. The application is predicated on the Statutory statement and the Verifying Affidavit sworn by Fredrick Kimemia Kimani dated 22nd May, 2023.
- 3. The Ex - parte Applicant claims to be a director of Cirtex Kenya Ltd, the registered Proprietor of Land Reference No. 24968/2 I.R.179264 with a valid Certificate of title that has been validated by three government institutions to wit: National Land Commission, Ministry of Lands and Physical Planning and Director of Surveys.
- 4. There is an ongoing land ownership dispute in ELC Case No. 152 of 2018 pitting at least 4 different entities wherein the ex parte Applicant's Company is the plaintiff in the matter and there are four Defendants all with distinct titles who have all advanced rival claims of ownership of the Property.
- 5. The applicant is troubled by the fact that the 3rd Respondent has isolated him and decided to pursue him purely for harassment and intimidation reasons.
- 6. The Respondents have made numerous attempts to charge the applicant with many Criminal counts of the Penal Code, in Milimani Chief Magistrate's Criminal Case No. E666 of 2022 Republic vs Fredrick Kimemia Kimani where his now co- accused was the complainant after the 3rd Respondent declared him the bona-fide owner and which the 1st Respondent terminated under Section 87 (a) of the Penal Code, and in this second attempt where the alleged proprietor the 2nd Ex-Parte Applicant, Peter David Leparakwo is no longer the owner but a suspect fraudster.
- 7. The applicant believes that the decision to prosecute him was arrived at improperly without meeting the minimum thresholds under the law capable of sustaining a charge for reasons that the alleged parcel of land Measuring 9.25 Ha does not exist both on the ground and in Government records.



8. The applicant is convinced that the 1st and 3rd Respondents are acting at the behest of unknown third parties with whom they have conspired with intent to use the police and the Criminal justice system to harass the Applicant and in essence defraud his company of proprietary rights over the land through intimidation.
9. The 1st Respondent has abused its Constitutional powers and the effect of the criminal proceedings will result in an abuse of the court process and without due regard to public interest, against the interest of the administration of justice so as to unlawfully aid third parties to gain an unfair benefit and advantage as against the Applicant during the pendency of ownership wrangles in the Environment and Land Court and this may convolute the dispute as the criminals are now busy subdividing the applicant's land.
10. The 2nd Ex-Parte Applicant, Peter David Leparakwo, who is the 2nd accused person and who was the Complainant in the previous criminal proceedings which the 1st and the 3rd Respondents had instituted against the applicant filed Judicial Review proceedings against the Respondents being Misc Judicial Review Case No. E055 of 2023 on grounds that, their previous investigations had declared him the bona-fide owner only for this position to change.
11. The Ex-parte Applicant later filed an Application seeking consolidation of the two suits on grounds that both the Applicant and the 2nd Ex-Parte Applicant were charged in E341 of 2023 facing similar charges and the subject matter in their respective Judicial Review Applications are the same, and if the matters were to be determined separately, there was a possibility of the court issuing inconsistent decisions.
12. Article 157(11) of *the Constitution* provides that;

‘In exercising the powers conferred by Article 157, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.’
13. It is the Applicant's case that the ODPP was not guided by the above principles before deciding to prefer charges against the Applicant for the following reasons.
14. In the pending land dispute there are two deed plans bear the same deed plan number but different special dimensions. This according to the director of surveys is not a practical scenario in land Surveying.
15. The purported charges which were commenced whimsically relates to the manner in which the Applicant's company acquired the said title, a question which will be properly answered by the Environment and Land Court in its final judgment upon hearing the parties.
16. Two government departments and one Constitutional Commission seized with the mandate of determining land disputes have rendered their verdict on the matter, declaring the applicant's Company the bona-fide proprietor of the disputed parcel of land vide reports which have not been challenged by either the Respondents or the other claimants.
17. The Applicant was arrested at 7.00 pm on the 14th July,2022, and he was arraigned in court on 15th July,2022 and charged with the offences of Conspiracy to defraud contrary to section 317 of the penal code, Forgery contrary to Section 345 as read with Section 349 of the Penal Code, Forgery contrary to Section 350 (1) of the penal code, Forgery of a Lease Contrary to Section 350 (1) of the penal code Forgery of a Certificate of Title Contrary to Section 350 (1) of the Penal Code, Obtaining Registration of Land by False Pretenses Contrary to Section 320 Of the Penal Code .



