Republic v Inspector General of Police & 3 others; Ahsa Limited & 4 others (Interested Parties); Korir & another (Exparte Applicants) (Judicial Review Miscellaneous Application E112 of 2023) [2024] KEHC 3270 (KLR) (3 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3270 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E112 OF 2023

JM CHIGITI, J

APRIL 3, 2024

BETWEEN

REPUBLIC .... APPLICANT

AND

INSPECTOR GENERAL OF POLICE .... 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION .... 2ND RESPONDENT

THE ATTORNEY GENERAL .... 3RD RESPONDENT

THE CHIEF MAGISTRATE'S COURT, CRIMINAL NAIROBI .... 4TH RESPONDENT

AND

AHSA LIMITED .... INTERESTED PARTY

SAID ABDULLAHI SHEIKH .... INTERESTED PARTY

OMAR HASSAN MUHINDI .... INTERESTED PARTY

HALIMA ISMAIL .... INTERESTED PARTY

RUGUTT KIPLANGAT .... INTERESTED PARTY

AND

ELIUS KEMBOI KORIR .... EXPARTE APPLICANT

WOMEN AND YOUTH AGAINST AIDS AND POVERTY .... EXPARTE APPLICANT

JUDGMENT

1. The application before this court for determination is dated 14th July 2022 wherein the Applicants are specifically seeking the following orders:

    i. An Order of Certiorari directed to the 1st, 2nd, 3rd and 4th Respondents to quash the charges, charge sheet dated 17 10.2023 in respect of MCCR E 862 of2023 Republic versus Elius Kemboi;

    ii. An Order of Prohibition directed at the 1st, 2nd, 3rdand 4th Respondents and interested parties from interfering with the civil proceedings of Civil Case No. 2874 of 2023, Women and Youth against Aids and Poverty versus Halima Ismail, Rugutt Kiplangat, by use of criminal proceedings to harass, intimidate and imprison the ex parte Applicants.

    iii. An Order of prohibition directed at the 1st, 2nd, 3rdand 4th Respondents and interested parties from interfering with the ex parte Applicant's lawful private businesses;

    iv. An Order to restrain the 1st and 2nd Respondents from acting or continuing to take further administrative action against the ex parte Applicants with an aim of frustrating his business;

    v. An Order directing the 1st and 2nd Respondents compelling them to undertake public duty owed in law and in respect of which the ex parte Applicants has a legally enforceable right and legitimate expectation.

    vi. The costs of the Application.

A. FACTUAL BACKGROUND

2. The 1st ex-parte applicant herein filed the instant Judicial review application seeking for an order of Certiorari to quash the charges together with charge sheet dated 17th October,2023 and the resulting criminal proceedings of Cr. no. E862 of 2023 in Republic -vs- Elius Kemboi Korir against the 1st Ex-parte applicant.

3. In response to the judicial review application, the 1st and 2ndRespondent filed their replying Affidavit dated on 14thNovember, 2023, sworn by CPL Geoffrey Mwangi, the 1st Interested Party filed its replying affidavit dated 1st December,2023 together with their ground of opposition, in opposition of the Judicial review application. The 1st ex-parte applicant later filed a Further Affidavit dated 4th December,2023 in response.

1ST & 2ND EX-PARTE case

4. The 1st Ex-parte Applicant is the Chief executive officer of the 2nd Exparte applicant. The Ex-parte applicants operate offices in lsiolo and Nairobi and have employed various persons to help in the day to day running of its affairs to enable it achieve its goal of extending assistance to the needy.

5. The 4th and 5th interested parties being such persons appointed/employed to do such work for the 2nd Exparte applicant. The two interested parties engaged the 1,2,3 interested parties into various transactions on their own accord without involving the 2nd Ex-parte applicant or seeking its approval on whatever they were doing.

6. When various demands were issued against the 1st and 2nd Ex-parte applicants the 2nd Ex-parte applicant instituted investigations and audit into its affairs to understand what has been ongoing, and upon making its findings it issued demands, instituted a civil suit against the interested parties for breach of contract.

