



**Republic v Directorate of Criminal Investigations & 3 others; Leparakwo  
(Exparte) (Judicial Review Miscellaneous Application E055 of 2023)  
[2024] KEHC 14908 (KLR) (Judicial Review) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 14908 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E055 OF 2023  
JM CHIGITI, J  
OCTOBER 18, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE DIRECTORATE OF CRIMINAL INVESTIGATIONS .... 1<sup>ST</sup> RESPONDENT**

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

**THE CHIEF MAGISTRATE, CRIMINAL COURT AT MILIMANI .... 3<sup>RD</sup>  
RESPONDENT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**PETER DAVID LEPARAKWO ..... EXPARTE**

**JUDGMENT**

1. The matter that is before this court for determination is the Notice of Motion dated 30<sup>th</sup> May 2023 seeking the following Orders:
  - a. An Order of Certiorari to remove to the High Court and quash the decision of the Respondents and all criminal proceedings and prosecution against the Ex-parte Applicant as contained in the Charge Sheet dated 15<sup>th</sup> May 2023 in Criminal Case No. E341 of 2023; Republic -vs- Peter David Leparakwo be and is hereby issued.
  - b. An Order of Certiorari to remove to the High Court and quash the decision by the 1st Respondent to arrest, investigate, charge, interrogate, summon and/or prefer any criminal



charges against the Ex-parte Applicant in respect of L.R. No. 2496812 I.R. No. 87345/1 or L.R. No. 24968/2 I.R. No.152577 Deed Plan No.230580 measuring 9.72 Hectares situated in Karen Plains within Nairobi County in the Republic of Kenya be and is hereby issued.

- c. An Order of Prohibition, prohibiting the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> Respondents from investigating interrogating, summoning, charging, amending or substituting any further charges in the Charge Sheet dated 15<sup>th</sup> May 2023 and from continuing with criminal proceedings and the prosecution of the Ex-parte Applicant in Criminal Case No. E341 of 2023; Republic-vs-Peter David Leparakwo or otherwise in respect of L.R. No. 24968/2 L.R.No.87345/1 and L.R. No. 24968/2 L.R. No. 152577 be and is hereby issued.
2. On 15<sup>th</sup> May 2023, the Ex-parte Applicant was arraigned by the 2<sup>nd</sup> Respondent before the 3<sup>rd</sup> Respondent in Criminal Case No. E341 of 2023; Republic-vs-Peter David Leparakwo & Another to answer to nine (9) counts.
3. It is his case that in the process of drawing up of the impugned Charge Sheet dated 15<sup>th</sup> May 2023 and the subsequent arraignment of the Ex-parte Applicant on 15<sup>th</sup> May 2023 to face the criminal charges, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents violated and infringed his right to a fair trial under Article 50 of *the Constitution*.
4. It argues that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in subjecting the Ex-parte Applicant to the said criminal charges were not only unwarranted but equally against the spirit, intention, meaning, purport and effect of *the Constitution* and all other relevant laws including Section 49 of the *National Police Service Act* No.11A of 2011 which requires a Police Officer in the performance of their duties and exercise of their powers to do so in a manner that is lawful, respects the law and to the best of their capability, prevent and oppose any violations of them. This, the 1<sup>st</sup> Respondent totally disregarded.
5. It is his case that he is the registered owner of all that parcel of land known as L.R No.24968/2 LR No. 152577, Deed Plan No. 230580 measuring 9.72 Ha situated at Karen Plains within Nairobi County in the Republic of Kenya ("the suit property") and has been in occupation thereof at all material times. On or about 10<sup>th</sup> April 2019, he became aware that the suit property was being claimed by other parties.
6. This prompted him to lodge a complaint at the "the 1<sup>st</sup> Respondent" who generated a report and recommendations dated 9<sup>th</sup> September 2021 that was forwarded to the Chief Land Registrar Ministry of Lands and Physical Planning indicating in part as follows: -

“The evidence was found to have been demonstrated by the Title Deed IR No.152577 LR 24968/2 registered in favour of Peter David Leparakwo which investigations affirmed to be the registered proprietor of the land.

