



Republic v Director Of CID & 2 others; Kalungu (Exparte Applicant) (Judicial Review E006 of 2022) [2024] KEHC 5035 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5035 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
JUDICIAL REVIEW E006 OF 2022**

**RK LIMO, J
MAY 9, 2024**

IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE ACT

AND

**IN THE MATTER OF INFRINGEMENT OF CONSTITUTIONAL
RIGHTS UNDER ARTICLE 27, 28,29, 31, 47, 48, 50**

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

BETWEEN

REPUBLIC APPLICANT

AND

DIRECTOR OF CID 1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

**BONNY S. OKEMWA & THE DIRECTOR OF PUBLIC
PROSECUTIONS 3RD RESPONDENT**

AND

JOSEPH NYAMAI KALUNGU EXPARTE APPLICANT

JUDGMENT

1. This is Judicial Review matter brought by Joseph Nyamai Kalungu seeking to challenge any decision by the DCI, the Police and the Office of the Deputy Director of Public Prosecutions (DPP) from investigating, arresting and/or charging the applicant regarding an incident that occurred on 8th January, 2022 between him and one Mary Munyao reported to be a complainant in the incident.



2. The motion before this court is dated 13th October 2022 brought pursuant to the provisions of Order 53 Rule 3 of the Civil Procedure Rules, the Law Reform Act and the Judicature Act. He seeks the following reliefs/orders:
 - i. That an order of Certiorari do issue to bring into this Honorable Court and quash the decision by the respondents of investigating, arresting, charging and/or prosecuting the applicant in relation to assault arising from an incident which occurred on the 8th January 2022 between one Mary Munyao (alleged complainant) and the applicant.
 - ii. That an order of Prohibition do issue against the respondents prohibiting them from investigating, arresting, charging and/or prosecuting the applicant in relation to assault arising from an accident which occurred on the 8th January 2022 between one Mary Munyao (alleged complainant) and the applicant.
 - iii. That an order of declaration do issue that the decision by the Respondents of investigating, arresting, charging and/or prosecuting the applicant in relation to assault arising from an incident which occurred on the 8th January 2022 between one Mary Munyao (alleged complainant) and the applicant is unlawful, unfair tainted with malafide, conducted in bad faith and the procedures used are bias against the applicant.
3. The motion is supported by the grounds set out in the face of the application and the supporting affidavit of Joseph Nyamai Kalungu on 13th October, 2022. The same is summarized as hereunder;
 - a. That the applicant's constitutional rights are being violated in that his wife, himself and his servant recorded statements as witnesses at Thua Police Post on the directive of the County Director of Public Prosecutions, Kitui without cautionary statements whatever they may say may be used against any one of them and now the respondents wants to use these statements against the ex-parte applicant.
 - b. The said witness statements were obtained in a manner tainted with procedural impropriety, trickery and borders on luring the applicant to give self-incriminating evidence contrary to the guaranteed freedom and rights as provided by the constitution.
 - c. That the applicant has a constitutional guarantee, if need be to be investigated by neutral and impartial state agencies and those making relevant recommendations to be devoid of bias but in this particular case, Bonny S. Okemwa, the County Director of Public Prosecutions, Kitui is highly conflicted in that he has already taken a position that the land which is causing the current ripples belongs to the alleged complainant and has done a letter to that effect yet he is directly involved in the criminal process as the officer directing where to fill the gaps and recommending prosecution without disclosing his interest/prior dealings or knowledge and/or disqualifying himself from the criminal proceedings.
 - d. That the respondents and in particular Bonny S. Okemwa as the County Director of Public Prosecutions is enjoined in the exercise of his powers to have regards to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process, but the contents and tone of his letter to the chief, Ngungi Location and the subsequent witness statement from the applicant cannot in any way be in the interest of administration of justice and /or the need to prevent or abuse of the legal process. To the contrary, the two amount to miscarriage of justice, travesty of the legal process, an affront to the administration of justice and are inimical to the rule of law.