18. The 3rd respondents did not take any statement from the Applicant and neither did they disclose to him the nature of the offences they were to charge him with in court during the arrest.
19. The ex parte applicant lodged a complaint and supplied the officers of the 3rd respondent with all the documents of ownership and sought the assistance of the 3rd respondent in arresting the fraudsters who had attempted to take away the land.
20. It is the Applicant's case that due to the ulterior motives the 1st and 3rd Respondents hurriedly charged the applicant in court without conducting investigations.
21. The 3rd Respondent is simply working in cahoots with fraudsters to dispossess the Ex- Parte Applicant of his land.
22. The 1st respondent was unable to furnish any witness statements or prosecution documents to be relied upon in the criminal trial.
23. For eleven months since the ex- parte applicant was arraigned in court and took a plea of not guilty, the matter was withdrawn without service of statements or prosecution documents to the applicant as ordered by the court.
24. The Applicant is troubled that even in this 2nd instance, the 1st and 3rd Respondents have again failed to furnish the Ex-parte applicant with witness statements or prosecution documents to be relied upon in the criminal trial almost 4 months since the ex- parte applicant was arraigned in court.
25. According to the Applicant it is also quite unlikely that the 1st respondent duly undertook its constitutional functions by perusing through the available evidence, assessing the sufficiency evidence against the ex- parte applicant to warrant a prosecution considering that the ex-parte applicant was arrested at 1900hrs in the 1st instance and 3.00pm in the 2nd instance and arraigned in court the following mornings respectively.
26. The applicant believes that the ODPP did not have ample time to go through the file and approve the charges.
27. In addition, the applicant questions the hurry to ensure that the ex- parte applicant was arraigned in court that fast while missing out on key steps.
28. The Applicant argues that the 1st and 3rd Respondents filed Grounds of Opposition to the application so as to deny this court the opportunity to see the evidence, if any relating to the ownership of the land in support of the criminal charges facing the applicant.
29. In the Case of Henry Aming'a Nyabere v Director of Public Prosecutions & 2 others; Sarah Joslyn & another (Interested Parties) [2021] eKLR the High court while addressing a similar issue had the following observation to make;

“Second, the uncontroverted status of the criminal case lays bare the misuse of the criminal justice system in this case. There are no listed witnesses and no witness statements availed or available for the criminal case. They are, so to speak, criminal charges filed in vacuum and in search of facts and potential complainants and witnesses. They are floating dangerously waiting to crystallize at some point in the future – all in intransigent defiance of the promises of Article 49 and 50 of the Kenyan Constitution, respecting the rights of an arrested and Accused Person and information which must be given to them at the commencement of their criminal prosecution.”



30. In *Patrick Ngunjiri Muiruri v DPP* [2017] eKLR, this Court said the following regarding the standard the Court uses to scrutinize the DPP’s use of his charging authority:

“The law and practice, then, are quite clear: while the discretion of the DPP is unfettered, it is not unaccountable. While the authority to prosecute is entirely in the hands of the DPP, it is not absolute. On the other hand, while the power of the Court to review the decisions of the DPP are untrammelled, they are not to be exercised whimsically. While the Court can review the DPP’s decisions for rationality and procedural infirmities, it cannot review them on merit.”

31. In *R v Inspector General of Police & 3 Others Ex Parte Lillian Wangari & 5 Others* [2017] eKLR, this Court explained the application of this principle in the following words:

“It is for this reason that while the DPP has complete discretion and full autonomy to determine whether and against whom to bring criminal charges, the Courts have held that he must at least demonstrate that he has a prosecutable case and that his aim in bringing those charges are in the public interest. Hence, in *R v Attorney General Exp. Kipngeno Arap Ngeny* (High Court Civil App. No. 406 of 2001), the Court stated thus:

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 criminal prosecution otherwise the prosecution will be malicious and actionable.”

