Republic v Inspector General of Police & 2 others; Kebathi & 5 others (Exparte); Cementers Limited & another (Interested Parties) (Application E033 of 2022) [2023] KEHC 19866 (KLR) (Judicial Review) (4 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19866 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E033 OF 2022

J NGAAH, J

JULY 4, 2023

BETWEEN

REPUBLIC .... APPLICANT

AND

INSPECTOR GENERAL OF POLICE .... 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS .... 2ND RESPONDENT

MILIMANI CHIEF MAGISTRATES' COURT .... 3RD RESPONDENT

AND

STANLEY KEBATHI .... EXPARTE

STANLEY KEBATHI T/A AS ARCHPLANS .... EXPARTE

KARIUKI MUCHEMI .... EXPARTE

INTERCONSULT ENGINEERS LIMITED .... EXPARTE

WILSON MUNYU KARABA .... EXPARTE

CONAPEX CONSULTING ENGINEERS LIMITED .... EXPARTE

AND

CEMENTERS LIMITED .... INTERESTED PARTY

MULTICHOICE KENYA LIMITED .... INTERESTED PARTY

JUDGMENT

1. Before court is the ex parte applicants' notice of motion dated 29 March 2022. The motion is brought under order 53 Rule 3 of the Civil Procedure Rules and the applicant seeks judicial review orders of certiorari and prohibition. The prayers for these orders have been phrased as follows:

    1. That an order of certiorari do (sic) and is hereby issued bringing to this court and quashing the 1st respondent's decision to investigate the ex parte applicants in relation to the professional services rendered in the construction and related works of erecting an office block on land reference no. 2734/421 Oloitoktok road Nairobi.

    2. That an order of certiorari do (sic) and is hereby issued to bringing to this court and quashing the 2nd respondents (sic) decision to charge and prosecute the ex parte applicants as contained in the amended charge sheet dated 8th March 2022 in Milimani Chief Magistrate's Court Criminal Case No. E007 of 2022 Republic versus Kariuki Muchemi and 6 others

    3. That an order of certiorari do (sic) and is hereby issued bringing to this court and quashing the 3rd respondent's decision to admit the amended charge dated 8th March 2022.

    4. That an order of certiorari do (sic) and is hereby issued bringing to this court and quashing all the proceedings in Milimani Chief Magistrate's Court Criminal Case No. E007 of 2022 Republic versus Kariuki Muchemi and 6 Others in their entirety;

    5. That an order of prohibition do (sic) and is hereby issued forbidding the 1st, 2nd and 3rd respondents from conducting any further proceedings whatsoever in Milimani Chief Magistrate's Court Criminal Case No. E007 of 2022 Republic versus Kariuki Muchemi and 6 Others.

    6. That an order of prohibition do (sic) and is hereby issued forbidding the 1st respondent, its employees, servants and/or agents from harassing, summoning, arresting and/or intimidating the ex parte applicants for the professional services rendered in the construction and related works of erecting an office block on land reference number 2734/421 Oloitoktok road Nairobi.

    7. That an order of prohibition do and is hereby issued forbidding the 2nd respondent from instituting any further or future charges against the ex parte applicants based on the same complaint or facts the subject of the criminal charges in Milimani Chief Magistrate's Court Criminal Case No. E007 of 2022 Republic versus Kariuki Muchemi and 6 Others."

2. The applicants have also asked this court to make an order for costs.

3. The application is based on a statutory statement dated 22 March 2022 and affidavits respectively sworn on even date by Stanley Kebathi (Kebathi) and Kariuki Muchemi (Muchemi), verifying the facts relied upon.

4. Kebathi is the 1st applicant in this suit and he has sworn that he carries on business in the name of SK Archplans, a registered business name, and which is named as the 2nd applicant in this suit. He has also sworn that he is a member of the Architectural Association of Kenya and the Chartered Institute of Arbitrators.

5. Sometime in 2011, he came to learn that Multichoice Kenya Limited (Multichoice) intended to construct an office block and was in the process of assembling a group of professionals to undertake the project. He got this information from a friend of his whom he has identified as Mr. Suleiman Magare.

6. Kebathi's firm successfully participated in the competition for the best design proposal. By a letter dated 10 October 2011, Multichoice appointed Kebathi as the principal architect for the project. Subsequently, by an agreement dated 9 November 2011, Kebathi was formerly engaged by Multichoice to carry out architectural services with respect to development of the construction project on a parcel of land known as LR. No. 3734/421 situated off Oloitoktok road in Nairobi.

7. According to clause A(iv) of the agreement between Multichoice and Kebathi, the latter was given the powers of the lead consultant and in that regard, he was to appoint other consultants to provide structural services, quantity surveying, mechanical and electrical services approved by Multichoice. Accordingly, Kebathi appointed the following consultants on behalf of Multichoice:

    i. Conapex Consulting Engineers to provide structural services

    ii. Magare and Partners were appointed as quantity surveyors

    iii. Prime Consultant Engineers were engaged for mechanical and electrical services.