Thorough investigations on all the documents supplied and witnesses interviewed, have upheld and supported Peter David Leparakwo's claim, whereas the rest of the Claimants have been cited for offences such as fraudulent conspiracy, forgeries, utterings, abuse of office among other offences all centred to open greed which formed part of the complicit in the fraud the recommendation has been retained by this headquarters for further Police action.

The Director of Survey is therefore advised to expunge any records purportedly submitted without the instructions of Mr. Peter David Leparakwo who is the bonafide proprietor.

The DCI sincerely appreciate documentary evidence and other support provided during investigations, which has enabled the office conclude investigations and arrive at its decision.



By way of this letter, you are therefore advised to act accordingly as required by law for the purpose of allowing the registered owner transact accordingly."

7. This led to the arrest of one Fredrick Kimemia Kimani who was thereafter arraigned in court on 13<sup>th</sup> July 2022 at the Milimani Chief Magistrate Court, Criminal Case E660/2022; Republic-vs-Fredrick Kimemia Kimani wherein the Ex-parte Applicant was the complainant.
8. The Ex-parte Applicant had been summoned at the Land Registry wherein he was exonerated by the Ministry of Lands and Physical Planning and Just like the 1<sup>st</sup> Respondents finding on 9<sup>th</sup> September 2021 his title was found to be genuine.
9. Given that no other investigations have been carried out with the involvement of the Ex-parte Applicant he argues that the 1<sup>st</sup> Respondent in commencing criminal proceedings violates the Ex-parte Applicant's right to a fair trial as enshrined under Article 50 (1) of *the Constitution* of Kenya 2010.
10. Other relevant Government Departments have confirmed the sanctity and authenticity of the Ex-parte Applicant's title as follows:

"(a) A Report and determination by the Ministry of Lands and Physical Planning in a letter dated 28th January 2020 from C.K. Ngetich (for Chief Land Registrar) Ministry of Lands and Physical Planning to NHIF, the Ex-parte Applicant and Cirtex Kenya Limited which reads in part as follows: -

7. A decision is therefore hereby made that the valid ownership document regarding land LR No.24968/2 is the Certificate of Title L.R.No.I.R.152577 issued and registered on 29th October 2013 in favour of Peter David Leparakwo.
8. Grant No.I.R.87345 issued on 29th October 2001 and registered on 1st November 2001 is from the date hereof cancelled.
9. The lease I.R. 179264 and the resultant Certificate of Title No. I.R.179264 registered on 25th August 2016 are from the date hereof cancelled.
10. The relevant cancellation entries to be entered in the registers of both title documents for record purposes.
11. That an Order for rectification of the register for both Grant No. 87345 and Certificate of Title No.L.R. 179264 do issue forthwith."

(b) Letter dated 16<sup>th</sup> January 2018 from Dr. Nicholas Muraguri (Principal Secretary) Ministry of Lands and Physical Planning to the Ex-parte Applicant's Advocates which reads in part as follows: -

According to our Government Records held in Central Registry Nairobi, Title L.R. No. 24968/2 is registered and owned by Peter David Leparakwo."

(c) Letter dated 30<sup>th</sup> May 2022 by the Ministry of Lands and Physical Planning to the Attorney General which reads in part as follows: -



This office did a hearing on 10<sup>th</sup> April 2019 under Section 14 of the [Land Registration Act](#) No. 3 of 2012 where all parties were present with their Advocates and were heard.

- (d) Letter dated 22<sup>nd</sup> November 2018 from Mr. Nyoike N.I (Chief Valuer) Nairobi City County to 1<sup>st</sup> Respondent which reads in part as follows: -

Attached please find copies of the receipt forwarded to us duly authenticated for your further necessary action. Please also note that the subject property has been claimed by various parties but the person appearing in our records as the rateable owner is one Peter David Leparakwo of P.O. Box 22436-00502, Karen."