32. There is no material evidence to sustain the trial in respect of the charges facing the applicant.

33. It is his submission that there was a Constitutional and statutory obligation placed on the 1st and 3rd Respondents to give the applicant prior and adequate notice of the nature and reasons for the offences and supply him with the requisite statement and documents which was not discharged.

34. Reliance is placed on the case of *Republic v County Director of Education, Nairobi & 4 others Ex-parte Abdukadir Elmi Robleh* [2018] eKLR learned judge observed as follows in paragraph 27 of his judgment;

“In my view the notice contemplated under Article 47 of *the Constitution* as read with section 4(3) of the *Fair Administrative Action Act* must not only be prior to the decision but must also be adequate and must disclose the nature and reasons for the proposed administrative action.”

35. In *Geothermal Development Company Limited vs. Attorney General & 3 Others* [2013] eKLR it was held that:

“Article 47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including “(c) responsive, prompt, effective, impartial and equitable provision of services” and “(f) transparency and provision to the public of timely, accurate information.”

As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a



person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (See *Donoghue v South Eastern Health Board* [2005] 4 IR 217). Hilary Delany in his book, *Judicial Review of Administrative Action*, Thomson Reuters 2nd edition, at page 272, notes that, “Even where no actual hearing is held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision.”

36. Notice is a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be.
37. In *Msagha vs. Chief Justice & 7 Others Nairobi HCMCA no. 1062 of 2004 (Lessit, Wendo & Emukule, JJ on 3/11/06) (HCK) [2006] 2 KLR 553* it was held:

“The Court observes firstly that the rules of natural justice “audi alteram partem” hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialization of the globe during the hey-days of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision”
38. The said decision was clearly based on irrelevant factors, failure to consider relevant factors, was irrational and was breach of the principle of proportionality.
39. It is clear that the 1st and 3rd respondent’s actions were tainted with malice and illegalities.
40. In his supplementary affidavit the Applicant argues that the investigating officer, corporal Nicolaus Osuri Otieno has vested interest in the land together with other senior DCI officers who are hell bent in dispossessing the applicant of his land using all means including planning to assassinate the applicant, information which he has received in confidence and which he shared with IPOA and the EACC for reasons that most of those in the office of the Directorate of Criminal Investigations are working for one Joshua Chelelgo Kulei and he cannot get justice from that office.
41. The applicant argues that the investigating officer has severally used his position to obtain money from the applicant through intimidation and coercion and he has even threatened me via a text message which I have preserved.
42. The said Peter David Leparakwo is the trespasser on his land holding under the protection of one Mr. Patrick Khaemba and other senior DCI officers.
43. He invites the Court to scrutinize the Respondent’s Exhibit marked NOO44(a) dated 14th August 2020. It is very clear that the investigating officer is on a fishing expedition. It is clearly noted at the foot of the exhibit by the author as follows:

“Kindly note that the annual returns filed from the year 2009 to 2025 ,state that the following are directors /shareholders However, there are no supporting documents of how they were appointed or acquired the shares”.



44. He argues that all the ownership documents that he holds were issued by the government after following the due process of the law, the same have been confirmed as genuine documents by all relevant government departments except DCI whose mandate in land matters is very limited.
45. The 3rd respondent has refused to arrest and charge in court all the other three claimants who have been declared to be holding fake titles by those charged with that mandate and are instead harassing the one holding authentic documents which is very strange and contrary to their mandate and my legitimate expectations which amounts to an abuse of their powers.
46. The entire Affidavit by the respondents and all their reports are silent on the fate of the other titles declared fake.
47. He presented all documentary evidence to the investigating officer including my original Provisional Certificate of Lease to assist in the investigations, the reports in my Verifying Affidavit marked FKK6 and FKK9.
48. He argues that he reliably learnt that the Provisional Certificate of Lease, which he handed over to Mr. Nicholus Osuri Otieno was shredded by the investigators.
49. There is no single report from the bodies mandated to deal with land matters that have authenticated the purported title by NHIF. The reports available but which the 3rd Respondent has ignored indicate the purported title is fake and the acreage indicated therein is non-existence in Karen. It's only the 3rd Respondent who knows where that land is situated.
50. Land ownership is not demonstrated by letters but by survey records and registration from the applicable Government departments.
51. It is his case that the survey report and the report by NLC have not been challenged and the court cannot close its eyes to this mischief by the 1st and 3rd respondent.
52. He believes that the Respondents' cumulative actions are tantamount to a violation of his fundamental rights and Article 40 Constitutional Right to own property.
53. According to him the Respondents who are state and public officers bound by Article 10, National Values and Principles of Governance have by their impugned actions spat in the face of the rule of law, the cornerstone of our democracy and thereby denied me natural justice.
54. The police officers ought to serve the public without any conflict of interest, without unjustly enriching themselves through third parties and without allowing persons over whom they have control, to carry out unethical and clearly illegal actions against other unsuspecting citizens.

