



**Republic v Director of Public Prosecutions & 2 others; Kamore & another
(Ex parte Applicants); Mwituria & 30 others (Interested Parties) (Judicial
Review E001 of 2022) [2024] KEHC 5578 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5578 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
JUDICIAL REVIEW E001 OF 2022**

GL NZIOKA, J

MAY 8, 2024

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 22, 23, 25, 27, 28, 29,
47, 48, 50, 73, AND 259 OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

REPUBLIC APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

THE CHIEF MAGISTRATE'S COURT AT NAIVASHA 2ND RESPONDENT

THE DIRECTORATE OF CRIMINAL INVESTIGATIONS 3RD RESPONDENT

AND

MICHAEL KIGOTHO KAMORE EX PARTE APPLICANT

**KIAMBU NYAKINYUA FARMERS COMPANY LIMITED EX PARTE
APPLICANT**

AND

**LUCY FRANCES GATHONI MWITURIA & 30 OTHERS INTERESTED
PARTY**



JUDGMENT

1. By a notice of motion application dated 20th June 2022, brought under the provisions of Order 53 Rule 3 of the [Civil Procedure Rules, 2010](#), and all enabling provisions of the law, the applicant is seeking for orders: -
 - a. That this Honourable court be pleased to issue an order of *Certiorari* to remove into the Honourable court and quash the respondents' decision to charge and prosecute the 1st applicant in Naivasha Chief Magistrate's Court criminal case No. E614 of 2022.
 - b. That this Honourable court be pleased to grant an order of prohibition directed to the respondents, prohibiting further proceedings in Naivasha Chief Magistrate's Court criminal number E614 of 2022 and further prohibiting the first and second respondents from instituting any further charges against the applicant in respect to the subject.
 - c. That the costs of this application be awarded to the applicants.
2. The application is based on the grounds thereto and an affidavit of the even date sworn by the 1st *ex parte* applicant. He avers that, he has been charged with various offences vide Chief Magistrate's criminal case No. 614 of 2022. That based on the particulars of the charge sheet, the 2nd *ex parte* applicant is the sole complainant. That the 2nd *ex parte* applicant's chairman has sworn an affidavit on its behalf to the effect that, it has not made any complaint against the 1st applicant to the 3rd respondent, and neither has it agreed to be a complainant in the matter. Further by a resolution of the 2nd *ex parte* applicant, it has challenged the decision of the respondents to include it in CMCRC No. E614 of 2022 as a complainant.
3. It is argued that, the 1st and 3rd respondent have acted ultra vires in purporting to sit in the capacity of the 2nd *ex parte* applicant and make decisions on its behalf. Further, that in the absence of a board of directors resolution to institute the proceedings in CMCRC No. E614 of 2022 there is no valid case before the court.
4. The applicants avers that, No. 88xxx PC Ian Karimi has deposed at paragraph 7 of the 3rd respondent's replying affidavit that, he is the one who decided that, the 2nd *ex parte* applicant be a complainant in the matter.
5. Further, although the 1st respondent avers in the grounds of opposition dated 8th August 2022 that, the case was commenced on the strength of complaints received from recognized members of the 2nd *ex parte* applicant, the said members are not listed as complainants. Similarly the 3rd respondent does not, in its replying affidavit make reference to the specific individuals who lodged the complaints.
6. The *ex parte* applicants further argue in the submission in support of the application that, the 2nd *ex parte* applicant has deposed that there is none of its property that was stolen or lost as alleged in the charge sheet yet the 1st *ex parte* applicant is charged, with stealing contrary to section 282 of the [Penal Code](#). As such the CMCRC No. E614 of 2022 is an abuse of Judicial time and process.
7. The *ex parte* applicants argue that the criminal proceeding in the said Chief Magistrate's court are motivated by extraneous matters divorced from the goals of justice, in that, the alleged persons who made a complaint to the police are the people who filed an application dated 8th August 2022 vide Nakuru ELC Judicial Review No. 1 of 2019 seeking to be enjoined in that matter, and the application was dismissed. The 1st *ex parte* applicant thus submit that, the commencement of Chief Magistrate



criminal case No. E614 of 2022 was marred with illegality, irrationality and procedural impropriety and should thus be quashed.