8. Kebathi together with his team of professionals did what he has described as "preliminary work" and prepared the tender documents for the project.

9. The 1st interested party, Cementers Limited (Cementers) won the tender and was thus employed by Multichoice as the contractor responsible for the development of the office block on LR. No. 3734/421. A contract to this effect, detailing the works to be executed, was entered into between the Cementers Limited and Multichoice.

10. The site was handed over to Cementers on 13 February 2015 and thereafter works commenced on 3 March 2015. As the works progressed, Kebathi visited the sites on a regular basis, more particularly, at intervals of two weeks. It was during one such visit that he noted cracks on the building and sagging of floors. These defects in the building raised concerns about the integrity of the development and it was therefore decided that the services of an independent structural engineer be secured to carry out a structural audit of the building and determine if the defects were structural and if they affected the structural integrity of the entire building.

11. Interconsult Engineers Limited (IEL), the 4th applicant in this application was commissioned by Multichoice to carry out the structural audit of the building. As will become apparent in the affidavit of Muchemi, IEL is a limited company and Muchemi is a director and shareholder in the company.

12. The 3rd applicant or his company commenced assessment of the structural integrity of the building on 11 April 2016 as "an independent engineer". He produced independent periodic reports in liaison with the project engineer, Conapex Consulting Engineers. These reports were forwarded to Multichoice.

13. By a letter dated 1 September 2016, Kebathi advised Conapex Consulting Engineers to take immediate remedial measures that entailed erection of columns which, apparently, were meant to support the sagging floors.

14. On 25 October 2016, IEL was appointed as the civil and structural engineer and was tasked with the investigating and issuing a report on the noted defects. Meanwhile, Kebathi was instructed by Multichoice to terminate the services of the then project engineer, Conapex Consulting Engineers. These instructions were affected by Kebathi's letter dated 27 October 2016.

15. Non-destructive and destructive tests were commenced soon thereafter and the results were forwarded to Cementers and Multichoice. After several meetings between the two companies and other professionals, the construction contract between them was terminated on 21 June 2017.

16. Cementers disputed the termination and declared it a wrongful termination. On its part, by a letter dated 29 November 2017, Multichoice declared a dispute with respect to construction of the office block.

17. On 16 June 2018 at about 5 PM, Kebathi's offices were raided by people claiming to be agents or employees of the 1st respondent. They carted away all the physical files and computers relating to the project. Later, Kebathi learnt that Cementers had obtained an ex parte order in High Court Commercial and Admiralty and Taxation Civil Case No. 307 of 2018; Cementers Limited versus Multichoice Kenya Limited and 13 Others authorising the raid of Kebathi's premises. The raid, according to Kebathi, was contrary to the rules of natural justice that require a party to be heard before such drastic orders are given. As at the time of filing the instant suit, the suit by Cementers was still pending for determination. Besides the suit by Cementers, there are also pending arbitration proceedings on the construction dispute between Cementers and Multichoice.

18. On 12 July 2019, Kebathi was informed by Titus Kyende, whom he has identified as a member of his staff, that he was being sought by agents of the 1st respondent with regard to the Multichoice project. He visited the Directorate of Criminal Investigations Office on 15 July 2019 but did not record any statement. He eventually recorded his statement on 19 July 2019 detailing all matters within his knowledge about the contract between Multichoice and Cementers.

19. On 4 January 2022, Kebathi was arrested and put in police custody at Muthaiga police station. He was released on bond and ordered to report to court on 5 January 2022 when he was charged with the offences of conspiracy to defraud contrary to section 317 of the Penal Code in Milimani Chief Magistrates' Court Criminal Case No. E007 of 2022: Republic versus Eugine Muchemi & 4 Others. On 8 March 2022, the 2nd respondent amended the charge sheet by adding S.K Archplans, IEL, Conapex Consulting Engineers Limited as co-accused for the crime of conspiracy.

20. It is Kebathi's contention that the amendment of the charge sheet is without basis and is malicious since he has already been charged in his personal capacity.

21. The 3rd applicant Kariuki Muchemi swore that he is a director and shareholder of IEL and that he is an engineer specialising in civil and structural engineering. He is also an advocate of this Honourable Court.

22. IEL, according to Muchemi, deals in design and supervision of construction of both commercial and residential buildings within and outside Kenya.

23. Sometimes in March 2016, Kebathi contacted him seeking a professional opinion on a project that his firm was undertaking. The project was referred to as "the proposed construction of an office block on plot L.R. NO. 3734/421".

24. Kebathi informed him that he and other project consultants were of the opinion that the structure under construction had a number of defects that required immediate attention. He further informed him that as the lead consultant, he had stopped all construction works pending remedial measures to correct the defects.

25. On 14 March 2016, Muchemi was invited to the project site by Kebathi. He was shown the perceived defects that included multiple cracks in the structure elements which he identified as the structure columns, beams, slabs, and masonry walls.