The 1st & 3rd Respondents case

55. It is their case that the ex parte applicant has not demonstrated how the 1st and 3rd respondents have abused the court process by charging him in Milimani CMCC No E341 of 2023.
56. The applicant wants the 3rd respondents, to be prohibited from prosecuting and proceeding with the trial of the applicant in Criminal case number E341 of 2023.
57. The mandate of the 1st respondent is well stipulated under Article 157 of *the Constitution* of Kenya, 2010.
58. They believe that the applicant has been legally charged within the parameters of *the Constitution* of Kenya, 2010.



59. In exercising the powers in deciding to charge the Applicant, the Director of Public Prosecutions had regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process as per Article 157(11) of *the Constitution* of Kenya, 2010.

Reliance is placed in the case of *Kelly Kases Bunjika v Director of Public Prosecutions (DPP) & another* [2018] eKLR where the court pronounced itself that ~To succeed in challenging the constitutional validity of the action or, where he refuses to institute or continue or discontinue a prosecution, inaction of the DPP, an applicant must show that the DPP has failed to give effect, in the particular case, to “public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process”.

60. The prayer sought to by the applicant that this court calls for the file number CMCC No e108 of 2022 and quash the decision made by the Director of Public Prosecutions to charge the Exparte applicant has failed the test in *Kelly Kases Bunjika’s* case (Supra).
61. Prohibiting orders are particularly useful as they may be sought to prevent a decision being made in excess of jurisdiction, even if there is a right to appeal the decision.
62. In the case of *Kenya National Examination Council versus Republic ex parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR, the Court stated the grounds upon which such an order may issue as follows;
- i. What does an Order Of Prohibition do and when will it issue” It 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 – See *Halsburys Law Of England*, 4th Edition, and Vol.1 at pg. 37 paragraphs 128.
63. In the case of *Kuria & others versus AG* [2002] 2 KLR 69, the High Court held.
- “An order of prohibition should be granted where there is an abuse of the process of the court, which will have the effect of stopping the prosecution already commenced. A prerogative order is an order of a serious nature and cannot and should not be granted lightly. There should be concrete grounds for supposing that continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest could be best served by the staying of the prosecution”
64. The applicant has not demonstrated that the decision of the 1st and 3rd respondents is illegal, unfair and irrational. This is the threshold and as the applicant has failed to demonstrate as aforesaid, this application is therefore a nullity.
65. It’s their case that the Exparte applicant has not demonstrated how the 1st and 3rd respondents have abused the court process by charging him in Criminal Case No. E108 of 2022 thus making the decision illegal, unfair and irrational.
66. In their submissions, the applicants submits that there is an existing civil suit instituted in the Milimani Law Courts as ELC No 152 of 2018 *Cirtex Kenya Limited vs Peter David Leparakwo & 3 others* litigating on ownership of the parcel of Land Reference number 24968/2, Inland Register Number 179264 situated along Karen Plains.



67. The subject of the criminal case Milimani CMCC No E341 of 2023 is on procuring of registration by false pretenses and forgery and uttering of documents. It is therefore, lawful for both civil and criminal proceedings to run concurrently under Section 193A of the Criminal Procedure Code which provides; '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.

The 2nd, 3rd and 4th Respondents' case;

68. In opposing the Application, they rely on the Replying affidavit of corporal Nicolaus Osuri Otieno the investigating officer relating to the subject matter.