7. Upon service of the court documents the 1st interested party communicated to the police who summoned the ex-parte applicant to appear at the station for arraignment in court for purposes of taking plea.

8. Being aggrieved the Ex-parte Applicant instituted a Judicial Review Application on the 19/10/2023 against the 1st & 2nd Respondents having made a decision to charge him vide CR. No. E 862 OF 2023; R vs Korir Elius Kemboi, which has been consolidated with E804 of 2023 in the Nairobi criminal court (milimani) for an offence of obtaining money by false pretence contrary to section 213 of the penal code, conspiracy to defraud contrary to section 317 of the penal code well knowing that the ex-parte applicant's employees on their own volition misused their official positions and entered into contractual obligation/ business they had with the interested party and on the interested party's own breach of contract led to the filing of a civil suit no. 2874 of 2023 by the 2nd Ex-parte applicant.

9. It is the Exparte Applicant case that Article 27 of *the Constitution* 2010 provides "that every person is equal before the law and has the right to equal protection and equal benefit of the law" Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

10. They argue that the 1st & 2nd Respondents have a duty to play enshrined upon them in *the constitution* and should not be directed on how to carry out their work.

11. This according to them means that they ought to consider the Ex-parte applicant's position/ evidence before making any decisions to prosecute him since he enjoys a right to equal protection of the law.

12. Article 47 of *the Constitution* provides for the right to a fair Administrative Action enshrined in the *Fair Administrative Action Act* No. 4 of 2015. Section 2 of the act defines an "administrative action" to include: - 'the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

13. The right to access justice is guaranteed under Articles 48 of *the Constitution*, the right to enforcement of the Bill of Rights is guaranteed under Article 22, and the authority of the court to uphold and enforce the Bill of Rights is provided under Article 23, of *the Constitution* 2010.

14. The Ex-parte applicant is a charitable non-governmental organization whose business and rights have to be protected under the law.

15. The criminal conduct of employees cannot be visited upon the institution but the employees themselves since the criminal law applies in personnam.

16. Reliance is placed in the case of Bennet vs Horseferry Magistrates Court & another. {1993} All E.R 138, 151, House of Lords where the court confirmed that an abuse of process justifying the stay of a prosecution could arise in the following circumstances: -

    i. Where it would be impossible to give the accused a fair trial; or;

    ii. Where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.

17. It is the ex-parte applicants case that they will not be given a fair trial and the criminal justice system is being misused so as to manipulate them.

18. They argue that since there is a civil suit for breach of contract, fraud to recover monies lost in the transaction for payments made for goods not delivered to them as an institution then it amounts to an abuse of court to use the same questioned or/ disputed transaction in the civil matter.

19. Reliance is placed in Chris Corns Chris Corns, Judicial Termination of Defective Criminal Prosecutions: Stay Applications, 76 University of Tasmania Law Review, Vol 16 No. 1, 1977, argues that the grounds upon which a stay will be granted have been variously expressed in the cases. These grounds can be classified under three categories: -

    i. When the continuation of the proceedings would constitute an 'abuse of process,'

    ii. When any resultant trial would be 'unfair' to the accused, and

    iii. When the continuation of the proceedings would tend to undermine the integrity of the criminal justice system.

20. Criminal proceedings commenced to advance other gains other than promotion of public good are vexatious and ought not to be allowed to stand. The word "vexatious" means "harassment by the process of law," "lacking justification" or with "intention to harass." It signifies an action not having sufficient grounds, and which therefore, only seeks to annoy the adversary. The hallmark of a vexatious proceeding is that it has no basis in law (or at least no discernible basis); and that whatever the intention of the proceeding may be, its only effect is to subject the other party to inconvenience, harassment and expense, which is so great, that it is disproportionate to any gain likely to accrue to the claimant; and that it involves an abuse of process of the court.

21. The applicants believe that the criminal proceedings instituted under CR. No. E862 of 2023 and now consolidated with E804 of 2023 are not short of those commenced for other gains such as to inconvenience, harass and subject the ex-parte applicants to unnecessary expenses.