8. However, the application was opposed vide a grounds of opposition which states:
 - a. The power to institute and undertake criminal proceedings against any person before any Court, other than a court martial, in respect of any offence alleged to have been committed is a mandate of the 1st respondent as entailed in Article 157 (6) (a) of *the Constitution* of Kenya (2010).
 - b. In accordance with section 89 of the *Criminal Procedure Code*, the proceedings against the *ex parte* applicant began as a result of the complaints brought forward to the 3rd respondent by a number of recognized members/shareholders of the 2nd *ex parte* applicant detailing various acts of fraud, misappropriation of funds and schemes by the 1st *ex parte* applicant supported by "officials" of the 2nd *ex parte* applicants with to various parcels of land that ought to have been sub-divided and apportioned to the members/shareholders (hereinafter referred to as complainants) of the 2nd *ex parte* applicant.
 - c. After an in-depth investigation by the 3rd respondent and a careful and thorough analysis of the evidence presented to the 1st respondent, the Decision to Charge and the charges preferred against the 1st *ex parte* applicant in Naivasha Criminal Case No. E416 of 2022 was arrived at on 26th April 2022 and was formally endorsed as so on the charge sheet presented to the court on 12th May 2022. The decision conforms with the 1st respondent's Decision to Charge Guidelines of 2020.
 - d. Article 157 (10) of *the Constitution* does not require the 1st respondent to get the consent of any person or authority for the commencement of criminal proceedings and in the exercise of this powers or functions, shall not be under the direction or control of any person or authority. Further that, in any event, the 1st respondent made its decision based on the complaints of the members/shareholders of the 2nd *ex parte* applicants.
 - e. The present Application is an abuse to the Judicial process and is a shortcut in attempt to deny the complainants their right to a fair trial as enshrined in Article 25 (c) of *the Constitution*. The same provision accords the 1st *ex parte* applicant the opportunity to disprove (if at all) the charges leveraged him in the Chief Magistrates Court.
 - f. In accordance with Article 27 (1) of *the Constitution* of Kenya, the 1st respondent has the authority to institute more charges against the 1st *ex parte* applicant for any different or additional complaints received as long as there is evidence in support thereof to ensure that each individual complainant has equal protection and equal benefit of the law
 - g. The charges against the accused in Naivasha Criminal Case No. E614/2022 are in fact not malicious but properly before the court having been so preferred procedurally with due regard to the 1st respondent's powers within the law and the interests of justice.
9. In addition, No. 88xxx PC Ian Karimi filed a replying affidavit dated 5th August 2022 and deposed that, the 1st respondent has constitutional mandate to institute legal proceedings against any person pursuant to its mandate under Article 157(6) of the Constitutional of Kenya, 2010.
10. That pursuant to the aforesaid, he investigated complaints received vide a report in OB No. 36/6/03/22 booked at Naivasha Police Station which were made by various recognized members of the 2nd *ex parte* applicant against the 1st *ex parte* applicant.