69. The charging and prosecution or withdrawal of cases in court are within the Constitutional mandate of the 1st Respondent under Article 157(4), (6), (7), (8), (9), (10) and (11) of *the Constitution* of Kenya, 2010 based on thorough investigation carried out by the 3rd Respondent under Article 244 of *the Constitution* of Kenya, 2010 and Section 35 of the *National Police Service Act* No.11A of 2011 and fair administration of justice herein is supposed to be observed by the 2nd Respondent which is a Court of competent jurisdiction.

70. It is their case that on 6th November, 2018 Fredrick Kimemia reported to DCI Headquarters vide DCI Complaints referral form ref. CID/C/GEN/COMP/6/11/2018/1043 on behalf of Cirtex Kenya Limited that in early 2018, a Mr. Peter David Leparakwo came up with another Title bearing I.R. No.152577 claiming ownership of the subject parcel of land LR. No.24968/2 IR. No.179264 which he stated Peter David Leparakwo had been fenced off hence sought for police investigations into the source of Peter David Leparakwo's Title document.

71. Thereafter, on 8th November, 2018, Peter David Leparakwo also made a report claiming to be the registered owner of land parcel LR. No.24968/2 I.R. No.152577 situated within Karen Area and indicated that he was in possession of the original documents of Title for the same parcel of land.

72. He also indicated that Fredrick Kimemia Kimani had on 19th April, 2018 procured Title documents reference I.R. No.179264 claiming the same suit land and sought for investigations by DCI into the circumstances under which Fredrick Kimemia Kimani obtained such Title documents.

73. Both Peter David Leparakwo and Fredrick Kimemia Kimani were arrested on 14th May, 2023 by the 1st Respondent and arraigned before the 3rd Respondent.

74. According to the Registrar of Companies records the Cirtex Kenya Limited was registered on 28th October, 1987 under Certificate of registration No.C.35825 with its Directors being Jamal Virjee and Naseem Azim Virjee who transferred their Directorship and shares to Ahmed Hasham Lalji and his brother Diamond Hasham Lalji in late 1980's.

75. Mr. Diamond Hasham Lalji on 1st September, 2020 recorded a statement with the 3rd Respondent herein stating clearly that he does not know the petitioner who has also not been their employee as a Managing Director as alleged and disowning all they records presented to the 3rd Respondent by the petitioner in his statement including their Company claiming ownership of the suit property or filing the ELC Civil suit No.152 of 2018 or instructing any Advocates or filing any complaint with any institution.

76. The Registrar of Companies noted in the response to the 3rd Respondent letter dated 14th August, 2020 that the information was provided by the Secretaries on record for the Company Deena Chhaniyara of Equatorial Secretaries & Registrars. The reason being that the Registrar of Companies' file has been



missing and which the 3rd Respondent believe was stolen or destroyed by the Exparte Applicant herein to enable him and his accomplices facilitate fraud.