22. In Republic v Attorney General ex parte Arap Ngeny the prosecution High Court Civil application number 406 of 2001 Held that 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.

23. The 1st ex-parte applicant is being charged of obtaining through false pretense contrary to section 313 of the Penal code as reproduced below:

    'Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years'.

24. The following essential elements of the offence of obtaining through false pretenses are discernible: - that the person;

    a. Obtained something capable of being stolen;

    b. Obtained it through a false pretense; and

    c. With the intention to defraud.

    d. The act has to happen immediately and not future.

25. From the evidence, there is no doubt there is an allegation that goods were received by the 2nd Ex-parte applicants but the applicants state that the goods were not taken by them and their audit reveals that those goods were not utilized by them. However, their employees might have used their official positions to process the goods and took them which is something capable of being stolen under the law. But it is not the taking of goods that constitutes the offence, but rather that it was taken with the intention to defraud. The fraud is found in the false pretense". What is false pretense? It is defined in section 312 of the Penal code as below:

'Any representation, made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence'.

26. Let us un-pack the above definition of false pretence further. There must be:

a. A representation of fact by word, writing or conduct;

b. The representation is either past or present;

c. The representation must be false; and

d. The person made the representation knowing it to be false or did not believe it to be true.

27. The offence of obtaining does not relate to future events. 'The particulars of the offence in the charge sheet refer to the future event'…'The section itself proclaims that the representation should be of either a past or present fact, not future fact. Case law as well posits the same position. See the celebrated dictum of Bowen, L.J.expressed in; The case of EDGINGTON v FITZMAURICE that:

" There must be a misstatement of an existing fact…"

28. Further illumination on what constitutes an existing fact is drawn from the words of Devlin, J. R v DENT 1955 2 Q.B. pp 594/5 that:

" …a long course of authorities in criminal cases has laid down that a statement of intention about future conduct, whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence in criminal law".

29. Section 313 of the Penal Code codified the position in the above cases; the representation of fact must be either past or present, and not future.

30. The Ex-parte applicant's never made any requisition and contracts with the interested party and it explains why it went to court to seek redress.

31. The 2nd Ex-parte applicant disputed the supply when invoices were given to them for payment because they did not authorize any purchase and stocking of goods thus undertook an audit to allow it understand how its employees have been conducting business.

32. It filed a civil suit No.2874 of 2023 against its former employees and the interested parties over those same transaction giving rise to the criminal proceedings since it had already made payments to some suppliers.

33. A Non-Government Organization by virtual of Section 12 (3a) of the Non-Governmental Organization Coordination Act is a legal institution that can sue and be sued and the deliberate prosecution of the chief executive officer or the 1st Ex-parte applicant herein was unfair administrative decision by the 1st and 2nd Respondents.

34. Having considered the particulars of offence as stated in the charge sheet, the applicants argue that the law of obtaining through false pretence does not apply to future and it is not possible to enter into a contract for future performance and allege being obtained, it can only be a civil claim under breach of contracts.

35. The High Court has the powers to quash proceedings if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the Court or that the ends of justice require that the proceedings ought to be quashed. Reliance is placed in the case of Republic v Inspector General of Police & 4 Others ex parte John Lopez Lutuka Kibwenge & Another {2018} e KLR.

36. Based on the foregoing, the Ex- parte applicants have demonstrated that the prosecution is brought in absence of factual basis to accord him unfair trial, that would amount to misuse/manipulation of the criminal justice process which offends the Court's sense of justice.

Whether the 1st interested party is using the 1st and 2nd Respondents to solve individual business differences with the ex-parte applicants and the 4th interested party?

37. The 1st Ex-parte applicant argues that in his personal capacity and also as the Chief Executive officer of the 2nd Ex-parte applicant has always done tremendous charity work and could not be managing an NGO that is defrauding members of the society for purposes of distributing free commodities to poor people in society living with HIV AIDS.