26. After a series of meetings between the lead consultant and the project manager, IEL was formally commissioned by Multichoice to carry out a structural audit of the building with the aim of determining if the perceived defects were all structural and whether they affected the structural integrity of the structure.

27. After the visit to the site, Muchemi requested Kebathi to furnish his office with architectural drawings. The structural audit involved his office developing structural designs and calculations of the affected areas with the aim of establishing the structural adequacy of the sample structural elements of concern against the designs proposed by the consulting engineer applied during the project execution. He got the drawings on 12 April 2016.

28. Muchemi's company then advised Kebathi that it would be prudent to appoint a specialist to conduct non-destructive tests (NDT's) and scan some of the areas of concern within the structure. This was to help understand and determine the cause of the visible cracks and also map out the depth, size and location of the cracks which would aid in mapping out the extent of cracks within the structure. Secondly, the non-destructive tests were meant to map out the reinforcement that was laid out in the sample building structure elements, that is, the beams, slabs and columns.

29. Muchemi's company proposed Mass Labs Limited to carry out the tests and scans on some of the critical areas. According to Muchemi, Mass Labs Limited is a well-respected, accredited and licensed specialist firm with a laboratory that was capable of carrying out the tests. The proposal was accepted by the Multichoice and the tests were eventually undertaken.

30. The preliminary investigations by Mass Labs Limited and Muchemi's company established that there was inadequate steel reinforcement in the structural elements tested and that the concrete needed to be tested further to determine the reason for the cracks.

31. After sharing the preliminary report, Muchemi's company was approached in October 2016 and offered the position of project civil structural engineering consultant. This was after the position fell vacant after Conapex Consulting Engineers left the project.

32. After Muchemi's company took over the position, it was instructed to carry out full structural audit of the office block. The company understood its brief to be that of instructing Kebathi, the lead consultant, of the need to add more props to the structure in addition to the existing props. The company also recommended further structural mapping of the structure to determine the sizing of the structural members, reinforcement, sizing and spacing. It also recommended non-destructive tests to investigate the cracks and determine the concrete strength; the location of the cracks; the size and orientation of the cracks; and, the frequency of the cracks together with their depth of the penetration.

33. Quality Inspectors Limited was appointed to carry out the tests. The results from the tests showed that the concrete strength of the structure was well below the designed strength. It was also established that there was significant deficiency of steel in comparison to IEL structural design and there were discrepancies between the reinforcement in the drawing and reinforcement mapped in the structure.

34. Muchemi's company recommended destructive testing but Cementers was opposed to the idea ostensibly because the tests would weaken the building. Cementers also disputed and contested the non-destructive tests particularly on the finding that concrete strength was not in accordance with the project specifications.

35. Even then, Cementers attended one testing meeting with its engineer. During the said meeting, a core was placed on the hydraulic crushing machine and even before the machine could apply any significant pressure, the core cracked. From then on, Cementers never participated in any other testing exercise.

36. Thereafter, a structural integrity report was put together capturing the findings of both the destructive and non-destructive test results. According to this report, the structural failure of the building was attributable to the fact that the concrete strength was significantly lower than the designed strength coupled with the under reinforcement of the various structural members. Following this report, Kebathi asked Muchemi to propose remedial measures for the project building.

37. Muchemi and his company developed remedial measures to strengthen the structure by proposing additional bracing of the structure through introduction of reinforced structural columns and beams complemented by additional reinforcement and application of carbon fibre wrap and other bonding agents to the existing structural members.

38. After sharing the final structural audit report which Muchemi deposed was made in February 2017, Muchemi's office was raided by people claiming to be agents and employees of the 1st respondent on 1 August 2018. These people claimed that they had a court order to seize computers, phones and documents deemed to be of the proposed building project. The 1st respondent's agents informed Muchemi that they were seizing this property to avoid destruction of evidence. Later Muchemi was asked to pick his property from Kilimani police station. This, he did a week after the seizure.

39. On 24 March 2020, Muchemi was requested to go to the directorate of investigations and record a statement with respect to his report on the project. He recorded the statement on the same date. On 8 March 2022, he was charged in Milimani Chief Magistrates' Criminal Case No, 007 of 2022; Republic versus Kariuki Muchemi & 5 Others.

40. Muchemi has deposed that the criminal proceedings against him are adversely affecting his business and reputation since his clients are bound to question his professional competency and integrity.

41. The 1st and 2nd respondents opposed the application and in that regard filed a replying affidavit sworn by police constable Ian Mukumbu Makumi. According to Constable Makumi, on 8 April 2019, Cementers made a complaint to the director of criminal investigations that an alteration had been made to a structural integrity investigation report to the prejudice of the complainant. The 1st respondent acted on the complaint and undertook investigations into the allegations of, making a false document contrary to section 347 of the Penal Code; inciting another to commit an offence contrary to section 391 of the Penal Code; and, conspiracy to defraud contrary to section 317 of the Penal Code.

42. In the course of investigations, the investigators recorded statements from the complainant and also collected documents relevant to the complaint for analysis. They also summoned the suspects for interrogation and also had their statements recorded.

