



**Republic v Inspector General of Police & another; Kyule (Interested Party);  
Ndambuki (Exparte) (Judicial Review Miscellaneous Application E022 of 2022)  
[2023] KEHC 860 (KLR) (Judicial Review) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 860 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E022 OF 2022  
AK NDUNG'U, J  
FEBRUARY 16, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE INSPECTOR GENERAL OF POLICE ..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTION ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**TERRY-ANNE KYULE ..... INTERESTED PARTY**

**AND**

**ALICE MBITHE NDAMBUKI ..... EXPARTE**

**JUDGMENT**

1. The *ex parte* applicant aggrieved by the charges filed by the interested party herein at the Savannah Police Post has filed the application before this court dated March 24, 2022 seeking the following orders;
  - i. An order of prohibition do issue prohibiting the 1<sup>st</sup> respondent from arresting and preferring charges or otherwise acting upon the complaint filed against the applicant by the interested party at Savannah Police Post.
  - ii. An order of prohibition do issue prohibiting the 2<sup>nd</sup> respondent from receiving, approving the charges against the applicant or prosecuting the applicant on the basis of the complaint filed by the interested party against the applicant herein.



- iii. Costs of this application be provided for.
2. The application is supported by a statutory statement dated February 21, 2022 and a verifying affidavit sworn by the *ex parte* applicant on even date.
  3. The *ex parte* applicant's case is that following the interested party's failure to pay rent which arrears amounted to the sum of Kshs 55,000/= and the interested party having abandoned the house from February 2021 and later resurfacing in January 2022, she sought assistance from the area assistant chief who visited the premises and instructed the applicant's caretaker to break the house and remove the goods and keep them in the store until the interested party comes for them.
  4. The *ex parte* applicant's case is that it is the assistant chief who personally took inventory of the goods and even called the interested party and advised her that all her items would remain in the applicant's store until she came to collect them.
  5. The interested party is said to have failed to collect the items despite numerous calls to the *ex parte* applicant promising to collect the same. The *ex parte* applicant's case is that she received a call from a police officer stationed at Savannah Police post directing the *ex parte* applicant to report to the post. It is her case that upon arriving at the station and explaining what had transpired the officer became very rude and threatened that if she failed to return the said goods to the interested party she would be charged with the offence of breaking and stealing.
  6. The officer is accused of persistently calling the *ex parte* applicant asking her to report to the police station for her fingerprints to be taken and for her to be taken to court. The *ex parte* applicant argues that she fears for her life and that the dispute between the interested party and herself is purely a landlord/tenant dispute and as such the 1<sup>st</sup> respondent is engaging in an open abuse of the criminal justice system to aid the interested party.
  7. The respondent in rebuttal through an affidavit sworn on April 20, 2022 by Aden Hassan, the officer in charge of Savannah Police Patrol Base within Buru Buru Police Station contends that the interested party was a tenant of the *ex parte* applicant since February 2021 paying a monthly rent of Kshs 15,000/= and that she fell on hard times and was unable to pay the said rent and she defaulted to pay rent to the tune Kshs 45,000/=.
  8. It is alleged that upon default to pay rent, the *ex parte* applicant broke into the interested party's house and took away her household goods and it is for this reason that the interested party lodged a complaint vide OB No 20/02/2022 accusing the *ex parte* applicant of breaking into a building and committing a felony.
  9. The deponent claims that she made numerous efforts to resolve the dispute but the *ex parte* applicant was having none of that. It is the deponent's case that upon the *ex parte* applicant recording a statement it emerged that there was no court order authorizing the applicant or any person to break into the complainant's house and retain her goods as security for the said rent arrears.
  10. The application was canvassed by way of written submissions. The *ex parte* applicant in her written submissions dated August 25, 2022 contends that it is an abuse of process for the police to get involved in what clearly belongs to another justice system and to arrogate itself or usurp what belongs to the Rent Tribunal. Further that the argument that proper procedure was not followed is clearly baseless as the body that determines whether the right procedures were followed before distress for rent is issued is the Rent Restriction Tribunal. The cases of *R v Horseferry Road Magistrate's Court ex parte Bennett* and *R v Mullen* are cited in regard to the doctrine of abuse of process.



