Republic v Director of Public Prosecutions & 2 others; Kijogi (Interested Party); Paul & another (Exparte) (Application E098 of 2023) [2024] KEHC 8501 (KLR) (Judicial Review) (15 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8501 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E098 OF 2023

J NGAAH, J

JULY 15, 2024

BETWEEN

REPUBLIC .... APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS .... 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS .... 2ND RESPONDENT

ATTORNEY GENERAL .... 3RD RESPONDENT

AND

GEOFFREY MWITI KIJOGI .... INTERESTED PARTY

AND

LINUS MWITI PAUL .... EXPARTE

ANN KAGWIRIA MTHUIRU .... EXPARTE

JUDGMENT

1. The application before court is a motion dated 3 August 2023 in which the applicant seeks the following orders:

   "

   " a) An Order of Prohibition directed at the 1st Respondent or through officers subordinate to him, prohibiting him from carrying on with the intended prosecution or charging of the ex parte Applicants into alleged offences of

obtaining money and further prohibiting the 1st and 2nd respondents from instituting any future charges against the ex parte applicants on the same facts and touching on the subject matter of the impugned investigations.

b) An Order of Prohibition directed at the 2nd Respondent or through officers' subordinate to him prohibiting him from arresting, carrying on with any further investigations touching on the ex parte applicants Linus Mwiti Paul And Ann Kagwiria Muthuiru in relation to the alleged offences of obtaining money from the interested party."

The applicant has also sought an order for costs.

2. The application is expressed to be brought under Sections 8 and 9 of the *Law Reform Act*, cap. 26 and Order 53 Rule 3 of the Civil Procedure Rules and it is based on a statutory statement dated 3 August 2023 and an affidavit verifying the facts relied upon sworn on even date by Ms. Ann Kagwiria Muthiru.

3. According to Ms. Muthiru, on 17 July 2023, police officers arrested her and took to the Directorate of Criminal Investigation (DCI) headquarters. She was assaulted in the course of the arrest and during her interrogation by the DCI officers. She was released on the night of the same day she was arrested but on condition that she reports back to the DCI headquarters for further interrogations on alleged offences of obtaining money by false pretenses. As at the time of filing this application, the same officers were looking for Ms. Muthiru's husband, who is named as the 1st applicant in this application.

4. The applicants have since learned that the arrest is informed by the interested party's complaint to the police against the applicants with respect to the money he had contributed together with the applicants in what I understand to have been a sort of partnership or joint venture of purchasing avocados locally and exporting them to United Arab Emirates (UAE). The exports were to be made through the applicants' company called Kenizitte Exporters Limited.

5. The joint venture or partnership is said to have come about this way. Sometime in January, 2023 the interested party approached the applicants and expressed his intention to join the applicants' company business by purchasing shares in the company. The applicants agreed that he could join the company by purchasing 250 shares of the company. Following this agreement, the interested party paid the sum of Kshs. 3,500,000/= after which all the parties executed the documents necessary for the transfer of shares to the interested party.

6. On diverse dates in the months of January and February, 2023, the applicants exported avocados worth Kshs. 8 Million (alleged to be approximately $57,000. It is not clear of which countries currency) on the understanding that the consignee was to remit 75 % of the payments upon dispatch of the exports and the balance to paid upon the consignee receiving the consignment. Part of the money used to buy the avocados locally was the Kshs. 3,500,000/= that had been paid by the interested party towards acquiring a stake in the applicants' company.

After the consignment was dispatched, the consignee issued a cheque of 40,000 dirhams being the initial deposit for the avocados but upon presentation of the cheque for payment, it was dishonoured.

7. The applicants reported the incident at the DCI Headquarters and also lodged a claim in a UAE Court seeking recovery of the purchase price from consignee who has been identified as one Adnan Ahmed. The case is alleged to be pending for determination. According to the applicants, the dispute between them and the interested party is of a civil nature and engaging the police in such dispute is an abuse of the criminal justice system. In the circumstances, this Honourable Court ought to intervene and stop the respondents in their tracks.