43. Upon completion of the investigations, the duplicate file was forwarded to the office of the Director of Public Prosecutions for perusal and advice. After perusing the file, the office of the Director of Public Prosecutions returned it to the 1st respondent with recommendations to charge the suspects. According to these recommendations, there was evidence indicating foul play, conspiracy and intention to make a false document. Constable Makumi exhibited on his affidavit documentary evidence supporting the charges against the suspects.

44. Acting on the advice of the office of the Director of Public Prosecutions, officers from the serious crimes unit arrested the suspects and arraigned them before the Chief Magistrates Court at Milimani.

45. No response was filed on behalf of the 3rd respondent.

46. Like the 1st and 2nd respondents, Cementers, the 1st interested party, opposed the application. According to a supplementary affidavit sworn by its director, Dipak Halal on 8 April 2022, Halal adopted his affidavit sworn on 6 April 2022 filed in opposition to the application by the applicants for leave to file the instant suit.

47. Halal is in agreement with the applicants that his company and Multichoice entered into a contract for construction of an office block on Multichoice's land and that Kebathi participated in the project as the principal architect and lead consultant. He also admits that his company filed a suit against Multichoice in this Honourable Court as civil suit no. 307 of 2018 in which he sought, among other prayers, Anton pillar orders.

48. Cementers obtained the Anton pillar orders against 14 defendants who included the 1st to 4th applicants and Multichoice. The orders were subsequently executed.

49. Halal has admitted that indeed the suit in which Cementers obtained the orders is still alive but has been stayed pending the determination of arbitration proceedings. Besides the civil suit and the arbitration proceedings, Cementers also lodged a criminal complaint to the director of criminal investigations against the 1st to 4th applicants and Multichoice in relation to false electronic and physical documents allegedly made by the applicants. According to Halal, the documents obtained in execution of the Anton Piller orders may be crucial to both the criminal proceedings and the arbitration proceedings.

50. Halal has also sworn that the arrest of the applicants stems from their participation in the alteration of professional documents in relation to the construction dispute between his company and Multichoice. The alteration, he has sworn, was a conspiracy to set up Cementers in the construction dispute.

51. It has also been sworn that the applicants are not parties to the arbitration proceedings and, therefore, they cannot invoke the existence of those proceedings in their attempt to forestall the criminal charges against them. In any event, the arbitral tribunal has no jurisdiction to hear and determine the applicants' and Multichoice's fraudulent conduct. It is through the criminal process that the applicants' criminal inclination can be ascertained and a sufficient penalty meted out in the event they are held culpable.

52. According to Halal, the charges preferred against the applicants do not relate to their opinions as professionals, but they relate to fraudulent editing and changing of professional reports with the motive of covering up for their failures and lay blame on Cementers. The applicants, it has been sworn, can be charged if their actions are not in good faith and are fraudulent.

53. It has also been deposed that the charges against the applicants are valid in law because the complainant had a right to make and indeed it made a complaint to the police. That investigations were subsequently undertaken by an independent body which is the directorate of criminal investigations; and, the office of the Director of Public Prosecutions preferred charges against the applicants before an independent adjudicator, which is a court of competent jurisdiction.

54. Nancy Matimu, the 2nd interested party's managing director swore a replying affidavit and confirmed that indeed Multichoice is the owner of the office block on LR No. 3734/421 Oloitoktok road in Nairobi. She has also admitted that Multichoice engaged Cementers to build the office block worth over Kshs. 800,000,000/= in March 2015.

55. Ms. Matimu has also not disputed that Multichoice retained the services of Kebathi as the project architect; Conapex Engineers Limited as the structural engineer and IEL as an independent structural auditor of the stalled works.

56. According to Ms Matimu, the contract between Multichoice and Cementers was terminated after concrete and steel works in the office block were found to be substandard. The office block has since been condemned by the county government of Nairobi and demolished.

57. Like the applicants and the 1st interested party, Mas Matimu has sworn that the contractual dispute between Multichoice and Cementers is pending before this Honourable Court as civil suit number 307 of 2018. There is also another suit, apparently over the same subject matter which has been registered in this court as civil suit no. 359 of 2018 MIH East Africa Limited versus Cementers Limited and 3 Others. Also pending are also arbitration proceedings between Multichoice and Cementers. Kebathi and IEL are said to be witnesses for Multichoice in the arbitration proceedings and their prosecution is aimed at intimidating them in those proceedings.

58. On 5 January 2022, Lavender Lucky Waindi, who has been described as a principal legal compliance officer of Multichoice's consultant MIH (East Africa) Limited, alongside 6 other people were arraigned in Nairobi Chief Magistrates Court Criminal Case No. E007 of 2022 with offences of making a false document contrary to section 347 of the Penal Code; uttering a false document contrary to section 353 of the Penal Code; inciting another to commit an offence contrary to section 391 of the Penal Code; and, conspiracy to defraud contrary to section 317 of the Penal Code.