11. The respondents on the other hand in their submissions dated September 26, 2022 submit that the prayers sought by the applicant are unconstitutional as they seek to prevent the ODPP and DCI from exercising their mandate as provided in law. Further that it is an established principle that where a party alleges a breach of fundamental rights and freedoms, he or she must state and identify the rights with precision and how the same have been or will be infringed in respect to him as was held in the case of *Anarita Karimi Njeru v The Republic* (1976-1980) KLR 1272.
12. It is their submission that the court is independent and impartial and therefore the *ex parte* applicant shall enjoy the right to equal protection in any court of law and fair administrative process as matters are decided on merits.
13. The respondents contend that in the exercise of its power of investigation, the DCI is functionally independent and can only take directions to investigate from the ODPP and no other authority. In the case of the DPP's directive, the *Constitution* requires the directives to be in writing for the police to give effect to them.. It is urged that in the instant case the *ex parte* applicant has not presented any written directive to the DCI by any other authority to justify his claim that the investigations have been commenced for a collateral purpose and that in the absence of that evidence, the court can only presume that they are purely acting on the discharge of their lawful authority.
14. Additionally, the respondents argue that the law allows the DCI and any other investigative agency to investigate any person if there's probable cause to do so, the status of the applicant notwithstanding. To buttress this argument, the case of *Republic v The Commissioner of Police & the Director of Public Prosecution ex parte Michael Monari & another* Misc application No 68 of 2011, Nairobi is cited.
15. It is their submission also that the primary test in making of a prosecutorial decision on the part of the DPP is whether or not the material gathered meets the evidential and public interest threshold. This position is enunciated in the National Prosecution Policy and in the cases of *Mohamed Ali Swaleh v The Director of Public Prosecution & another*- High Court Mombasa petition No 2 of 2017 and *Republic v Commissioner of Police & another* (2012) eKLR.
16. The respondent's argue that it is not the court's duty to decide who to be charged and with what offence as they would clearly be intermeddling in matters that are purely within the province of the DPP thus rendering the DPP a constitutionally docile entity. This is as was held by the court in *Pauline Raget Adhiambo Agot v DPP and 5 others* (2010) petition No 446 of 2015.
17. It is submitted that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the court to determine the merits of two or more different versions presented before it, the court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved.
18. The respondents also argued that too much superintendence by one organ could render the other arms of government dysfunctional, which is clearly a threat to the rule of law and could possibly lead to a constitutional paralysis or crises in government. Any intervention therefore by one arm against the other must be guarded and properly justified.
19. I have had due regard to the application, the statutory statement it is anchored on and the verifying affidavit. I have carefully considered the replying affidavits and the submissions filed by the parties through their respective counsel. The issue for determination crystalizes into whether the applicant has established the legal threshold for the grant of the prerogative writs of judicial review and based on the answer thereof, what orders should issue.



20. The constitutional underpinning of the vast and unfettered powers over public prosecutions vested on the 1<sup>st</sup> respondent is found under article 157 of the [Constitution](#), 2010. The article provides that the 1<sup>st</sup> respondent shall not require the consent of any person or authority for the commencement of criminal proceedings and that in the exercise of his or her powers or function, shall not be under the direction or control of any person or authority. Under sub article 11 he or she is required to have regard for the public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process.
21. However, the said article does not give the office bearer free reign to commit crimes or violate the law. If the officer behaves in violation of the law or without following due process, the court will be there to provide redress. By definition, the decision to charge is an administrative action that falls under the [Fair Administrative Actions Act](#)'s guidelines and is overseen by this court in accordance with article 47 of the [Constitution](#). For eligible remedies, this court's judicial review jurisdiction may be invoked and has indeed been invoked successfully in appropriate cases.
22. The Court of Appeal in the case of [Diamond Hasbam Lalji & another v Attorney General & 4 others](#) [2018] eKLR, extensively considered in detail the applicable law and circumstances under which the court could interfere with the exercise of prosecutorial discretion by the DPP. Among the guiding principles outlined in section 4 of the [ODPP's Act](#) No 2 of 2013 and the National Prosecution Policy formulated by the DPP pursuant to section 5(1)(c) of the [ODPP Act](#) are that; "The decision to prosecute as a concept envisages two basic components namely; that the evidence available is admissible and sufficient and that public interest requires a prosecution to be conducted."
23. Paragraph 4 (b)(z) of the said policy provides; "the evidence test- public prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, public prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available."
24. In the *Diamond's case* (supra), the court held at para 42 as follows;
- "The burden of proof rests with the person alleging unconstitutional power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision."
25. In para 45 the court went further to state thus;
- "(45) In considering the evidential test, the court should only be satisfied that the evidence collected by the investigative agency upon which DPP's decision is made establishes a *prima facie* case necessitating prosecution. At this stage, the courts should not hold a fully-fledged inquiry to find if evidence would end in conviction or acquittal. That is the function of the trial court. However, a proper scrutiny of facts and circumstances of the case are absolutely imperative."
26. It is trite that the standard to be met to allow review of the discretion of DPP to prosecute or not to prosecute is high and courts will interfere with the exercise sparingly and Lenaola J (as he then was) summed it up aptly in [Patrick Ngunjiri Muiruri v DPP](#) [2017] eKLR where he stated;
- "The law and practice, then, are quite clear; while the discretion of the DPP is unfettered, it is not unaccountable. While the authority to prosecute is entirely in the hands of the DPP,