8. The respondents opposed the application and, to this end, the 1st and 2nd respondents filed a replying affidavit. The 3rd respondent filed grounds of objection. The 1st and 2nd respondents' replying affidavit was sworn by Sergeant Dekow Nuno who has identified himself as a police officer serving in the National Police Service and attached to DCI Headquarters. He is one of the investigation officers investigating the complaint against the applicants.

9. According to Mr. Nuno, on 9 May 2023, the interested party made a complaint against the applicants at Syokimau police station. The report was booked as OB. No. 31/09/05/2023. According to the interested party's report, he had met the respondents at Meru where they agreed to export avocados. They were share the profits equally. On diverse dates in the Month of January, 2023, the interested party paid the applicants a total of Kshs. 3,500,000/= towards this venture.

10. When the interested party discovered that there was nothing coming out of the business deal, he opted out and asked for a refund of his money. The applicants, however, declined to refund the money and is for this reason that the interested party lodged a complaint against them. After the investigations, the respondents came to conclusion that there was a reasonable suspicion that an offence warranting the intervention of the 1st and 2nd respondents had been committed.

11. In the course of investigations, the 2nd applicant was summoned, apparently to the DCI headquarters but she did not appear. She could also not be traced through her phone. After getting a tip off of her whereabouts, the 1st and 2nd respondents arrested the applicant on 17 July 2023 along Thika Road and escorted her to DCI headquarters for interrogation. The applicant fell ill in the course of her interrogation but she was treated at the DCI Clinic and later discharged. Since she was not able to raise any bail, she was issued with a Notice to Compel Attendance in accordance with section 52(1) of the National Police Act.

12. Mr. Dekow has denied that the 2nd applicant was assaulted. According to him, the 2nd respondent adhered to the highest standards of policing and professionalism in the investigations of the complaint against the applicants.

According to the 1st and 2nd respondents this application is intended to subvert criminal justice since the issues which have been raised could very well be determined by a trial court. Accordingly, it is their case that this suit is mala fides, it is misconceived and an abuse of the due process of this Honourable Court.

13. On his part the 3rd respondent avers in the grounds of objection that this court lacks jurisdiction to hear this suit since the applicant ought to have filed a constitutional petition and not a judicial review application. The application is also alleged to be an abuse of the process of this Honourable Court and that it seeks to curtail the respondents from undertaking their statutory mandates. To be precise, it is contended that if the orders sought were to be granted, the investigatory functions of the respondents under section 24(c) of the *National Police Service Act*, No, 11A of 2011 would be undermined.

14. Mr. Geoffery Mwiti Kijogi who is named in this application as the interested party, swore a replying affidavit opposing the application. He has sworn that he met to the applicants in Meru in December 2022. They introduced themselves to him as husband and wife and that they were in the business of exporting avocados to UAE. They invited the interested party to invest in that business. If the interested party invested as advised, he would be entitled to 50% of the profits for every container of avocados exported. Subsequently, and more particularly in January 2023, he paid the applicants a total of Kshs. 3,500,000/=.

15. After paying this money, the applicants never provided any proof of avocado exports as alleged. Without proof of the exports coupled with the applicants' suspicious conduct of avoiding the

interested party's calls, the interested party demanded his money back. The applicants did not refund the money and so the interested party reported the matter to Syokimau police station. This station referred him to the DCI in Nairobi where he recorded his statement on 23 May 2023.

16. Mr. Kijogi has admitted that he was to purchase 250 shares in the applicants' company at the price of Kshs. 250,000/= and not Kshs. 3,500,000/- as suggested by the applicants. It is his case that since he thought he had been defrauded of his money, he was entitled to report the matter to the police.

17. From the affidavit evidence, it is common ground amongst the parties that the applicants received the sum of Kshs. 3,500,000/- from the interested party on diverse dates in January, 2023. According to the applicants, this money was for the interested party's stake in the applicants' company, Kenizitte Exporters Limited. The interested party is of contrary position; his position is that the money was his contribution towards local purchase of avocados for export. The interested party was to get fifty per cent of the profit from the proceeds of the export.