- e. That the applicant is undergoing discrimination in the hands of the respondents. He presented his report, statements and exhibits early enough at the police post with jurisdiction but the alleged complainant lodged her complaint at her pace at a police station of her choice as she was not seeking justice but actuated by ulterior motives. Indeed, the respondents are mute on the applicant's complaint and/or have disregarded altogether.
 - f. That is Bonny S. Okemwa, the County Director of Public Prosecutions had identified a cognizable offence on perusing Mary Munyao's file, then there was no basis in law for him to direct the applicant's wife, servant and himself record statements as witnesses.
 - g. The respondents are pursuing criminal proceedings in a dispute which is purely civil (land) and the alleged assault in an appendage for maximizing pressure on the applicant to surrender his rights in relation to land.
 - h. There is an underlying grudge-land dispute and the Director of Public Prosecutions who knew it all ought to have proceeded with that in mind that the complainant could afford to hide behind and exert pressure through the allegation of assault.
 - i. That there is a cardinal rule that justice must only be done but seen to be done. In the current situation, justice cannot be seen to be done in light of the County Director of Public Prosecution's letter dated 22nd March 2022 and the applicant witness statements which were obtained through trickery.
 - j. The applicant has subjected himself to be investigated by reporting the incident to the police post with jurisdiction and has availed himself as and when required but the complainant shopped for a police station where to report because she is interested in a certain outcome and wants to proceed with precision.
4. In his supporting affidavit, the ex-parte applicant depones that he purchased the late Munyao's land in 2005 from the larger Muthengi family and had been enjoying quite possession since then. That however in April 2021, one Mary Munyao made a report to the Area Chief alleging that she was Munyao's heir and was interested in the land but a meeting was called where it was resolved that the land had been sold to the applicant. He avers that in October 2021, Mary Munyao made a report to the Deputy County Commissioner (DCC) and a meeting was called where she was again advised to stop interfering with the ex-parte applicant's quite possession of the suit parcel. That on 8th January 2022, the ex-parte applicant visited the suit parcel accompanied by his wife and servant and while there, they encountered Mary Munyao who was working on the parcel. That the ex-parte applicant enquired why she was on the land and Mary charged at him ready to attack him with a jembe. He averred that he managed to calm the situation and Mary left leaving behind her leso, jembe, water jerrycan and a cup. He proceeded that he reported the incident at Thua Police Post where he was advised to return the following day to record a statement. That the following day, he received a call from officer in charge, Nzangathi Police Post who asked him to report at the station on a complainant that had been made by Mary Munyao but he informed the officer that he had already made a report at Thua Police Post. He averred that he proceeded to record his statement at Thua Police Post and the police indicated that they would prompt Mary Munyao to record her statement at the station as well. The ex-parte applicant averred that later on after a period of 5 days, Mary Munyao visited Thua Police Post armed with a warrant of arrest and reported that her complainant had been investigated and consent granted by the Director of Public Prosecutions for his arrest on a charge of assault. He proceeded that on 22nd March 2022, the County Director of Public Prosecution, Mr Bonny S. Okemwa wrote a letter to the chief of Ngungi directing him to hand over the title deed of the suit parcel to Mary Munyao on the basis that



she was the only heir and surviving daughter of the late Munyao. That the letter also threatened the Chief with an aim of coercing him to act on the instructions with speed. The ex-parte applicant states that there is an ongoing civil dispute between the parties touching on the suit parcel.