11. It is his case that the criminal proceedings against the are prejudicial to him in light of the foregoing cases and in light of all the documents submitted on hereinabove which vindicate his title. One of the titles which was recommended to be cancelled is the one held by NHIF which now forms the basis of the criminal proceedings against the Applicant.
12. He also argues that there is a suit between NHIF and Crownline Freighters Limited being ELC No. 691 of 2011 regarding the suit property. The said suit was amalgamated with another suit being Milimani ELC No. 152 of 2018; Cirtex Kenya Limited-vs-Peter David Leparakwo & Others.
13. Reliance is placed on the Court of Appeal decision in Commissioner of Police & The Director of Criminal Investigation Department & Another v Kenya Commercial Bank Limited & 4 Others [2013] eKLR. in which decision the court held as follows:

"It is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court. This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations. We have no doubt in our minds that the belated involvement of the police in this purely civil dispute is an abuse of their power."

14. He also relies on the Court of Appeal decision in Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others [2018] eKLR (see page 9 to 18 of the bundle of authorities) in which decision the court held as follows: -

[49.] The learned judge concluded thus on page 113 of the judgment:

"The validity or otherwise of the charge is therefore an issue that is directly subject in the pending civil suit. The criminal process seeks to investigate possible fraud in connection with the charge. I agree with petitioner that this is a roundabout way of having the matter subject of the civil suit determined in another forum. The court must act swift to stop this move in its tracks particularly in light of the clear decisions that have emanated from the courts

[50.] From the above observation, we respectfully agree with the High Court's declaration that the continued investigations would be a threat to the Is Respondent's right to a fair trial under Article 50 of [the Constitution](#)."



15. He also relies on this Honorable Court's findings in Republic v Attorney General & 9 Others Ex-parte Cyrus Shakhalaga Khwa Jirongo [2017] eKLR in which decision the court relying on the case of Vincent Kibiego Saina vs. The Attorney General H.C Misc Appl.839 and 1088/99 held as follows: -

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement or frustrations of their civil cases.....No one is allowed to use the machinery of justice to cause injustice.”

16. He believes that the criminal proceedings are aimed at assisting NHIF to address its challenges on the large payments allegedly made to various alleged service providers and suppliers on the alleged Health Facility Project which was to be on a property that does not exist, since the title held by NHIF was found to be fraudulent and thereby cancelled by the Ministry of Lands and Physical Planning following the investigations and recommendations by the 1s Respondent as submitted herein.
17. It is his case that the discretion given to the Respondents is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes the Court ought not to hesitate to bring such a process to a halt.
18. He further relies on this court's decision in County Government of Nyeri & Another v John Wachiuri t/a Githakwa Graceland & Wandumbi Bar & 50 Others [2016] eKLR (see pages 62 to 75 of the bundle of authorities) where the court held as follows: -

“Judicial Review involves supervision of administrative decision-making process, that is, did the public body act in a lawful manner in deciding the way it did. There are three categories of public law wrongs which are commonly used in cases of this nature. These are: -

- a) Illegality- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal....."

19. He also relies on Republic v Cabinet Secretary, Ministry of Agricultures, Livestock & Fisheries; Cabinet Secretary, Ministry of Industry, Trade & Co-operatives (Interested Party) Tanners Association of Kenya (Suing through its Chairman Robert Njoka Ex-parte Applicant [2019] eKLR the court held as follows: -

“.... In one sense, there must always be the premise of "want of legality". Differently stated, in response to a challenge to the legality of administrative action, courts generally need to consider the compliance with both substantive and procedural legal rules. This is because any administrative decision-making process involves the exercise of legally conferred powers and the observation of legally prescribed procedures.