38. The Exparte applicant even moved court on the civil suit. The 1st interested party has decided to use the 1st and 2nd Respondents to harass and subject the them to unfair trials to scare him from advancing his civil suit the applicants to force payments to be made to them. It is in that situation of duress, coercion that the ex-parte applicants wrote a letter to the 1st interested party proposing payments to them once the internal audit is concluded. The 1st Ex-parte applicant has filed various suits against the interested party such as Civil suit no. 2874 of 2023 and E716 of 2023.

39. The dispute in that matter is concerning various supplies that are alleged to have been supplied but not delivered, invoices to the 2nd Ex-parte applicant for goods not supplied and internal dealings of employees of the 2nd Ex-parte applicant from where it can be seen that there is no doubt that the 1st interested party instigated criminal charges so that he keeps the ex-parte applicant in fear, of prison since it had become the norm of the 1st Respondent to always summon the ex-parte applicant on Friday evening and detain him over the weekend over civil/ contractual obligations he had with the interested party deeming them criminal in nature.

40. In R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001: it was Held that:

> "Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Director of Public Prosecution must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper

case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case…A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence…In deciding whether to commence or pursue criminal prosecution the DPP must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds."

41. The applicants are convinced that the 1st interested party is using the 1st and 2nd Respondents to settle his civil debts he holds with the ex-parte applicant.

Whether the chief executive officer of a Non-Governmental Organization is responsible for the civil/ criminal liability of the Non-Governmental Organization?

42. Section 12 (3) of the Non-Governmental Organization Coordination Act provides that: -

A registered Non-Governmental Organization shall by virtue of such registration be a body corporate with perpetual succession capable in its name of—

(a)suing and being sued;

43. The criminal proceedings against the 1st Ex-Parte applicant are hell bent to harass him, unfair and unfair decision made by the 1st and 2nd Respondents to charge the executive officer in his personal capacity for the offence they allege were committed by the 2nd Ex-parte applicant and the charge sheet in CR no. E862 OF 2023, consolidated together with CR Case No. E804 OF 2023 should be quashed for lack of substance and locus on the right party being prosecuted.

44. It is the Ex-parte Applicants submission that the costs follow the suit and the 1st interested Party and 1st & 2nd Respondents should pay Costs for having led to all these deceitful eventualities which have led the 1st and 2nd Respondents to arrest, imprison and attempt to prosecute the 1st Ex-parte applicant.

<u>THE 1ST AND 2ND RESPONDENTS' CASE:</u>

45. The 1st and 2nd Respondents have opposed the Application via a Replying Affidavit dated 14th November 2023 sworn by No. 75579 Cpl Geoffrey Mwangi.

46. The 1st Respondent is empowered by Article 157 (6) of *the Constitution* to institute, undertake, and takeover prosecutions of all criminal proceedings. The same Constitution under Article 157(10) precludes the Director of Public Prosecutions from requiring the consent of any person or authority to commence criminal proceedings and reiterates that the Director shall not be under the direction or control of any person or authority.

47. The discretionary prosecutorial powers donated to the 1st Respondent are subject to key considerations to wit: "the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process."

48. The independence of the 1st Respondent in the discharge of investigation duties is also safeguarded by Article 245 94) (a) of *the Constitution* of Kenya, 2010. Therefore, no person may give a direction to the 1st Respondent in respect to criminal investigations.

49. Reliance is placed in the case of Republic v Director of Public Prosecutions & 2 others ex parte Edwin Harold Dayan Dande & 3 others, observed as follows:

> "A reading of Article 157 of *the Constitution* leaves no doubt that the DPP is required to not only act independently, but to remain fiercely so. It is also important to mention that article 245(4)(a) of *the Constitution* provides that: 'no person may give a direction to the Inspector General with respect to the investigation of any offence or offences.' Just like the constitutionally guaranteed independence of the DPP, this provision is aimed at ensuring that investigations are undertaken independently."

50. It is their submission that the decision whether or not to prosecute is the most important step in the prosecution process. In every case great care is taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made.

51. The 2nd Respondent is aware that a wrong decision to prosecute or, conversely, a wrong decision not to prosecute, tends to undermine the confidence of the community in the criminal justice system.

52. Section 193(A) of the Criminal Procedure Code Chapter 75 Laws of Kenya 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 civil proceedings shall not be a ground for any stay, prohibition or delay in criminal cases.