18. Irrespective of who between the applicants and the interested party is right, one thing is clear and also common to all the parties: that despite having paid the Kshs. 3,500,000/-, the interested party neither got the stake in Kenizitte Exporters Limited nor any part of the profit from the export of avocados to the UAE. The applicants' explanation for the interested party's failure to get shares of Kenizitte Exporters Limited is that the interested party stopped the process of transfer of shares, a fact that the interested party does not appear to contest save that, according to him, he was to buy 250 shares of the company for the sum of Kshs. 250,000/- and not for Kshs. 3,500,000/- which he paid the applicants.

19. For purposes of settling the dispute in this application, the interested party's explanation that the money he paid or a substantial part of it was meant for the purchase and export of the avocados and not for shares in the applicants' company appears to be more plausible because at paragraph 8(c) of the 2nd applicant's affidavit, it is sworn as follows:

> " c. That in the meantime on diverse dates of January and February, 2023 the ex parte applicant while in agreement with the interested party utilized the contributed capital to top up with their other finances and dispatched two containers of fresh avocados to UAE both valued at approximately Kshs 8 Million ($57,000 or thereabouts) with the understanding that the consignee was to remit 75 % of the payments upon dispatch and the balance after receiving the consignment. (Attached and Marked as AKM-4 are copies of consignment notes, bill of lading and other documents in support of the exported goods)".

20. So, assuming there were any avocado exports as suggested by the applicants, the interested party's money was used to finance the local purchase and export of the avocados. But if the process of acquisition of shares in the applicants' company had been stopped, I have not found any answer, in the applicant's affidavit or anywhere else in their application, to the question why they proceeded to apply the money paid by the interested party as if his acquisition of a stake in the applicants' company was a done deal.

21. Secondly, the interested party's evidence that he was to get fifty percent of the profits of the sale of avocados has not been controverted. Certainly, the interested party could not have paid applicants the sum of Kshs. 3,500,000/= for no consideration at all; at least, no such suggestion has been proffered by the applicants.

22. To compound the applicants' case even further, is their suggestion that the apparent deal between them and the interested party was frustrated by the consignee of their exports who issued a bad cheque in a

purported settlement of the purchase price for the avocados. The imputation here is that the interested party would have been paid, apparently, in terms suggested by the interested party, if the consignee had met part of his bargain.

23. One other thing I have noticed from the evidence provided by the applicants is that the money paid by the interested party was not received by Kenizitte Exporters Limited but by the applicants, in their own names. A question that arises from these transactions is why the applicants would have received the money in their personal accounts when it was meant for Kenizitte Exporters Limited. As earlier noted, the money could not have been used to acquire the shares as the agreement to that effect never materialized and also there is a dispute as to the value of the shares purportedly to be purchased by the interested party. There is also no evidence that the avocados were purchased for export. As matter of fact, there is no evidence of any contribution that the applicants made towards purchase and export of the avocados as suggested in their affidavit or at all.

24. As far payment by the consignee is concerned, there is indeed a cheque of 40,000 dirhams (which is the UAE currency) drawn on account of one Adnan Ahmed Masood Mushtaq Ahmed. The payee, however, is not Kenizzite Exporters Limited but Linus Mwiti Paul. Further, there is no evidence that this cheque was either presented to any bank for payment or that it was presented and dishonoured as suggested by the applicants. Assuming the interested party had acquired shares in the Kenizzite Exporters Limited, he would have been defrauded of the proceeds of the exports even if the cheque was to be paid for the simple reason that one of the directors of the company had diverted the proceeds of the sale to his personal account.

25. Finally, although the applicants have stated that they have lodged a suit or a claim against the consignee apparently in the UAE courts, there is no evidence of such a suit or claim having been lodged.

26. When all these circumstances are taken into account, the question that then follows is this: would the interested party be faulted for lodging a report or complaint to the police about the applicants' conduct? In my humble view, he shouldn't. It is true that a civil action path against the applicants for recovery of his money was and is still open to the interested party despite the fact that he has lodged a complaint with the police the result of which may be the applicants' prosecution. But if the police investigations establish an offence or offences have been committed, the argument that the applicants cannot be investigated and prosecuted merely because the interested party has the option of filing a civil suit for recovery of his money is untenable in law. It is untenable in law because according to section 193A of the Criminal Procedure Code, cap. 75, criminal proceedings can run concurrently with civil proceedings against any particular individual. This section reads follows:

    193A. Concurrent criminal and civil proceedings

    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.