24. The most basic rules of administrative law are first that decision makers may exercise only those powers, which are conferred on them by law and, second, that they may exercise those powers only after compliance with such procedural prerequisites. So long as administrators comply with these two rules, their decisions are safe. This fundamental principle generally requires that the exercise of powers of administrators and statutory bodies must strictly comply with the law both substantively and procedurally. It follows, therefore, that the legality of an administrative decision can be judicially challenged



on grounds that the administrative decision does not comply with the basic requirements of legality.”

20. He also relies on Republic v University of Nairobi Ex-parte Lazarus Wakoli Kunani & 2 Others [2017] eKLR where the court relying on the case of Resley vs. The City Council of Nairobi [2006] 2 EA 311, held as follows: -

“In this case there is an apparent disregard of statutory provisions by the Respondent, which are of fundamental nature. The Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid...The purpose of the court is to ensure that the decision-making process is done fairly and justly to all parties and blatant breaches of statutory provisions cannot be termed as mere technicalities by the Respondent. That the law must be followed is not a choice and the courts must ensure that it is so followed and the Respondent’s statements that the Court’s role is only supervisory will not be accepted and neither will the view that the Court will usurp the functions of the valuation court in determining the matter. The Court is one of the inherent and unlimited jurisdictions and it is its duty to ensure that the law is followed...”

21. He is persuaded that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have no basis whatsoever to commence any criminal proceedings against and their decision to initiate proceedings against him are illegal, and pre-judicial and not initiated in good faith and the same are meant to achieve some ulterior motives other than doing justice as by law provided.

22. In Cyrus S.K. Jirongo vs. Soy Developers Limited & 9 Others [2021] eKLR it was held as follows:

“(71) ...the ODPP...ought always to act judiciously and not in perpetuation of an unfair and malicious criminal complaint...in doing so, that office must always be guided by the principle that the right to a fair trial cannot be limited thus raising the bar in the determination Of the question whether to prosecute or not...

(82) .. where it is shown that the expectations of Article UT(11) have not been met, then the High Court under Article 165(3)(d)(ii) can properly interrogate any question arising therefrom and make appropriate orders...

(83) ..the DPP is enjoined ..to have regard to the need to prevent and avoid abuse of the legal process. The Court is required to oversee that the DPP and the Inspector General undertake these functions in accordance with the law. If it comes to the attention of the Court that there has been a serious abuse of power, it should in our view express its disapproval by stopping it in order to secure the ends of justice and restrain abuse of power that may lead to harassment or persecution...”

23. In Republic v Chief Magistrate’s Court at Mombasa Ex-parte Ganijee & another [2002] eKLR it was observed as follows:

“..where however in the process of detecting and punishing crime and redressing to wrongs and violations of the law, people are persecuted and bashed about with a resultant disrespect



for the law and where there is reckless or ill-timed or disproportionate indulgence in an excessive criminal process, the Courts will interfere and stop the process...”.

The Court then went ahead to hold as follows:

“...the Interested Party in this matter is more actuated by a desire to punish the Applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive. And that is when the High Court steps in...”

24. The 2<sup>nd</sup> Respondent has by its conduct ignored his primary duty of ensuring that the right to a fair trial cannot be limited thus raising the bar in the determination of the question on whether or not to prosecute by not making whimsical decisions and in violation of Articles 50(1) and 157(1) of *the constitution*.

25. In the case of Republic v Attorney General & 4others Ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR.

“...Judicial review applications do not deal with the merits of the case but only with the process. In other words, judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...”

26. Section 7(1) of the Fair Administrative Actions *Act, No. 4 of 2015* to review an administrative action or decision, if the person who has made the decision has acted in excess of jurisdiction or power conferred to him under any written law and has been reasonably suspected of bias having denied the persons to whom the administrative actions or decision relates, a reasonable opportunity to state their case.

### **The 2<sup>nd</sup> Respondent’s case.**

27. It is its case through the grounds of opposition that The Applicant seeks to prevent the Director of Public Prosecutions from exercising his mandate as provided under Article 157 of *the Constitution*.