11. The deponent argues that, the decision to charge the 1st ex parte applicant is not an abuse of the court process as it is based on the evidence gathered during the investigation which disclosed prima facie case as detailed out in the replying affidavit. Further, the 1st respondent also relied on the National Prosecution Policy in making a decision to charge the 1st ex parte applicant. Reference was made to page 7 of that policy. The 1st respondent further submit that, the evidence availed is a sufficient to prove all the charges and therefore, the case should proceed to full hearing, wherein the 1st ex parte applicant will be given an opportunity to cross-examine the witnesses.
12. The 1st respondent further argued that, the ex parte applicants have not demonstrated how their constitutional rights have been violated under Article 25(a), 28, 29(d), 47 and 50 of the Constitutional of Kenya, 2010. That the allegations to that effect are thus mere allegations which have no factual basis to support them. That, the 1st ex parte applicant was involved in the investigation process as stated and outlined in the replying affidavit under paragraph b(i) to (vii). Further the 1st ex parte applicant was presented before court in time, granted bond and bail terms, and supplied with all evidence. As such he will have a fair trial pursuant to article 50 of the Constitution of Kenya, 2010.
13. Finally, the 1st respondent argued that, the issues raised by the ex parte applicants go to the merit of the case in the trial court and therefore the motion herein lacks merit and should be dismissed with costs and the matter in the lower court proceed.
14. The 2nd and 3rd respondents on their part submitted that, the role of the 3rd respondent was merely to investigate the matter upon receipt of a complaint by one Walter Munyua of Kiambu County Peace Campaigns acting on behalf of the 2nd ex parte applicant. That the 3rd respondent could not turn a blind eye to the report. Further the 2nd and 3rd respondent acted in accordance with the mandate of the 3rd respondent under section 35 of the National Police Service Act. That, the ex parte applicants have not discharged their burden in proving how the 2nd and 3rd respondents acted ultra vires in the exercise of their mandate.
15. That under Article 260 of the Constitution of Kenya a person is defined to include a company, and based on the case of *Salmon -vs- Salmon and Company Ltd* (1897), a company can institute legal proceedings in its own name.
16. The 2nd and 3rd respondent submitted that, the 2nd ex parte applicant has twelve (12) directors and 1403 members, but it does appear that the 1st ex-parte applicant is holding all the share holders at ransom.
17. Further the company has not complied with the statutory requirements, including holding statutory meeting and/or filing of returns, and therefore the 1st ex-parte applicant has no authority to act for the company when no elections have been held after their tenure ended. Furthermore the 1st ex parte applicant's counsels herein has no authority to act for the 2nd ex parte applicant without the board of directors resolution appointing them as such.
18. Finally, the 2nd and 3rd respondent argued that, the 1st ex parte applicant will have his day in court in the criminal matter to ventilate his issues. Further, the 2nd and 3rd respondent should not have been part of these proceedings as the 2nd respondent merely presided over the matter whereas the 3rd respondent only investigated the same.
19. The interested parties were enjoined in this matter vide a ruling delivered on 5th June 2023. In response to the application, they filed grounds of opposition which states:



- a. That the application herein is incurably defective, incompetent and bad in law. The applicant seeks orders to quash a decision to prosecute him made by the 1st respondent. This offends two cardinal principles.
 - i. The independence of the 1st respondent. The 1st respondent is established as an independent office by Article 157 of *the Constitution* of Kenya and specifically Article 157 (10) and (11). The decision or prosecute is made in accordance with the principles laid down in *the Constitution* and the Statute made thereunder and cannot be subject to the, control of this court or any other person.
 - ii. The duty placed on the 1st respondent in regard to public interest and administration of justice. This requires that once an investigative agency, such as the 3rd respondent has established that crimes have been committed and have evidence to that effect, the 1st respondent should, under the mandate granted by *the Constitution* and the Statute, prosecute the person(s) who may have committed the offence in order to protect the public interest and the person(s) affected by the said crime(s). Article 157 of *the Constitution* and Section 23 of the *ODPP Act* are clear on this.
 - iii. No illegality or malice established. The Applicant has; not established that the actions of the Respondents are illegal in any way. The duty of the 3rd respondent is to investigate any alleged crime no matter the method in which the 3rd respondent gets notice of the same. The duty of the 1st respondent is to prosecute in accordance to the law once evidence has been established before the 1st respondent of the commission of a criminal offence. The duty of the 2nd respondent under the law is to try and to determine whether in fact, a criminal offence has been committed once a charge has been preferred before the 2nd respondent. The Applicant has not shown that any of the actions of the respondents were effected due to malice.
 - b. That the reliefs sought cannot be granted as the same would negate the duty of the respondents to investigate, prosecute and undertake proceedings to determine whether criminal offences have been committed.
 - c. That the application is an abuse of the process of court. It is clear that the applicant herein has his own agenda and that agenda has nothing to do with achieving justice but with avoiding facing and confronting evidence of criminal conduct which adversely affected the interested party and for which information was availed to the 3rd respondent leading to the preferring of charges before the 2nd respondent, a court with competent jurisdiction to hear and determine the issue. This Court is being recruited to frustrate the enforcement of the law. This court must resist such abuse of its process. It is also an abuse of process to file incompetent and defective process and to hoodwink the Court in to making orders based on such defective process.
20. The interested party further filed submission that mirror grounds of opposition, save to argue that, the ex parte applicants have not established that the actions of the respondents are illegal in any way, or that the said actions were motivated by malice. The interested argued that, the application herein is an abuse of the court process, and intended to aid the 1st ex parte applicant avoid prosecution.
21. At the conclusion of the arguments by the parties and their respective submissions I find that, the key issue to consider at the outset is whether the application herein has met the threshold of a judicial review application. Hence the need to interrogate the nature of a judicial review process or proceedings. In