27. In this particular case, the interested party has not even lodged civil proceedings against the applicants and, as far as I understand the applicants' case, the complaint against them is still under investigations. They are yet to be charged.

28. If the criminal proceedings can proceed concurrently with pending civil proceedings, the police cannot be faulted for undertaking investigations on the interested party's complaint only because the option of pursuing a civil claim is open to the interested party. If anything, the police have a legal duty to undertake investigations and prevent crime. This is clear in at least two provisions in the *National Police Service Act*, cap. 84. Section 24 of the Act states as follows:

24. Functions of the Kenya Police Service

The functions of the Kenya Police Service shall be the—

(a) provision of assistance to the public when in need;

(b) maintenance of law and order;

(c) preservation of peace;

(d) protection of life and property;

(e) investigation of crimes;

(f) collection of criminal intelligence;

(g) prevention and detection of crime;

(h) apprehension of offenders;

(i) enforcement of all laws and regulations with which it is charged; and

(j) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time. (Emphasis added).

And section 35 of the same Act states as follows:

35. Functions of the Directorate

The Directorate shall—

(a) collect and provide criminal intelligence;

(b) undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others;

(c) maintain law and order;

(d) detect and prevent crime;

(e) apprehend offenders;

(f) maintain criminal records;

(g) conduct forensic analysis;

(h) execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157(4) of *the Constitution*;

(i) coordinate country Interpol Affairs;

(j) investigate any matter that may be referred to it by the Independent Police Oversight Authority; and

(k) perform any other function conferred on it by any other written law. (Emphasis added).

The "Directorate" referred to in this section in the Directorate of Criminal Investigations established under section 28 of the *National Police Service Act*.

29. As far as the Director of Public Prosecutions is concerned, he has a constitutional duty not just to direct investigations but also to prosecute. The pertinent provisions in Article 157 of *the Constitution* to this end state as follows:

157. Director of Public Prosecutions

(4) The Director of Public Prosecutions shall have power to direct the Inspector- General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

(a) 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;

(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

30. But it would be naïve to imagine that the powers to investigate and prosecute will not be abused in spite of the clear terms in which these provisions of the law have been couched. They are sometimes abused and where there is a clear case of abuse of power by a public authority in this regard, a judicial review court is bound to intervene and stop the authority in its tracks by way of an order of certiorari and prohibition. But the court's power to this end can only be used sparingly. Lord Salmon expressed himself on this issue in D.P.P versus Humphrey's (1976) 2 ALL ER 497 at 527-8 as hereunder:

> " A judge has not and should not appear to have any responsibility for the institution of prosecutions, nor has he any power to refuse to allow a prosecution to proceed merely because he considers that as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to interfere. Fortunately, such prosecutions are hardly brought but the power of the court to prevent them is, in my view, of great constitutional importance and should be jealously preserved".

31. Considering the circumstances under which the applicants have been investigated, I am not persuaded that their investigation and, perhaps, their subsequent prosecution can be said to amount to abuse of the process of the criminal justice system. Neither can it be said that their investigation or prosecution is vexatious and oppressive to the applicants as to warrant this Honourable Court's interference.

32. A few other local authorities that speak to the same issue include, this Honourable Court's decision in Kuria & 3 Others vs. Attorney General (2002) 2 KLR 69 where it was held as follows:

> "The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer......"

33. The same point was expressed in Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another (2002) 2 KLR 703, where it was held as follows:

> "It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth... When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... The predominant purpose is to further that ulterior motive and that is when the High Court steps in..."

34. One other case that underscores the point that the court is entitled to intervene and stop abuse of the criminal process is the case of Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (2008) 2 EA 323 where it was held as follows:

> "Whereas we appreciate the fact that the decision whether or not to prosecute the petitioners is an exercise of discretion this Court is empowered to interfere with the exercise of discretion

in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable…"

35. Considering the background of the investigation of the applicants' conduct and the intended prosecution, I would not say that the respondents decision or decisions are tainted on any of the grounds enumerated in this decision.