5. It is further averred that the ex-parte applicant was called by the police on 24th April 2022 and asked to record statements together with his wife and servant in relation to Mary Munyao's complaint on instructions allegedly given by the County Director of Public Prosecutions, Mr Bonny S. Okemwa which they did. The ex-parte applicant takes issue with recording of these statements stating that they were not issued cautioned against recording them for the reason that in early August 2022, he was informed by OCS Nzambani that the DPP had recommended he be charged for assault. He deposes that his constitutional rights are being violated because he recorded statements at Thua Police Posts without cautionary statements that whatever he said could be used against him and his wife and servant.
6. In his further affidavit sworn on 14th April 2023, the applicant avers that the respondents have conceded to his allegations of procedural unfairness raised in this Judicial Review because the 3rd Respondent filed grounds of opposition instead of replying affidavit in response to the said allegations of unfairness. He insists that there is a decision to charge him though he has not exhibited the same.
7. In his written submissions done through learned counsel M/s Gwaro & Co. Advocates, and dated 17th September 2023 the Applicant makes the following submissions;
 - a. That the ex-parte applicant's constitutional rights are being violated in that his wife, himself and his servant recorded statements as witnesses at Thua Police Post on the directive of the County Director of Public Prosecutions Kitui without cautionary statements that what they said could be used against them. Further, that the statements were obtained using trickery and borders on luring him giving self-incriminating evidence. On the same grounds, the ex-parte applicant has submitted that his right to fair trial was breached as well as his privilege to not self-incriminate. He has placed reliance on article 50 (2) (1) of *the Constitution* and cited the case of Richard Dickson Ogendo & 2 Others vs Attorney General & 5 Others (2014) eKLR where the court reiterated that an accused person is protected against compulsory oral examination for the purpose of extorting unwilling confessions or declarations implicating the accused in the commission of an offence.
 - b. That he has a constitutional guarantee to be investigated by an impartial body but in this case, the County Director of Public Prosecution is biased as he has already taken the position that the suit property which is the epicenter of the present dispute belongs to the complainant, Mary Munyao. The ex-parte applicant submits that Mr Bonny S Okemwa is biased going by what counsel terms as a strong worded letter from Mr Okemwa to the Chief Ngungi location directing him to call for the title of the suit property from the ex-parte applicant and subsequently hand it over to Mary Munyao. Counsel has reiterated the mandate of the ODPP and submitted that the ODPP has made a recommendation for the ex-parte applicant to be charged. Counsel submits that the ODPP failed to put in a response to the application for leave as such, the argument that the decision to charge is yet to be made is unsupported. Counsel has referenced the case of Commissioner of Police & Anor vs KCB & Others (2013) eKLR on the submission that the police are enjoined in exercising their investigative powers to have regard to public interest.
 - c. Counsel has cited discrimination and submitted that the Respondents disregarded his complaint made at Thua Police Post but acted on the complainant's complaint which was made after his.



- d. It is also submitted that the application is unopposed as the Respondents filed grounds of opposition instead of a replying affidavit.
 - e. Counsel submits that the intended prosecution is meant to have him surrender his rights to the suit parcel and abandon his interest in the civil dispute between the parties pertaining to the same land.
8. In the supplementary submissions dated 30th October 2023, counsel reiterates that the ex-parte applicant has set out the constitutional violations occasioned against and maintains that he is lamenting that his wife, servant and himself were asked to record statements as state witnesses without any cautionary statements that the respondents intended to charge the ex-parte applicant on the strength of those statements. That further, those statements were obtained in a manner that was marred by procedural improprieties, trickery and breach to his right to remain silent and not to self-incriminate.
9. The Respondents have opposed this application through grounds of opposition dated 28th October 2022 and written submissions dated 2nd November 2023.
10. The Respondents oppose this application on the following listed grounds namely;
- a. That the application is incompetent bad in law, lacking in merits and otherwise an abuse of the due process of the court.
 - b. That the application/petition herein has not stated the rights of the applicant that have been violated and infringed and further does not specify the nature of such rights.
 - c. That the applicant has not demonstrated any issues of determination by this Honourable Court since the prayers and grounds in support are totally different from what the supporting affidavit sworn by Joseph Nyamai Kalungu which is omnibus, vague, embarrassing and an abuse of court process.
 - d. That under the provisions of Article 157 (9) of *the Constitution* of Kenya and Section 5 (2) and (3) of the *Office of the Director of Public Prosecutions Act* No. 2 of 2013, the Director of Public Prosecutions has powers to exercise in person or by subordinate officers acting in accordance with the general or special instructions. There is no evidence on record to confirm that the person of Bonny S. Okemwa was ever a prosecutor and/ or acting for the 3rd Respondent in that capacity.
 - e. That the applicant has terribly failed to demonstrate that the 3rd Respondent acted outside the provisions of Article 157, 47 and 48 of *the Constitution* of Kenya.
 - f. That the remedy sought under Article 47 and 48 of *the Constitution* of Kenya on Fair Administrative Action and access to justice, the applicant has not demonstrated any of such rights so violated and infringed by stating the nature of such violations, generatively or specifically.
 - g. That the applicant has not demonstrated any issues for the court to determine as against any of the Respondents herein and especially the DC1 and the 1st Respondent.
 - h. That the police in the case of Mary Munyao who has been adversely mentioned acted in good faith as provided by under the provisions of Section 24 of the *National Police Service Act* wherein they are mandated to carry out investigations and if any offence alleged to have been committed then the police will arrest and charge perpetrators of the crime.