that respect judicial review is the process of challenging the lawfulness of the decision made by public authorities. It is not a re-run of the merits of the decision but a challenge on the way it was.

22. However, it is noteworthy that, the scope of judicial review has been expanded by Article 47(1) of *the constitution* of Kenya, which entrenched the importance of fair administrative action and consequently the Fair Administrative Act 2015, empowers the court to inquire into some aspects of the merit of administrative action.
23. In support of the afore, the Supreme Court of Kenya in the case of *Dande & 3 others -vs- Inspector General National Police Service & 5 others* (Petition 6 (E007, 4 (E005) and 8 (E010) of 2022 (consolidated) 2023 KESC 40 KLR stated that:
 - “78. However, the entrenchment of judicial review under *the Constitution* of Kenya 2010 elevated it to a substantive and justiciable right under *the Constitution*. Accordingly, judicial review is no longer a strict administrative law remedy but also a constitutional fundamental right enshrined in *the Constitution*. Thus, article 47 provides that 'every person has a right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.’”
24. Thus, the Supreme Court of Kenya clarified that when a party approaches the court under the provisions of *the Constitution* of Kenya 2010, then the court can carry out a merit review of the case. However, if the party files the claim under the provisions of order 53 of the Civil Procedures Rules 2010, per se and does not plead violations of constitution rights, then the court can only limit itself to the process and manner in which the decision complained of was reached or action the decision per se.
25. A consideration of the motion herein reveals that, it is premised on the provision of section 8 and 9 of the *Law Reform Act* (Cap 26) the Laws of Kenya and Order 53 Rule 1 (1) (2) and (4) of the *Civil Procedure Rules 2010*. Although the applicant made reference to section 8 and 9 of the *Law Reform Act*, the same was moved in the application for leave and not reflected in the main motion. Therefore based on Rule 53 (1) (2) and (4), the court cannot delve into the merit of the matter.
26. Be that as it may, I wish to first deal with the issue of the 2nd *ex parte* applicant as an applicant to the motion. The issue was not canvassed by the parties but in my considered opinion an application can only be canvassed if it is properly before the court and/or is valid. The court does not have to be moved by the parties on matters of law.
27. The question is; is the 2nd *ex parte* applicant a proper party to this proceedings. That begs the question who can file a judicial review application. Section 7 of the *Fair Administrative Action* provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court in accordance with section 8 of or a tribunal in exercise of jurisdiction conferred in that regard under any written law.
28. The question that arises is, what decision has the respondents made against the 2nd *ex parte* applicant which it is to be removed or considered. It is understandable that, the 1st *ex parte* applicant has been charged with criminal offence vide CMCRC No. E614 of 2022. What about the 2nd *ex parte* applicant?
29. In my considered opinion the 2nd *ex parte* applicant as it were is a complainant in the matter and therefore the part and parcel of the a prosecution. As such when the 1st *ex parte* applicant is complaining against the respondents, by extension, he is complaining against the 2nd *ex parte* applicant. Therefore the 2nd *ex parte* applicant can only have been an interested party in the application and not made a litigant against itself.