77. They argue that it is true that after the Investigating Officer refused to compromise his investigation in favour of the Ex-parte Applicant and or another fraudulent claimant namely Peter David Leparakwo on offers of a sum of Kshs.150million and Kshs.200million respectively, he was transferred to East Pokot in Baringo County and investigation vide DCI Headquarters Inquiry File No.2 of 2023 has been opened in respect to the missing Original Provisional Certificate of Lease.
78. The Exparte Applicant's the alleged reports are further wide Conspiracy to defraud National Hospital Insurance Fund (NHIF) of its property Registered and Title known as Land Reference No.24968/2 IR. No.87345/1 on purchase for value and subsequent transfer from Kaskazi Traders Limited at Kshs.93,712,675.
79. The Exparte Applicant, this is a person who has mastered the art of undue influence in a corrupt manner in effort to defraud NHIF of its property in disregard to High Court order dated 27th July, 2016 issued in the High Court of Kenya at Nairobi in ELC Case No.691 of 2011 by Lady Justice Gacheru in favour of NHIF (now consolidated with ELC No.152 of 2018 in which he is the Applicant/Plaintiff).
80. The Applicant was arrested at 3.44pm at Capital Center along Mombasa Road and he was escorted to Muthaiga Police Station where his family and Advocates were allowed to see and represent him all through as provided for under Article 49 of *the Constitution* of Kenya, 2010.
81. It is their case as set out in the Application dated 22nd August, 2007 by former Commissioner of Lands Mr. Zablon Mabea in the Ministry of lands to Hon. Attorney General that the suit property is duly registered in favour of NHIF and not any individual or Company.
82. The Ex-parte Applicant has been working with cahoots from the same Ministry of Lands like the former Chief Land Registrar Mrs. Sarah Mwenda the author of a letter ref. CLR/A/39/VOL.XVIII/58 dated 15th December, 2014 to facilitate the fraudulent registration by the Exparte Applicant in order to defraud NHIF of its suit property. The letter reference in itself contradicts the body in that by indicating the LR. No.24968/2 shows that the land is already surveyed and given the said number which originated from the Commissioner of Lands office upon receipt of Deed Plan No.230580 and its ident.
83. The said Mrs. Sarah Mwenda is also amongst those to be charged and prosecuted alongside the Exparte Applicant were it not for the stay orders issued by this Honourable Court.
84. The Ministry of Lands has further clarified to the 3rd Respondent through a self-explanatory letter ref. 237838/16 dated 21st August, 2021 from the Director, Land Administration Mr. Gordon Ochieng in respect of the Title IR. No.179264LR. No.24968/2 purportedly held by Fredrick Kimemia Kimani fraudulently through Cirtex Kenya Limited on the suit property as follows; -
 - a. That the letter of Allotment ref.33044/V dated 1st August, 2000 that formed the basis of opening of the file is a photocopy yet it was not certified as true copy as is practice before opening of a plot file.
 - b. The payment receipt No.2475972 dated 23rd September, 2011 is equally a photocopy yet in practice, the triplicate copy of the official receipt (carbon copy) is what is retained in the file.
 - c. There is no indication as how the Deed Plan was processed as there are no records of the same in the file.



- d. There is no audit trail of how the lease documents was generated and registered. Ordinary such information would be found in the file.
 - e. The file section of the Ministry of Lands and Physical Planning has produced copy of the file opening card to confirm that file No.237838 was opened for a file in Nanyuki in favour of one C. G. Maina.
 - f. Finally, that the upshot of all these is that the lease document that is purported to have been generated from file number 237838 cannot stand as it does not have the requisite documents that would support its existence.
85. The 3rd Respondent is aware of the records Deed Plan No.230580 was allocated against the first letter of allotment issued to Kaskazi Traders Limited by the Director of Surveys against ident No.CR229/25/70 on 15th June, 2000 as per certified copy of Deed Plan following a re-survey by John Dominic Obel, a licensed surveyor on instructions of the first allottee Kaskazi Traders Limited when the Director of surveys gave the parcel a new LR. No.24968 from the initial LR. No.13782.
 86. Hon. Sammy Silas Komen Mwaita has also confirmed having registered and issued Grant Title LR. No.24968/2 IR. No.87345 to Kaskazi Traders Limited upon authorizing a subdivision allocating Karen Plains Residents Association 2.096 Ha and leaving Kaskazi Traders Limited with 9.250Ha as per the certified copy of subdivision records availed to the 3rd Respondent by the Director of Surveys.
 87. This has been confirmed by the former Commissioner of Lands, Hon. Sammy Silas Komen Mwaita and former Director of Physical Planning Mr. Renson Kakucha Mbwagwa in the statements with the 3rd Respondent.
 88. Hence the subject parcel of land was not available for allocation anyone else including the Exparte Applicant whether applied directly as a person or through his fraudulent means claiming to be a director of Cirtex Kenya Limited.
 89. The sale and purchase of the Land Reference No.24968/2 IR. No.87345/1 between Kaskazi Traders Limited and National Hospital Insurance Fund is confirmed by among many others Mr. Joshua Chelelo Kulei, Mr. William Kipchumba Sambu, Mr. Ibrahim Mude Hussein and Mr. Stephen Kipkenda Kiplagat respectively in their statements with the 3rd Respondent.
 90. The alleged malpractice averred to in paragraph 18 of conspiracy to defraud among others is subject to investigation vide DCI Headquarters Inquiry file No.2 of 2023.
 91. It is their case that the investigation herein have been conducted within the tenets of *the Constitution* and statutory law and in strict compliance with the functions of the National Police Service under the *National Police Service Act* No.11A of 2011.
 92. Section 35 therefore provides for the functions of the Directorate of Criminal Investigations which are interalia: -
 - i. Undertake investigations on serious crimes
 - ii. Conduct forensic analysis
 - iii. Apprehend offenders
 93. In conclusion it is their case that the application is made mala fides as the same should have been made in the already ongoing civil suit.