- i. That it is in the public interest that all complaints made to the police to be investigated and summons issued and statements recorded by the complainants and suspects are part of the investigations which were being carried out by the police.
 - j. That the instant application is pre-mature as the Director of Prosecution has not made a decision to charge the applicant with any offence.
 - k. That the Applicant has not demonstrated how he will suffer any substantial injustice if investigated and charged in a court of law as cases are determined on merit.
 - l. That this application is frivolous and vexatious and it is only meant to paint a bad picture of the Director of Public Prosecutions and the investigative agencies who are always doing a wonderful work to protect the fundamental rights of the citizens of the Republic of Kenya and humanity.
 - m. That the Applicant does not deserve any order in the writ petition or declaration of rights as prayed or at all since none has been violated by the Respondents herein, hence the application of 13th October 2022 should be dismissed with costs.
11. In their written submissions dated 2.11.2023 the 3rd Respondent Counsel has faulted the ex-parte applicant's contention that the present dispute is linked to the letter dated 22nd March 2022 and submits that the letter speaks to issues relating to a title deed and does not mention the incident which occurred on 8th January 2022. It is further submitted that the said letter was not addressed to the ex-parte applicant and further that there is no affidavit from Chief Mr. Kawembe Kimanzi to confirm that the issues raised are related. Counsel submits that orders sought cannot issue in this matter as the ex-parte applicant has failed to demonstrate any decision that was made by the 3rd Respondent against him. It is further submitted that the 1st and 2nd Respondents are mandated to receive complaints and allegations and carry out investigations while the 3rd Respondent is mandated to prosecute any person before any court in respect of commission of any alleged offence. That further, the 3rd Respondent has power to direct the Inspector General of Police to investigate any information or allegation of criminal conduct. That in cognizance of the powers enumerated above, the 3rd Respondent has not made any decision to charge the ex-parte applicant and that the applicant has not exhibited any evidence to prove otherwise in the form of a Notice of Intended Prosecution or a Charge Sheet particularly for the alleged charge on the offence of assault. Counsel submits that in the event the ex-parte applicant is charged with a criminal offence, the same will be tried and determined on merit.
 12. On the orders sought, counsel submits that they are unobtainable. That the alleged ulterior motives and bad faith on the part of the Respondents intended to allegedly coerce him to withdraw his civil claim against the complainant is incompetent as there is no existing civil case between the two parties as the same was struck out by the court on 30th June 2022. Finally, that orders of prohibition and certiorari can only issue to interfere with a decision made in excess of jurisdiction or where rules of natural justice have not been observed which has not been demonstrated in this case.
 13. This court has considered this application and the submissions made. I have also considered the response made by the State through the Office of the Director of Public Prosecutions (ODPP).
 14. The applicant's gist of grievance is that he together with his wife and a servant were asked to record statements regarding an incident that appears to have taken place on the 8th of January 2022 between the applicant and one Mary Munyao. There is evidence on record that the two seems to have a long standing dispute over a parcel of land. The applicant appears apprehensive that the statements taken from him and his wife are likely to be used against them and has cited procedural impropriety regarding



how the statements were obtained. He faults the police for not informing them of their right to remain silent and using trickery to obtain the same and further faults Mr. Bonny Okemwa from Office of the Deputy Director of Public Prosecutions for exhibiting bias vide a letter he wrote to the Chief Ngungi Location stating that the letter favoured Mary Munyao in the land dispute.