53. Reliance is placed in Republic v Director of Public Prosecution & 2 others Ex-parte Francis Njakwe Maina & another [2015] eKLR, where the learned Justice G.V. Odunga observed that:

> "the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court 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 recognised aim."

54. They submit that in the instant case, the Applicants have not provided any material evidence to demonstrate that MCCR E862 of 2023, Republic versus Elius Kemboi Korir has been instituted for an ulterior purpose.

55. Neither have they provided any evidence that the criminal proceedings were instituted to compel the settlement of the civil suits.

56. The Applicants have not demonstrated that the Respondents acted ultra vires in instituting the criminal proceeding.

57. Instead, they are itemizing the possible defences that they have against the case instituted.

58. In the absence of any evidence of abuse of the court process, the proper forum to address any defence by the Applicants is the trial court.

59. In the Francis Njakwe case (Supra) the court further observed that;

> "That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by Court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings."

Furthermore, in Meixner & Another v The Attorney General [2005] 1 KLR 189 the court held that;

> " The accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in the support of the charges."

60. Section 24 of the *National Police Service Act* mandates the police to investigate any complaint brought to their attention.

61. In the instant case the police rightly performed their statutory and constitutional function in commencing investigations into the complaint lodged.

62. The Ex parte Applicant has failed to prove that the 1st and 2nd Respondents acted ultravires in the discharge of his duties including the institution of criminal charges against the ex Parte Applicant.

63. A court sitting on judicial review is only concerned with the process leading to the making of the decision and the court should not go into the merits of the decision itself.

64. This position was affirmed by the Supreme Court in Dande & 3 others v Inspector General, National PoliceService & 5 others (Petition 6 (E007), 4 (E005) & 8(E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16June 2023) (Judgment) where the court observed that:

> " If a party filed a suit under the provisions of Order 53 of the Civil Procedure Rules and did not claim any violation of rights or even violation of *the Constitution*, then the court could only limit itself to the process and manner in which the decision complained of was reached or action taken and not the merits of the decision per se."

65. The Applicants have not demonstrated with sufficiency the manner in which the 1st and 2nd Respondents have infringed their rights and fundamental freedoms to warrant a merit review of the 1st and 2nd decision to investigate and institute criminal proceedings against them.

66. In the case of Municipal Council of Mombasa v Republic, Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2007(2002) eKLR, the Court of Appeal held that:

> " 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 make 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 they 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 this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review".

67. In response to the prayer for orders for prohibition, reliance is placed in the case of Kenya National Examinations Council vs. Republic Exparte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996 inter alia as follows as regards the nature of the order of prohibition:

> " 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…"

68. The order of prohibition is untenable in the instant case as the 2nd Respondent has already made a decision to institute criminal proceedings against the Applicant. Moreover, the DPP in making the said decision acted within his constitutional mandate.

69. The Ex parte Applicant has failed to demonstrate that the Respondents actions were ultra vires. Article 157 of *the Constitution* of Kenya 2010 empowers the 2nd Respondent to exercise authority in the discharge of prosecutorial functions, which include the decision to institute and undertake criminal proceedings in all courts in Kenya other than the court martial.

70. In the Ugandan case of Pastoli v Kabale District Local Government Council & Others, (2008) 2 EA 300 at pages 303 to 304 thus:

"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;

Further, in Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR), it was decided that:

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:

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)."

71. The Applicants are seeking a writ of mandamus to compel the 1st and 2nd Respondents to do their public duty owed in law and in respect of which the ex-parte applicants have a legally enforceable right and a legitimate expectation.

72. In Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543 where Goudie, J expressed himself, inter alia, as follows:

> " Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature.
>
> Since the exercise of prosecutorial powers to institute criminal proceedings is not imperative, the writ of mandamus cannot be issued against the 2nd Respondent to compel him to institute criminal proceedings against any person.
>
> Moreover, the writ of mandamus is to be granted only in instances where there is no other appropriate remedy. In the instant case, the Applicants have not demonstrated the purpose for which the writ of mandamus should be granted."