28. It is its case that under Article 157(10) of the Kenya Constitution, 2010, as read with Section 6 of the *Office of the Director of Public Prosecutions Act*, 2013, the 2<sup>nd</sup> Respondent does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of these powers or functions, shall not be under the direction or control of any person or authority.

29. Section 24 of the *National Police Service Act* mandates the police to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed.

30. The Ex-parte Applicant has not adduced reasonable evidence to show that the criminal proceedings in Nairobi CMCC E341 of 2023 are mounted for an ulterior motive and in bad faith.

31. The Ex-parte Applicant must demonstrate that substantial injustice would otherwise result if the criminal proceedings in Nairobi CMCC E341 of 2023 are not quashed. The trial court is an impartial arbiter and should be given an opportunity to determine the impugned lower court matter on merit.

32. The Director of Public Prosecutions made decision to charge him while having regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process as per spirit in Article 157 (11) of *the Constitution* of Kenya, 2010.



33. CMCC 341 of 2023 which is pending before the lower court has a complainant who is also seeking justice and his claim has to be determined by the trial court.
34. An order of Certiorari in the circumstance is also not applicable because the decision was made *intra vires* the Constitution and that there was no breach of rules of natural justice or any error of law apparent on the face of the record.
35. Judicial intervention should be limited to acts that are manifestly in breach of the law or where the court is satisfied that the decision-maker made it while under the influence of other considerations other than the law, evidence, and the duty to serve the interests of justice.
36. The grounds raised by the applicant in the Application are suitable evidence to be adduced before the trial court in CMCC E341 of 2023.
37. It is lawful under section 193A of the Criminal Procedure Code to have concurrent criminal and civil proceedings.

**The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents' case;**

38. They oppose the application through the replying affidavit by Detective Corporal Nicolaus Osuri Otieno dated on 20<sup>th</sup> November, 2023.
39. On 6<sup>th</sup> November, 2018 Fredrick Kimemia reported to DCI Headquarters on behalf of Cirtex Kenya Limited that in early 2018, the Applicant came up with another Title bearing L.R. No.152577 claiming ownership of the subject parcel of land LR. No.24968/2 LR. No.179264.
40. On 8<sup>th</sup> November, 2018, the Applicant also made a report vide DCI claiming to be the registered owner of land parcel of the same parcel of land.
41. It is the Respondents' case that upon investigations by the 1<sup>st</sup> Respondent, it came to light that the Ex-parte Applicant was a Director nor was he a Shareholder of Cirtex Kenya Limited as shown in the Registrar of Companies records Certificate of registration No.C.35825.
42. Further investigations also proved that the parcel of land was the registered property of National Hospital Insurance Fund (NHIF).
43. The Ex-parte Applicant was arrested on 14<sup>th</sup> May, 2023 and charged jointly vide Milimani Chief Magistrates Criminal Case No. E341 of 2023 by the 2<sup>nd</sup> Respondent before the 3<sup>rd</sup> Respondent on charges approved by the 1<sup>st</sup> Respondent for charges of conspiracy to defraud, forgery, computer forgery, personation, procuring registration of land by false pretense, giving false information to a person employed by Public Service.
44. It is their case that the police have special powers of investigations and if satisfied that there are reasonable grounds of suspecting that an offence under the Act has been committed by the person investigated, then that person will be charged for the offence in exercise of the power conferred under Section 35 of the National Police Service Act which provides that;

“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) Detect and prevent crime;
- d) Apprehend offenders;
- e) Maintain criminal records;
- f) Conduct forensic analysis;
- g) Execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of *the Constitution*”

45. It is their case that the ex-pate Applicant is trying to block the evidence presented by the 1<sup>st</sup> Respondents.
46. It is their case that Judicial review proceedings are not the proper forum in which the innocence or otherwise of the Applicant is to be determined.
47. Reliance is placed in Republic v Attorney General & 4 others Ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR when he stated that:

“Judicial review applications do not deal with the merits of the case but only with the process. In other words, judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows 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 by the parties 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.