36. Turning to the specific grounds of judicial review, the grounds stated in the statutory statement and for which review is sought have been couched as follows:

> " 3. 1 The decision for the intended arrest Charge and prosecute the ex parte applicants was made in breach of sound principles of for prosecution which require that the decision to prosecute must be based against with traditional considerations of candor fairness and justice.
>
> 3. 2 The dispute surrounding this matter is purely a civil dispute with no connection with any criminal conduct as the ex parte applicants are business partners with the interested party who is already aware that the consignment forming part of the partnership has never been paid for by the consignee despite having been delivered.
>
> 3. 3 The decision to charge and prosecute the applicants was made without taking into account very relevant considerations and material evidence, and instituted by officers of the 2nd Respondent who have vested interests in the subject matter of the investigations.
>
> 3. 4 The decision of the intended arrest charge and prosecution of the ex parte applicants is a gross abuse of the criminal justice.
>
> 3. 5 It is just and equitable that the orders sought herein be granted."

37. It is not quite apparent from the foregoing paragraphs which the applicants have captioned as "grounds upon which reliefs are sought" the grounds of judicial review upon which the applicants seek judicial review reliefs. The traditional grounds for judicial review are, of course, illegality, irrationality, procedural impropriety. The ground proportionality is a later development. The first three grounds were defined in Council of Civil Service Unions v. Minister for the Civil Service [1985] A.C. 374,410 where Lord Diplock spoke of them in the following terms:

> " My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality"

which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all.

38. While reiterating the importance of stating grounds for judicial review in concise and precise terms, Michael Fordham in his book, Judicial Review Handbook, at Paragraph 34.1 states as follows:

> " The need to identify and express accurately the possible grounds for judicial review is not simply a matter of analytical nicety. It is one of practical necessity. The provisions of the new order require the accurate identification of (a) potentially applicable grounds and (b) the time at which they arose. Given the frequent presence of multiple targets, the elusive nature of certain grounds, their disarming interrelationship, and the understandable fear of missed opportunity, it is easy to see why public lawyers may feel tempted to 'throw everything' including grounds which are dangerously close to the inconceivable. This approach is unlikely to endear them to the court."

39. The 'new order' referred to in this passage is Order 53 of the Rules of the Supreme Court of England whose provisions are more or less in pari materia with our own Order 53 of the Civil Procedure Rules, 2010. Order 53 Rule 1(2), for instance, states in mandatory terms that the statement accompanying the application must contain, among other things, the grounds upon which the application is made. It reads as follows:

(2) 2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the

relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. (Emphasis added).

And Order 53 Rule 4(1) states unambiguously that no grounds should be relied upon except those specified in the statement accompanying the application for leave.

40. Thus, courts will not entertain applications where grounds have not been identified and accurately stated. Stating the grounds in precise terms is not, as it were, a matter of analytical nicety but it is a practical necessity. It follows that where the grounds are not stated, the application is fatally defective as, strictly speaking, it has no foundation upon which it is built.

41. But if the applicants were to be given the benefit of doubt and assumed to have relied on any or all of these grounds, I am still not persuaded that the respondents' decisions can be said to be tainted in any of the ways envisaged by the judicial review grounds. As noted, the respondents actions to investigate the respondents have constitutional and statutory underpinnings. It has not been demonstrated, to my satisfaction, that in exercising their mandate, they did not understand correctly the law regulating their functions or decision-making power or they failed to give effect to it. In other words, there is no proof of illegality in the respondents' actions or decisions.

42. Considering the background and the circumstances in which the applicants were subjected to investigations, it cannot also be said with any sense of conviction that the respondents' actions or decisions were irrational in the sense that they were so outrageous in their defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Finally, there is evidence that the applicants have been given opportunity to be heard, in the course of the investigations. Apart from the complaint about assault of the 2nd applicant, a complaint that a trial court would competently interrogate and make appropriate orders, in the event the applicants are charged, there is no proof that the respondents have flouted any procedural step in the course of the investigations. Accordingly, the actions of the respondents cannot be said to be tainted on the judicial review ground of procedural impropriety.

43. For the reasons I have given, I am not persuaded that the applicants have made out a case upon which I can exercise my discretion in their favour and grant the judicial review reliefs sought. I hereby dismiss their application with costs.

SIGNED, DATED AND DELIVERED ON 15 JULY 2024

NGAAH JAIRUS

JUDGE