1st Interested Party's Case

73. It is its case that the court ought to establish if it was available for the interested party to complain over the refusal to pay for the goods supplied to the interested party.

74. It is very clear from the 1st interested party affidavit that some irregularities were occasioned by the 1st Ex-parte applicant and it the duty of the 1st and 2nd Respondent to unearth the rot of this well-orchestrated scheme ran by the 1st Ex-parte applicant to defraud the 1st interested party.

75. The decision to lodge a complaint, was occasioned by the fact that the conduct of the 1st ex-parte party constituted fraudulent and it is a very clear rule and cast in stone, that a body corporate cannot stand a criminal trial as criminal liability is in-person.

76. The 1st to 3rd Respondent are both constitutionally mandated to conduct any criminal investigations on a mere suspicion that the conduct of any party prefers a criminal conduct.

77. The investigations by the 1st and 2ndRespondent cannot be stopped when there is an apparent illegality being committed by an individual who may want to hide under/behind the guise and cover of the courts orders as cover-up on the facts of the commissions and omissions.

78. The interested party was right in lodging a complaint/ report at the 1st and 2nd Respondent with a view of establishing whether or not crime had been perpetuated by the ex-parte applicant and if it occurred that indeed crime had been committed, then criminal justice system installations were to come into play and have the said criminal acts processed with an end game of sustaining a conviction.

79. The 1st and 2nd Respondent principal duty is mapped out and it include but not limited to collections of and provision of criminal intelligence, undertaking investigations on serious crimes including but not limited the crime at hand.

80. The Ex-parte applicant is asking the court to do is to interfere with the independence of the institution.

81. The entire Ex-parte application, the affidavit in support and the further affidavit, nothings speaks to the illegality, irregular and irrational decision by the 1st and 2nd Respondent.

82. The Ex-parte applicant, is arguing about the merit/demerits and locus of the case. The ex-parte applicant, should have presented evidence that the Respondents have over stretched what the law has

donated to them, that is when the intervention of the court could have been invited to assist in issuance of the orders that the excesses are stopped.

83. The ex parte applicant decided, to argue the decision and the charge preferred against him and not the legality of the decision or whether the right process was followed in reaching at the decision to charge as held by Justice A.K Ndungu in Republic v Public Procurement Administrative Review Board & another Ex parte Intertek Testing Services(EA) Pty Limited & Authentic Inc; Accounting Officer, Energy and Petroleum Regulatory Authority & another [2022] eKLR as the court quoted the decision in Republic v Public Procurement Administrative Review Board & 2 Others Ex Parte Rongo University [2018] eKLR,, as it was held ‘’

> “the grant of orders of certiorari, mandamus and prohibition is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought. In our instant suit, am persuaded that grant of the orders sought would not be efficacious and more importantly, would go contrary to the principles enshrined in Article 227 of *the constitution* on public procurement of goods and services.”

84. The present application as drawn is trivial, frothy and paltry which does not meet the basis minimums of issuance of any order. Reliance is placed in Republic v Law Society of Kenya Disciplinary Tribunal & another Ex Parte Muema Kitulu [2018] eKLR, the court relied in Pastoli v Kabele District Local Government and & others (2008) EA, at 300-304, the court held 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”

85. It is the spirit of *the constitution*, that unfairness is/may be in non-observance of the rules of natural justice to act with procedural fairness towards one of the affected by the decision it may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislature intermittent by which such authority exercises the jurisdiction to make a decision.

86. In Civil Appeal no. 266 of 1996, In Kenya National Examination Council -vs- Republic: ex-parte Geoffrey Gathenji & 9 others, the court in its final remarks stated that:

> “That now it brings us to the question we started with; namely the efficacy and scope of Mandamus, prohibition and certiorari. Those remedies are only remedies available against public bodies such as the council in the case. What does an order of prohibition do and when will it issue? It is an order of the High Court directed on an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein excess of its jurisdiction or absence of it but also for a deprive 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”

87. The ex-parte applicant can continue its civil claim as it alleges that it emanates from the same subject matter. It is trite law that, existing of a civil proceeding emanating from the same subject matter is not a bar to institution and continuation of a criminal proceedings as it is the dictate of Section 193 of the Criminal Procedure Code Cap 75 of laws of Kenya, as the same can ran parallel to each other and that neither can stand in the way of the other.