The Court in judicial review proceedings is mainly concerned with the question of fairness to the Applicant in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are bona fides and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the Applicant.

Where, however, it is clear that there is no evidence at all or that the prosecution’s evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.”

Analysis and Determination.

The following issue crystalize for determination:

- I. Whether or not the Applicant is entitled to the orders sought.
- II. Who will bear the costs of the suit.



**The 1st issue: Whether or not the Applicant is entitled to the orders sought.**

48. In the case of *Pastoli vs Kabale District Local Government Council & Others*, (2008) 2 EA 300, that:

“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also, *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).

Illegality is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

49. Section 35 of the *National Police Service Act* sets the duties of the Directorate of Criminal Investigations as follows;

“To collect and provide criminal intelligence; undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber-crime among others; maintain law and order; detect and prevent crime; apprehend offenders; maintain criminal records; conduct forensic analysis; execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of *the Constitution*; co-ordinate country Interpol Affairs; investigate any matter that may be referred to it by the Independent Police Oversight Authority; and perform any other function conferred on it by any other written law.”

50. In *Republic vs Commissioner of Police and Another Ex-parte Michael Monari & Another* (2012) eKLR it was held that:

“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. 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”.

51. It is not in dispute that there is a suit between NHIF and Crownline Freighters Limited being ELC No. 691 of 2011 which is amalgamated with Milimani ELC No. 152 of 2018; Cirtex Kenya Limited-vs-Peter David Leparakwo & Others. The subject matter of the suit is the same property that at the heart of Criminal Case No. E341 of 2023; Republic -vs- Peter David Leparakwo. The said cases are yet to be heard and determined.
52. It is this court’s finding that the Applicant has not proven that commencement of the criminal proceedings herein against him during the subsistence of Milimani ELC No. 152 of 2018; Cirtex Kenya Limited-vs-Peter David Leparakwo & Others is tailored for other ulterior purposes for the purpose of the sanctification of the criminal justice system.
53. Section 193A of the Criminal Procedure Code on this issue provides that:

“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.”
54. In the case of Francis Matheka & 10 others v Director of Public Prosecutions & another (2015) Eklr the Court held as follows:

“With respect to the Applicants’ innocence, that is an issue for the trial Court. To determine the same would amount to this Court on a judicial review application usurping the powers of the trial Court and that is not the jurisdiction conferred on this Court in these kinds of proceedings. It must be remembered that justice must be done to both the complainant and the accused and where there is evidence upon which the prosecution can reasonably mount a prosecution, it is not for the High Court in a judicial review proceeding to inquire into the sufficiency or otherwise of such evidence since the High Court ought not to usurp the role of the trial court in determining the merits of the criminal case.”
55. It is my finding and I do hold that the issues and the evidence brought out by the parties herein are sufficient to form the basis of a criminal trial where witnesses will testify and where parties will produce the documents that they will deem fit within the dictates of the [Evidence Act](#) and under Article 50 of [The Constitution](#) before the trial magistrate.
56. The plethora of the documents, reports and recommendations that the Applicant brought to this court as evidence can form part of the Applicant’s evidence at the criminal court during trial. In any event, he has not demonstrated to this court that he will stand prejudiced by the impugned trial.
57. Further, this court is also cognizant of the fact that victims in criminal cases have rights. This court is under a duty to uphold, protect, promote and fulfil the victims’ right of access to justice which includes the rights of victims to participate in criminal trials under the [Victim Protection Act](#).
58. The complainant in Criminal Case No. E341 of 2023; Republic -vs- Peter David Leparakwo has a legitimate expectation that he will be given an opportunity to present his case before the trial magistrate. The Applicant will get an opportunity to cross examine him before the trial magistrate determines the case under Article 50 of the [Evidence Act](#).