59. Ms Waindi was specifically charged with making a false document contrary to section 347 of the Penal Code, the document being a structural integrity investigation report on the proposed construction of Multichoice office block on LR. No. 3734/421 dated "February 2017". She was later discharged as the charges were withdrawn by the Director of Public Prosecutions.

60. It has been sworn by Ms Matimu that the structural report is a key piece of evidence and contentious issue at the arbitration proceedings. The admissibility of this report has been contested in the suit in the High Court and in the arbitration proceedings. Again, the examination of the facts reveals that the dispute between Multichoice and Cementers is purely a civil matter and investigation of criminal charges against the applicants is duplicitous and a malicious attempt to use the 1st and 2nd respondents to harass, humiliate and violate the rights and freedoms of the applicants in the hope of frustrating or unduly influencing the arbitral proceedings and the ongoing civil court cases.

61. It is Ms Matimu's deposition that criminal proceedings against the applicants are prejudicial to their professional reputations yet they were contracted to perform their professional duties in good faith.

62. So much for the parties' pleading and evidence. As far as the evidence is concerned, the facts which, in my humble view, are material to the determination of this application, are, to a greater, degree not in dispute. I have had also the opportunity to consider respective counsel's written submissions which have largely emphasised the facts leading to the dispute between the parties.

63. Amongst the material presented before court and to which my attention has been drawn in the quest to find an answer to the dispute before me, are several communications amongst the applicants and Multichoice on the cause of the defects in the office block which Cementers was contracted to construct. A look at these correspondence sheds light on the source of the dispute between Multichoice and Cementers Limited. The two are what I would call the 'primary characters' in the dispute that has eventually led to these proceedings.

64. For good measure, and from what I gather in the affidavits filed by the respective parties in the instant suit, the fact of communications and their content are matters that are not in dispute. The major bone of contention is the characterization of these communications. According to the applicants, the communications are nothing more than an innocent conversation between professionals and their client while the Director of Public Prosecutions, on the other hand, views them differently. According to him, the communications point to an elaborate scheme to commit criminal offences as defined in law, in particular, the Penal Code, cap. 63. This, in my humble view, is the overarching question, in this application.

65. As to whether this Honourable Court, in exercise of its supervisory jurisdiction, is competent to answer the question, one way or the other, is a question whose answer will become apparent in due course.

66. Due their centrality in resolving this application, it is necessary, if not for anything else, to understand each of the party's case in this application, to chronicle, as much as it is necessary, the correspondence that eventually culminated in the instant application.

67. First in line is the letter dated 1 September 2016 addressed to Conapex Consulting Engineers Limited by Kebathi. According to this letter, Kabathi, was categorical that the defects on the office block that generated the dispute between Cementers and Multichoice were as a result of what he referred to as "inadequate designs" by Conapex Consulting Engineers Limited.

68. In particular, Kebathi noted as follows:

> " As you are aware several defective beams have been observed at the above building in which you are the structural and civil engineer. Other Engineers have been engaged by our client to give their assessment of the matter and all have pointed to failure in the beams due to inadequate sheet reinforcement in the beams."

69. As the matter now stands it is necessary to remedy the situation by building additional columns.

70. This is to notify you that you are held fully responsible for the inadequate design and therefore fully responsible for the all the costs of remedial work which must now be undertaken as soon as possible.

71. Due to the urgency of the matter we are informing you to take immediate measures to cause the necessary columns to be erected immediately to avoid any further delays.

> " Yours faithfully
>
> Signed
>
> Stanley Kabathi".
>
> (Emphasis added).

72. It is clear from this letter that, firstly, the defects in the building had been diagnosed by engineers appointed by Multichoice. Secondly, the engineers traced the genesis of the defects to Conapex Consulting Engineers Limited and, thirdly, for this reason, Conapex Consulting Engineers Limited was directed by the Kebathi to take remedial measures at its own costs.

73. A letter dated 27 October 2016, again by Kebathi of Archplans shows that the services of Conapex Consulting Engineers Limited were subsequently terminated. The termination took effect on the date of the letter. The letter read in part as follows;

Termination of Services

74. Reference is made to our letter dated 7th April 2014 appointing (sic) as the structural Engineer of the above project. We now have instructions from our client to terminate your services effective immediately as per clause 226 of the Ministry of Works conditions of engagement and scale of fees. We also notify you of the intention to claim damages from faulty design as per clause 206.01.

> " Yours faithfully
>
> Signed
>
> Stanley Kebathi".

75. The letter was copied to Multichoice. The letter is, more or less, self-explanatory that Conapex Consulting Engineers Limited's services were terminated as a result of its faulty design of the office block.

76. Besides conclusions by Kebathi on who was responsible for the defects in the office building, an email dated 5 May 2017 by Felicine Oriri of Multichoice Kenya addressed to Albert Van Rooyen of the same company suggests that a report on the state of the building had been done and that Conapex Consulting Engineers Limited was to bear the blame. Apparently, this was the report of IEL of February 2017.