88. Section 193A of the Criminal Procedure Code, a civil suit is not a bar to criminal proceedings. In James Mutisya & 5 others v Alphayo Chimwanga Munala& 2 others [2021] eKLR where it was held as follows;

> " Firstly, that the fact that there exist civil proceedings emanating from the same subject matter is not a bar to institution and continuation of criminal proceedings. This is the dictate of Section 193 A of the Criminal Procedure Code (Cap 75) Laws of Kenya it provides thus:
>
> "Notwithstanding the provisions of any other written law the fact that any matter in issue in any criminal proceedings is also directly and substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings..."

89. As rightly submitted by the claimant's criminal and civil proceedings can run concurrently. We agree with the Holding of the court in the case of Alfred Lumiti Lusiba -vs- Pethad Pank Shantilal & 2 others[2010] eKLR . The conclusion from the foregoing is that one can draw from Section 193 A of the Civil Procedure Code together with the decisions of the learned Judges in the aforementioned cases is that both civil and criminal jurisdiction can run parallel to each other and that neither can stand in the way of the other, see in; Alfred Lumiti Lusiba vs Pethad PankShantilal & 2 others [2010] Eklr.

90. As, I jot down this submissions, I invite this court to Justice John Mativo J. while commenting on the above provision held as follows at paragraph 30 of his Judgement in Republic v Inspector General of the National Police Service & another Ex parte Beatrice Hilda Omunia; Peter Nganga Chege & 2 others (Interested Parties) [2019] eKLR,

> " 30. Even though it is not for this court to consider the defense of the accused persons, which is basically a function of the trial court, the core issue raised by the ex parte applicant is that the dispute is purely civil. Section 193A of the Criminal Procedure Code permits parallel civil and criminal proceedings, hence, even if there was a civil suit in court, the existence of a parallel civil case is not bar to criminal proceedings. [14] The offence being investigated is known to the law, hence, the cited provision. The conduct under investigation can attract a criminal sanction if proved."

Analysis and determination:

91. The issue for determination by this court is whether the applicant is entitled to the prayers sought. 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 a reasonable manner.

92. In order to apply my mind to 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."

93. In the case of Republic vs Commissioner of Police and Another ex parte Michael Monari & Another (2012) eKLR where it was held:

> " The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene".

94. There is an active suit that is pending hearing and determination. The fact that there exists a civil suit is not a bar to any criminal proceedings or investigations.

95. 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."

96. The Applicant has not proven that the investigations are actuated by malice and/or bad faith. All the investigator is doing is within the law. Section 9(2) (a) of the Victims Protection Act Provides that victims assist the courts to obtain a clear picture of what happened (to them) and how they suffered as a result of the offenders conduct or omission.

97. 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.

98. The victim of an offense lodged a complaint with the police who initiated investigations.

99. This court does not see any malice in the manner in which the investigations are being conducted. The investigating officer has tendered proof of how he is conducting the investigations in a clear and transparent manner by contacting the relevant offices like the registrar of companies.

100. The court does not see any ill intentions on the part of the respondents and 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.

101. The power to investigate crime is an important component of the criminal justice system. 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.

102. 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.

103. 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)."

104. 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.

105. 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.

> "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.
>
> 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 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.
>
> 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.

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.

106. 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 recognised aim.

107. These principles have been restated in various judicial decisions. The role of the different players in the criminal process was recognised 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”.

108. The Applicant has failed and I so hold to prove 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 or that 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.

The Applicant has also sought orders of prohibition.

109. 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."

110. It is my finding 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:

111. The Application lacks merit.

ORDER:

The Notice of Motion dated 14th July 2022 is dismissed with costs.

Dated, signed and delivered at Nairobi this 3rd Day of April 2024

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J. CHIGITI (SC)

JUDGE

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