30. Further, in filing a judicial review application, the applicant must prove grounds of illegality, irrationality and procedural impropriety. The question is, how has the 2nd *ex parte* applicant proved these grounds? Does the decision to name it as a complainant amount to irrationality, illegality, or procedural impropriety?
31. Furthermore, a consideration of the prayers in the motion herein reveals that, the *ex parte* applicants seek for the quashing of decision of the respondents to charge and prosecute the 1st *ex parte* applicant, not the 2nd *ex parte* applicant and to prohibit the proceedings in CMCRC No. E614 of 2022. The question is; are there any proceedings against the 2nd *ex parte* applicant in that matter? The answer is in the negative. As such the application (if any) by the 2nd *ex parte* applicant is defective, incompetent and amounts to an abuse of the court process.
32. In the given circumstances I strike out the subject application by the 2nd *ex parte* applicant as being incompetent and hesitate to delve in to any issues raised by the 2nd *ex parte* applicant so that I don't prejudice any decision on the same in case, the issue is raised elsewhere, and again the provision upon which the application is premised restricts the decision if this court on process and not the merit of the matter.
33. Be that, as it may, I find that, even if the application by the 1st *ex parte* applicant was considered on merit, he has deposed to several matters, which in my considered opinion are evidential in nature.
34. At this stage, this court cannot delve into the evidential matters as it may be prejudicial to the matter in the trial court. I hold the opinion that, the matter in the trial court will be subjected to a full hearing where the parties will call witnesses for examination in chief, cross-examination and re-examination. It is during that process the true factual position of the case will be determined. Of course if it turns out that, there is no evidence, the 1st *ex parte* applicant will be acquitted, and if there is evidence a conviction will follow.
35. The further question that arise at this stage is whether, the 1st *ex parte* applicant will suffer prejudice if he were to be subjected to the trial. In my opinion the trial is a due process of law. It does not per se, amount to violation of one's right. It is the process of sieving, the truth from falsehood, the merit and lack of it. If eventually the 1st *ex parte* applicant is acquitted, he can then sue for damages if he was maliciously prosecuted.
36. Finally at the trial, the 2nd *ex parte* applicant can have an opportunity to prove that it has not raised a complaint against the 1st *ex parte* applicant and the locus of the interested party as a complainant will be tested and so will the issue of a board of directors resolution discussed herein.
37. As held in the case of *Ezekiel Evans Simiyu Wafula & another v Director of Public Prosecutions & 3others* [2020] eKLR the petitioners were claiming that there was no complainant against them and sought to quash the criminal prosecution instituted against them. In dismissing their petition Makau J held that:
 37. ...If what the 1st Petitioner is alluding to is the actual position, I find that the 1st Petitioner need not worry at all, as without a complaint in a criminal case the DPP cannot successfully prosecute the matter and get conviction. After all if the DPP chooses to prosecute the 1st Petitioner, the company directors will exonerate the 1st Respondent through their evidence, that they never lodged any complaint against him and has no case against the 1st Petitioner. In absence of evidence the 1st Petitioner will be acquitted on no case to answer and will stand vindicated against the charges preferred against him and will be in a position to seek damages for malicious prosecution amongst other causes of action.



39. ... What is alleged in this Petition is simple and clear that there is no complainant. In absence of the complainant, it is clear the case shall have no legs to stand on and will collapse on its first day of hearing. This need not worry the Petitioners then, as they would be victorious without uttering a single word; when matter comes up for hearing and then they will win their case hands down.
44. In the instant Petition there is a change in Criminal Case No. 3254 of 2018 (Nakuru). The particulars of the charge sheet are clearly set out and witnesses indicated thereto. The complainant is indicated as M/s Wanyororo Farmers Company Ltd; Nakuru. It is therefore not correct for Petitioners to allege there is no complaint against them and that there is no complainant. The Petitioners are much aware of the charge and the complainant and until the charge is either withdrawn or Petitioners acquitted there stands a charge against them and a complaint in the charge sheet, which they should face and deal with it head-on.
38. The upshot of all the aforesaid is that, I find the application herein has no merit and it is disallowed or dismissed.
39. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 8TH DAY OF MAY, 2024

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Adoli for the 1st and 2nd *ex parte* Applicants

Mr. Abwajo for the Respondents

N/A for the Interested Party

Interested Party present physically

Ms. Ogutu: Court Assistant