77. IEL, it may be recalled was initially engaged as an independent civil and structural engineer to audit the structural integrity of the office block but was eventually retained as, for lack of a better word, a resident civil and structural engineer or consultant after Conapex Consulting Engineers Limited was sacked.

78. In Oriri's email, which was copied to Kebathi and other officers of Multichoice, Oriri advised against sharing the report with Cementers. Part of that email read as follows:

> " Sharing of the complete report with the contractor had the potential of protracting resolution and it is for this reason that we advised that the complete report should not be shared with the contractor".

79. And on whether the contractor was to blame, Felicine noted:

> " The contractor is not being blamed for the steel deficiencies and therefore his response is not required on that leg".

80. As advised by Felicine Oriri, Multichoice did not share the entire report with Cementers. An email by Albert Rooyen dated 16 June 2017 addressed to Felicine shows this to be the case. In that email Rooyen wrote as follows:

81. Dear Fellicine, kindly note the below email that was sent to the contractor on April 28th, 2017 which included a (sanitized) report dealing with deficiencies only.

82. This is part of the report from IEL Engineers which they compiled during the audit.

83. What is noteworthy in the contractors (sic) latest response is that he is only referring to the earlier report by Mass Labs when claiming the concrete to be compliant, but have ignored the detailed alternative test… and results obtained by IEL which clearly indicated failure".

84. The report which the contractor is said to have been responding to was sent to it by one Titus on 28 April 2017. It is not clear who this Titus was but it may be assumed it is Titus Kyende whom Kebathi

identified as one of his staff members who informed him on 12 July 2019 that the 1st respondent's officers were looking for him.

85. There is also a legal opinion from a firm of lawyers called Coulson Harney LLP to Multichoice. The lawyers have stated at the introduction of their opinion that they were "instructed to advise Multichoice Kenya Limited (MCK) on the remedial works to be carried out as a result of defects in some structural elements".

86. As part of this opinion, the lawyers noted at paragraphs 2.3.4 of that opinion that;

> "The IEL Report attributed the inability for the structural deficiencies to the structural Engineer who was engaged in the preparation of the structural drawings and designs".

87. These correspondence and opinion to which the applicants and Multichoice are not only privy but have either authored or have been authored at their instructions point to what they believed was cause of the defects in the office block.

88. The correspondence also suggests that there was an attempt to divert or attribute liability of the defects in the office block from Conapex Consulting Engineers to Cementers despite the evidence to the contrary by Multichoice's own experts.

89. To the extent to which the judicial review jurisdiction of this court is invoked, I can only remark that despite being aware of these correspondence or communications, the applicants never made any reference to them in their application for leave to file the application for judicial review. In particular, none of the applicants who swore the affidavits in support of the facts relied upon came out clearly to bring this information to the attention of this Honourable Court. While Stanley Kebathi avoided the subject all together in his affidavit, Kariuki Muchemi attributed the defects to Cementers. He swore, inter alia, as follows:

90. That the results from the NDT's showed that the concrete strength of the structure was well below the designed strength of class 25(25N/m2) confirmed by the sample cores extracted and crushed in the laboratory.

91. That it was well found that there was significant deficiency of steel in comparison to structural design as well as noting discrepancies between the reinforcement indicated in the "as built" Drawing and the reinforcement mapped in the structure.

92. That in the summary our report captured that the structural failure of the project- building was attributable to the fact that the concrete strength was significantly lower than the design strength coupled with the under reinforcement of various structural members.

93. These depositions are clearly inconsistent with Kebathi's letters to Conapex Consulting Engineers Limited that stated in clear and unambiguous terms that the defects in the building were attributable to this company and that the company was also liable for the loss that Mulitchoice may incur. It is for the same reason that the company's services were terminated. The depositions are also contrary to Felicine's opinion that "the contractor is not being blamed for the steel deficiencies".

94. Again, they are also inconsistent with IEL report part of which was captured in the opinion by Coulson Harney LLP that:

> "The IEL Report attributed the inability for the structural deficiencies to the structural Engineer who was engaged in the preparation of the structural drawings and designs".

95. There are other emails that show further attempts to shift the blame to Cementers and also that the IEL report that was eventually shared with Cementers Limited was altered to suit Multichoice's whims.

96. In one of these emails dated 6 April 2017, Lucky Waindi who is also an employee of Multichoice asked Albert Van Pooyen whether the report should be shared. The email read in part:

97. Is it possible for Engineer Muchemi to extract only the portions that relate to Cementers and share it with them? I would recommend this for the following reasons;

    1. We are not legally bound to release the full report to them.

    2. Once Cementers has the report they will want to place/apportion blame on the structural Engineer.

98. Since we haven't (and are unlikely to be able) internally apportion this liability, Cementers may completely reject liability and hinder any remedial concrete works".

99. It would appear that the authors of the report IEL heeded Multichoice's intentions. This is because by an email dated 6 April 2017, the IEL wrote to Lucky Waindi, Albert van Rooyen and Titus stating as follows:

> " In regards to the above we shall appropriately edit the report to reflect the items that require attendance of the contractor (Cementers). I shall be able to share the report before noon tomorrow".