59. Section 9(2) (a) of the Victims Protection Act, provides that victims assist the courts to obtain a clear picture of what happened (to them) and how they suffered as a result of the offenders conduct or omission.
60. Victim participation in criminal cases should meaningfully contribute to the justice process. Article 50 of *the constitution* provides for the right to fair hearing.
61. It is this court's finding that the Applicant has not demonstrated how the Respondents have acted in excess of jurisdiction or power conferred to them by the law.
62. The Applicant has not proven how the prosecution is driven by malice or how charging him will highly prejudice his constitutional right to a fair trial.
63. The Court in Republic v Director of Public Prosecutions & 3 others Ex-parte Bedan Mwangi Nduati & another [2015] eKLR held as follows;

“In Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69, the High Court held:

“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 that which the courts indeed the entire system is constitutionally mandated to administer...It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of



the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus, where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the Court from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...”

I also agree with the decision in R vs. *Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001* 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”.

It is therefore clear that whereas the discretion given to the 1<sup>st</sup> Respondent to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence, the Court will not hesitate to bring such proceedings to a halt.

Judicial review applications do not deal with the merits of the case but only with the process. In other words, judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows 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 by the parties 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. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the Applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the Applicant in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are bona fides and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the Applicant. Where, however, it is clear that there is no evidence at all or that the prosecution’s evidence even if were to be correct would not disclose any offence



known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.

Therefore, the determination of this case must be seen in light of the foregoing decisions.

Whereas Article 157(10) of *the Constitution* provides that 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, Article 157(11) provides:

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.

Apart from that, section 4 of the Office of Public Prosecutions *Act, No. 2 of 2013* provides:

In fulfilling its mandate, the Office shall be guided by *the Constitution* and the following fundamental principles—

- (a) the diversity of the people of Kenya;
- (b) impartiality and gender equity;
- (c) the rules of natural justice;
- (d) promotion of public confidence in the integrity of the Office;
- (e) the need to discharge the functions of the Office on behalf of the people of Kenya;
- (f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;
- (g) protection of the sovereignty of the people;
- (h) secure the observance of democratic values and principles; and
- (i) promotion of constitutionalism.

It is therefore clear that the terrain under the current prosecutorial regime has changed and that the discretion given to the DPP is not absolute but must be exercised within certain laid down standards provided under *the Constitution* and the *Office of the Director of Public Prosecutions Act*. Where it is alleged that these standards have not been adhered to, it is this Court to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, *the Constitution* itself. I associate myself with the sentiments expressed in *Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565* to the effect that:

“the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret *the Constitution* and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system...In interpreting *the Constitution*, the Court must uphold and give effect to the letter and spirit of *the Constitution*, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003* is that



interpretation of *the Constitution* has to be progressive and in the words of Prof M V Plyee in his book, Constitution of the World: “The Courts are not to give traditional meaning to the words and phrases of *the Constitution* as they stood at the time *the Constitution* was framed but to give broader connotation to such words and connotation in the context of the changing needs of time..... In our role as “sentinels” of fundamental rights and freedoms of the citizen which are founded on laissez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one-party state. Even if it be at the risk of appearing intransigent “sentinels” of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right.”

64. The Applicant has not demonstrated how drawing up of the impugned Charge Sheet dated 15<sup>th</sup> May 2023 and the subsequent arraignment on 15<sup>th</sup> May 2023 to face the criminal charges has violated and infringed his right to a fair trial under Article 50 of *the Constitution*.

**Disposition;**

65. It is this court’s finding that the Applicant has failed to prove that the ongoing prosecution in Criminal Case No. E341 of 2023; Republic -vs- Peter David Leparakwo is an abuse of the process of court.

Order;

The Application is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF OCTOBER, 2024.**

**J. M. CHIGITI (SC)**

**JUDGE**

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