15. The ex-parte applicant has cited violation of his right to fair trial and has expounded on this by stating that he was asked to record statements at Thua Police Station together with his wife and servant but in doing so they were not cautioned that the statements could be possibly used against them and that at the present, the respondents intend to use the statements against the ex-parte applicant. The ex-parte applicant cited Article 50 (2) of *the constitution*. Article 50 however relates to the rights of an accused person and in particular, article 50 (2) provides that every accused person has the right to a fair trial which includes the right;
 - (1) to refuse to give self-incriminating evidence.
16. The ex-parte applicant further avers that the statements were obtained in a manner which was marred with procedural impropriety, trickery. There is no further explanation on the procedural irregularities alleged or how the ex-parte applicant was tricked into giving the statements. In his supporting affidavit at paragraph 21, the ex-parte applicant averred that he was called by the police on 24th April 2022 and was asked to go to the police station together with his wife and servant and record statements in relation to Mary Munyao's complaint. They therefore all knew the purpose of the visit to the police station.
17. It is therefore difficult to understand why the applicant feels that the police used tricks to obtain the statements when the evidence tabled indicates that the applicant and his wife went to Thuo Police Post on his own volition and recorded statements faulting the actions of one Mary Munyao.
18. The applicant has sworn an affidavit that after receiving a call from Nzangathi Police Post, regarding the incident, he opted instead to go to Thuo Police Post which raises the question why did he disregard Nzangathi Police Post when he knew a report had been made there regarding the incident especially if there was nothing to hide?
19. The ex-parte applicant is further complaining of bias on the part of the Mr Bonny S. Okemwa, the County Director of Public Prosecutions with regards to the letter of 22nd March 2022 and the officer's choice of words in the said letter. The ex-parte applicant takes issue with the said letter claiming that the officer was directly involved in the criminal process as he recommended prosecution of the ex-parte applicant. There is no indication that the ex-parte applicant has been charged and the position that the application for leave to file the present judicial review application went unopposed is a speculative position to take. The decision to charge either exists or it doesn't in my view and in this case, there is no evidence tabled indicating that the step to charge the ex-parte has been taken.
20. The applicant's action to lodge this application appears speculative based on the incident of 8th January 2022. The complaint regarding the statements he himself recorded willingly and the fear that the same may be used against is not based on tangible evidence but were speculations.
21. The Police are well guided and bound by the law when recording statements from complainants and potential witnesses alike. Section 52 of the *National Police Service Act* provides as follows;
 - a. A police officer may, in writing, require any person whom the police officer has reason to believe has information which may assist in the investigation of an alleged offence to attend before him at a police station or police office in the county in which that person resides or for the time being is.



- b. A person who without reasonable excuse fails to comply with a requisition under subsection (1), or who, having complied, refuses or fails to give his correct name and address and to answer truthfully all questions that may be lawfully put to him commits an offence.
 - c. A person shall not be required to answer any question under this section if the question tends to expose the person to a criminal charge, penalty or forfeiture.
 - d. A police officer shall record any statement made to him by any such person, whether the person is suspected of having committed an offence or not, but, before recording any statement from a person to whom a charge is to be preferred or who has been charged with committing an offence, the police officer shall warn the person that any statement which may be recorded may be used in evidence.
 - e. A statement taken in accordance with this section shall be recorded and signed by the person making it after it has been read out to him in a language which the person understands and the person has been invited to make any correction he may wish.
 - f. Notwithstanding the other provisions of this section, the powers conferred by this section shall be exercised in accordance with the Criminal Procedure Code (Cap. 75), the [Witness Protection Act](#) (Cap. 79) or any other written law.
 - g. The failure by a police officer to comply with a requirement of this section in relation to the making of a statement shall render the statement inadmissible in any proceedings in which it is sought to have the statement admitted in evidence (emphasis added).
22. The applicant is therefore well covered by the above provisions should the police go ahead and prefer charges and seek to use statements he recorded to prosecute him. The applicant therefore retains the right and has the right to raise objections to any statements or any evidence that could be used against him if that event occurs. For now, this court finds no basis to make interventions though Judicial Review orders as sought herein because the decision to charge him has not yet crystallized.
23. In Republic –vs- Commissioner of Police & Another ex Parte Michael Monari & Another [2012] eKLR, the court held as follows:
- “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”.
24. In Johnson Kamau Njuguna & Another vs Director of Public Prosecutions (2018) eKLR, the court also restated that:
- “It is settled law that the role of the court in a judicial review application of this nature is to ensure that an applicant is not dragged willy-nilly into court on criminal charges when there is no substantial evidence to sustain an indictment. The DPP has the authority and discretion to decide who, when and how to prosecute within the bounds of legal reasonableness. That role cannot be usurped by the court. If the DPP acts outside the bounds of legal reasonableness, however, he acts ultra vires and the court can intervene,



because it is the court's high responsibility and inherent power to secure fair treatment for all persons brought before the court, and to prevent an abuse of the court's process."