100. And true to their word, by an email dated 7 April 2017 IEL sent the edited report on even date.

101. In their covering e-mail they stated thus:

> " Attached find the structural report tailored as required. In case of any further information please let me know". (Emphasis added).

102. All these correspondence suggest that indeed there were defects in the office block and that the defects were attributable to Conapex Consulting Engineers Limited.

103. As I have noted before, these facts were not disclosed by the applicants. It may be that this information appears self-incriminating but that in itself is not a reason for a party who invokes the judicial review jurisdiction of this Honourable Court not to disclose material facts. Material facts must be disclosed regardless of whether they are prejudicial to an applicant's case.

104. It has been held that in application for leave for judicial review uberrimae fides is required and leave will not be granted, or may be later set aside, if there has been deliberate misrepresentation or concealment of material facts in the applicant's affidavit or affidavits.

105. In R v Kensington Income Tax Commissioner, ex parte Princess Edmond De Polignac [1917] 1KB 495, Viscount LJ addressed this point and stated as follows:

> " Where an ex parte application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which

bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that the Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit."

106. None of the applicants has denied the existence of these correspondence or communications. As far as I gather, the applicants do not appear to deny that the IEL report of February, 2017 was either 'altered', 'changed', 'edited' or 'tailored'. Their case is that if there was any alteration, editing or tailoring of the report, that in itself does not amount to a criminal offence. Rather, it is a civil dispute. The Director of Public Prosecutions, on the other hand, is of a contrary opinion-according to him the 'editing' 'changing' 'tailoring' of the IEL document points to a set of criminal offences on the part of the applicants.

107. But if I have to determine if the applicant is right I will certainly have to assess and evaluate the evidence and come to the conclusion whether the Director of Public Prosecution reached the correct decision in charging the applicants.

108. Yet it is not the duty of a Judicial Review Court to evaluate the evidence and determine whether indeed a crime has been committed or not and therefore whether the Director of Public Prosecution came to the correct decision. That is left to the discretion of the Director of Public Prosecution. This is captured in Article 157(6)(a) of *the Constitution* which provides as follows:

157.

(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;(Emphasis added).

109. The discretion to charge or not to charge is, of course not to be exercised at the whims of the Director of Public Prosecutions but it is subject to the supervisory jurisdiction of this Honourable Court. This point was taken as early as 1969 in Inspector Shaaban bin Hussien and others v Chong Fook Kam and another [1969] 3 ALL ER 1626 where the Privy Council noted as follows:

"It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbidden, it could seriously hamper the police. To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion... There is no serious danger in a large measure of executive discretion in the first instance because in countries where common law principles prevail the discretion is subject indirectly to judicial control."

110. Perhaps, I need to add that in Kenya, over and above the common law principles, *the Constitution* is the benchmark upon which the exercise of the discretion by the Director of Public Prosecutions is weighted. This why it is expressly stated in Article 157(11) of *the Constitution* that in exercising the powers conferred by Article 157 the Director of Public Prosecutions is enjoined to 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. Whenever an application such as the instant one is lodged before court, it is

incumbent upon court to check whether in exercise of his discretion, one way or the other, the Director of Public Prosecutions has given due regard to public interest, the administration of justice and the due process.

111. If a judicial review court has to disturb the exercise of discretion by the Director of Public Prosecution, or any other public authority for that matter, it must bear in mind that:

> " The very concept of administrative discretion involves a right to choose between more than one possible course of action on which there is room for reasonable people to hold differing opinions as to which is to be preferred."

113. These are the words of Lord Diplock in Secretary of State for Education and Science v Tameside Metropolitan BC [1976] 3 All ER 665 at 695, [1977] AC 1014 at 1064.

114. Turning back to the instant case, the Director of Public Prosecutions will have opportunity to present his case before the trial court based on the evidence he has gathered against the applicants. The applicants will have opportunity to cross-examine the prosecution witnesses on the evidence and raise reasonable doubt on, among other things, the weight or value of this evidence. The trial court will, on its part, interrogate the evidence and come to the conclusion whether the applicants are guilty or not.

115. The point is a judicial review court cannot substitute its own decision for that of the Director of Public Prosecutions. And neither can it assume the place of the trial court and decide whether offences alleged to have been committed were indeed committed.

116. All the court would be concerned about is the process by which the decision to charge was reached.

117. This legal proposition is not novel; it has been discussed in several decisions before, both in our local courts and foreign courts. In Energy Regulatory Commission v S G S Kenya Limited & 2 others [2018] eKLR Civil Appeal No. 341 of 2017, for instance, the Court of Appeal faulted the High Court for determining a judicial review matter as if it was an appeal, and for going into the merits of a decision already taken. The Appellate Court held it to be improper for the High Court to make value judgment regarding the evidence; to weigh the same, and to minutely examine it, to determine whether it reached a certain standard of acceptance. The Court found that the High Court had occasioned room for abuse of its power, by usurping the competences of the Public Procurement Administrative Review Board.