it is not absolute. On the other hand, while the power of the court to review the decisions of the DPP are untrammelled, they are not to be exercised whimsically. While the court can review the DPP's decisions for rationality and procedural infirmities, it cannot review them on merit.”

27. The fact that the dispute before this court is one between a landlord and tenant is not disputed by any of the parties herein, neither is the fact that the interested party herein has defaulted in the payment of rent, albeit the difference in the amount of arrears as stated by both parties. It is also not in contention that in a bid to recover amounts due in rent and to stop the continued loss suffered by the *ex parte* applicant in terms of rent the land lady broke into the interested party's house and removed and kept her goods with the help of the area assistant chief who also informed the interested party of the action taken. I note from the record that the inventory allegedly prepared by the assistant chief has been produced by the *ex parte* applicant.
28. There exists therefore a contractual relationship between the applicant and the interested party in the form of a tenant and landlord contract. Such a contract naturally has obligations on either of the parties. The outstanding obligation on the part of the tenant is to pay rent. In the instant case, the interested party fell into rent arrears. It is admitted as much. That fact is known to the local government representative, the chief, and evidence has been tendered that it is the chief who took the inventory when the interested party's items were taken away and stored.
29. It follows therefore that only a civil court would be able to establish the contractual relationship between the parties, any breaches thereof and the circumstances and legality of the recoveries made by the applicant if at all. Any breach on the part of the applicant leading to loss to the interested party would be appropriately remedied through proof of such damages in the civil process. Such an endeavour is not within the purview of a criminal trial. Invoking the criminal process is a clear abuse of the legal process. Among other valid legal concerns would be the fundamental issue of establishing mens rea on the part of the applicant.
30. I hold the view that if the interested party was aggrieved by the method the *ex parte* applicant used to distress for rent, and noting the relationship between the two parties is one of landlord and tenant, her first point of call would have been the Rent Restrictions Tribunal or a civil court of competent jurisdiction, as the case may be, to seek a remedy.
31. Having evaluated the facts herein, it is clear beyond per adventure that the decision to charge is unreasonable, oppressive and an abuse of the legal process. Am fortified in this finding by the holding in the case of *Republic v Commissioner of Police and another ex parte Michael Monari & another*, [2012] eKLR where it was held;

“the police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. 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”. (emphasis added).



32. Similarly, the Court of Appeal in the case of *Joram Mwenda Guantai v The Chief Magistrate*, [2007] 2 EA 170 held thus;

“It is trite that an order of 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 in 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...Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the judge has the power to intervene and the High Court has the inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”

33. This was also the position in *R v Attorney General exp Kipngeno Arap Ngeny*, High Court civil application No 406 of 2001 wherein it was held that:

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.

34. On the last issue as regards the relief sought, the ex parte applicant has sought an order of prohibition. The Court of Appeal held in *Kenya National Examinations Council v Republic Ex parte Geoffrey Gathenji Njoroge* civil appeal No 266 of 1996 *inter alia* as follows as regards the nature of the judicial review order:

“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....”

35. This court having established that the prosecution of the applicant by the respondents is an abuse of the legal process, unreasonable and for improper purposes an order of prohibition stopping any further prosecution of the *ex parte* applicant in the said criminal case is merited.

36. In the premises, I find that the *ex parte* applicant’s notice of motion dated March 24, 2022 merited to the extent of the following orders:



- i. An order of prohibition be and is hereby issued prohibiting the 1<sup>st</sup> respondent from arresting and preferring charges or otherwise acting upon the complaint filed against the applicant by the interested party at Savannah Police Post.
- ii. An order of prohibition is hereby issued prohibiting the 2<sup>nd</sup> respondent from receiving, approving the charges against the applicant or prosecuting the applicant on the basis of the complaint filed by the interested party against the applicant herein.
- iii. The respondents shall meet the *ex parte* applicant's costs of the notice of motion dated March 24, 2022.

**Dated, Signed and Delivered at Nairobi this 16<sup>th</sup> day of February, 2023.**

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**A. K. NDUNG'U**

**JUDGE**

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