25. The application is seeking orders of orders of certiorari and prohibition. The Court of Appeal held in *Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil 1(997)* eKLR as follows as regards the nature of the said remedies:

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

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

26. As I have observed above, there is no evidence placed before indicating that a decision to charge the applicant or his wife has been made. And even if there was one, the applicant still was required to show or demonstrate that the same was irrational, illegal and fails the procedural propriety test that was well elaborated in the celebrated Ugandan case of *Pastoli -vs- Kabale District Local Government Canal & others [2008] 2EA 300* where the court held as follows;

"In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

Illegality, is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision 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 to act 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 legislature instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehidswi...Vs...Secretary of State for the Housing Department (1990) AC 876*".



27. The ex-parte applicant is seeking orders to quash the decision to investigate, arrest or charge him in relation to the assault incident of 8th January 2022. Firstly, the prosecutorial powers of Director of Public Prosecutions are constitutionally and statutorily provided for under Article 157 (10) of *the Constitution* and Section 4 of the *Office of the Director of Public Prosecutions Act*, which provides that;
- “the Director of Public Prosecution shall not require the consent of any person or authority for the commencement of criminal proceedings and in exercise of his or her powers or functions, shall not be under the direction or control of any person or authority”.
28. The exercise of that power is however subject to Article 157 (11) which provides that in exercise of the said power, the DPP shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of legal process. Only in circumstances DPP acts will the High Court intervene. In this matter, there is no evidence of an ongoing or commenced prosecution of the Ex-parte Applicant. There is no indication of any matter where he has been charged or any charges preferred against them. As such the orders sought against the 3rd Respondent regarding prosecuting the Ex-parte Applicant is premature and pre-emptive.
29. While this court finds that the letter by Mr. Okemwa from the Office of the Deputy Director of Public Prosecutions (ODPP) dated 22.3.2022 may not have been appropriate to the extent that it sought to determine the question of ownership of a civil dispute over land, I am not persuaded that this court should stop or direct the DCI from investigating whether a crime has been committed to take appropriate action. A litigant cannot use the existence of a civil case in court as an excuse or a shield to commit a crime and ask the court to intervene by stopping a constitutional body mandated to investigate crime. In *Philomena Mbete Mwilu –vs- DPP & 3 others* [2019] eKLR, the court *inter alia* held as follows;
- “In our view, it would be within the mandate of an investigative body to receive complaints and to investigate them. Such bodies or entities cannot be faulted for acting on the complaints as in so doing, they would be acting within their constitutional and statutory duty. It was stated in *Josephat Koli Nanok & another v Ethics and Anti-Corruption Commission* (2018) eKLR, that by undertaking investigations an investigating entity does not violate any constitutional rights, and that violation of rights may only occur in the manner in which the investigative mandate is executed. In that event, the Petitioner would be under an obligation to demonstrate that his or her rights have been violated by the manner of investigation and attendant processes.”
30. Further in *Kenneth Kanyarati & 2 others v Inspector General of Police Director of Criminal Investigations Department & 2 others* [2015] eKLR the court also observed as follows:
- “I am satisfied that it is not the business of the court to identify the points of investigation. Neither is it the business of this court to wander into the merits and demerits of any intended or prospective prosecution. As was stated in *R v Commissioner of Police and Another Ex parte Michael Monari & Another* (2012) eKLR. 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.”
31. This court finds that the applicant has not demonstrated that the respondents abused, overstepped or exercised their respective mandates unlawfully in carrying out the investigation of what occurred on



3rd January 2022. In any event, the applicant has not included Mary Munyao in the proceedings if he feels that the police acted without any basis or maliciously.

32. In the premises, this court's application dated 13th October 2022 lacks merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT KITUI THIS 9TH DAY OF MAY, 2024.

HON. JUSTICE R.K. LIMO

JUDGE

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