118. It was held that in a judicial review matter, the Court's mandate is limited to procedural improprieties, and extends not to the merits of a decision.

119. And in OJSC Power Machines Limited, TransCentury Limited, and Civicon Limited (Consortium) v Public Procurement Administrative Review Board Kenya & 2 others [2017] eKLR Civil Appeal No. 28 of 2016 it was held that:

> " Save for a limited scope, which we shall return to later, the court, considering a judicial review application, must never consider its role as appellate court and must avoid any temptation to go into the substance of the impugned decision itself or to ask questions, whether there was or there was no sufficient evidence to support the decision of the public body concerned. It is not for the court or individual judges to substitute their opinion for that of the public body constituted by law to decide the matter in question. See Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited (2008) Misc. Civil Appl. No. 374 of 2006. In judicial review proceedings, the mere fact that the public body's decision was based on insufficient evidence, or on misapplication of evidence, cannot be a ground granting judicial review remedies. Whether that decision was right or not, the affected party ought to

challenge it on appeal. In reaching its determination, it must, however, be recognized that a tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts. Whereas a decision may properly be overturned on an appeal, it does not necessarily qualify as a candidate for juridical review. See East African Railways Corp. v Anthony Sefu Far-Es-Salaam [1973] EA 327."

119. Courts may intervene to review a power conferred by statute on the ground of unfairness but only if the unfairness in the purported exercise of the power be such as to amount to an abuse of the power. See Preston v IRC [1985] 2 All ER 327, [1985] AC 835, per Lord Templeman.

120. And in Chief Constable of the North West Police v Evans [1982] 3 ALL ER 141 at 154 it was held that:

> " Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

121. It was held further in this case that:

> " The remedy by way of judicial review under RSC…, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and …administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner…and not to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law." (Per Lord Hailsham at 1160E-H).

122. These authorities are sufficient enough to demonstrate that a judicial review court should not supplant a public authority's decision with its own decision. I need not belabour the point that judicial review is concerned more with the process by which a decision is arrived at than with the merits of that decision unless, of course, the decision is so irrational or unreasonable that no reasonable tribunal could have reached it.

123. As far as I can see, there is no basis upon which the process by which the Director of Public Prosecution reached the decision to charge the applicants can be faulted. He was presented with evidence which, upon consideration, he suspected the applicants to have committed a crime. The applicants have themselves admitted that before they were charged they were given opportunity to be heard and, in that regard, they had their statements recorded.

124. The applicants are innocent until they are proved guilty. The fact that they have been charged does not imply that they have been condemned or that they have been condemned unheard. They were charged only because they are suspected to have committed the crimes with which they have been charged.

125. Talking about suspicion, it has been held by the Privy Council in Inspector Shaaban bin Hussien and others v Chong Fook Kam and another [1969] 3 ALL ER 1626 that:

> " Suspicion in its ordinary meaning is state of conjunctive or surmise where proof is lacking. 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete, it is ready for trial and passes on to its next stage."

126. If, in the opinion of the Director of Public Prosecutions, he has sufficient evidence upon which he can mount a criminal case against the applicants, a judicial review court cannot and should not stand in his way to do so.

127. Of course where there is such a clear abuse of power by a public authority, a judicial review court is bound to intervene and stop the authority in its tracks by way of an order of certiorari and prohibition. I will in this regard adopt the words of Lord Salmon in D.P.P v Humphrey's [1976]2 ALL ER 497 at 527-8 when he expressed himself 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". (Emphasis added)

128. For the reasons I have given, I am not satisfied that there is any evidence of abuse of power by the Director of Public Prosecutions in reaching the decision to charge the applicants. Neither is there any material before me upon which I can reach the conclusion that the applicants' prosecution amounts to abuse of the process of the court or that it is oppressive or vexatious.

129. By the same token, I am not satisfied that any of the grounds of judicial review of illegality, irrationality or procedural impropriety have been proved to exist. Taking cue from Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service [1985] A.C. 374,410 where the learned judge defined the grounds for judicial review, I am not persuaded that the 2nd respondent's decision can be regarded illegal since there is no proof that, in charging the applicants, the 2nd respondent did not correctly understand his powers under *the constitution* or any other written law that regulates his decision making power.

130. I am not also convinced that the 2nd respondent's decision 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 at hand under the same set of circumstances would have arrived at the same decision.

131. Finally, there is no basis for the ground of procedural impropriety since the applicants were given opportunity to tell their side of the story before they were arraigned. The trial court should be competent enough to determine the question whether the evidence gathered by the 1st respondent and which the 2nd respondent intends to use against the applicants is admissible and whether it does carry, for instance, any probative value.

132. In the ultimate, I hold the applicants' application as lacking in merit and it is hereby dismissed. Parties will bear their respective costs. It is so ordered.

SIGNED, DATED AND DELIVERED AT NAIROBI ON 4 JULY 2023

NGAAH JAIRUS

JUDGE