Analysis and determination:

94. From the application, statutory statement, the verifying and the supplementary affidavit, the grounds of opposition, the rival submissions the issue that crystalizes for determination is whether or not the applicant is entitled to the prayers sought.
95. In order to determine whether or not the applicant has made out a case he must demonstrate and prove that the prosecution and those charged with the responsibility of making the decisions to charge acted in an unreasonable manner.
96. Judicial review jurisdiction, was discussed in the Ugandan case of *Pastoli vs 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).”

97. 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.
98. Article 165(6) of *the Constitution* 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. The consideration and determination of the substantive issues raised in this instant application now follows.
99. 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.



100. The merits question around the likelihood of success, or whether or not the Applicant has a good defence is not a ground for halting criminal proceedings by way of judicial review, in light of the purpose and limits of judicial review explained in the foregoing.
101. 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.
102. 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; and (h) Where the decision-maker is irrational and unreasonable.
103. The concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court as recognised 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.
104. In order to determine the issue, this court is guided by Section 35 of the [National Police Service Act](#) which 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.”
105. These principles have been restated in various judicial decisions. The role of the different players in the criminal process was recognized *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”.
106. The Applicant has failed and I so hold to prove that the Director of Public Prosecutions has abused discretion or exercised his discretion for an improper purpose; or acted in a manner that amounted to a



breach of the duty to act fairly; the Respondents have failed to exercise statutory discretion reasonably; or that the Respondents acted in a manner to frustrate the purpose of the Act donating the power, have fettered the discretion given or failed to exercise discretion; or that the Respondent has acted irrational and unreasonable.

107. It is not in dispute that there is an active suit being there is an existing civil suit instituted in the Milimani Law Courts as ELC No.152 of 2018 Cirtex Kenya Limited vs Peter David Leparakwo & 3 others pending hearing and determination. However, the fact that there exists a civil suit is not a bar to any criminal proceedings or investigations.
108. Section 193A of the Criminal Procedure Code on this issue 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.”
109. The Applicant has not proven that the investigations are actuated by malice and/or bad faith. All the Respondents are doing is within the law.
110. The investigating officer has demonstrated how he is conducting the investigations in a clear and transparent manner by contacting the relevant offices like the registrar of companies.
111. This court does not see any malice in the manner in which the Respondents are discharging their respective mandates. The Applicant has not proven that the Respondents acted ultra vires or illegality or through procedural impropriety. The court does not see any ill intentions on the part of the Respondents. The power to investigate and prosecute crime is an important component of the criminal justice system.
112. The police are under a duty under the National Police Act, to investigate crimes whenever they reported while the Office of the director of prosecutions is supposed to prosecute. That is exactly what is going on in this suit.
113. It is not the duty of this court to decide who should or should not be investigated, charged or prosecuted and I so hold. The discretion to charge rests with the Office of the director of prosecutions and I do not find any justification as to why I should grant the orders sought in prayer A. The Applicant will have his day in court in Milimani Chief Magistrate’s Criminal Case No. E341 of 2023 Republic vs Fredrick Kimemia Kimani& Anor.
114. The Applicant has also sought orders of prohibition in prayers B, C and D of the Application.
115. 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."

116. It is my finding and I hold that the issuance of prohibition orders as sought will serve no useful purpose given that this court has already made a finding that the applicant did not prove the 1st prayer, and I so hold. Prayers B, C and D are declined.

Disposition:

117. The application is premature and misconceived and the petitioner has failed to prove his case.

Order:

118. The Notice of Motion dated 30th May, 2023 is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF APRIL 2024

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J. CHIGITI (SC)

JUDGE

