Republic v Director of Public Prosecutions & 2 others; Kinyua (Ex parte Applicant); Atta Kenya Limited & another (Interested Parties) (Judicial Review 1 of 2024) [2024] KEHC 13596 (KLR) (17 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13596 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

JUDICIAL REVIEW 1 OF 2024

OA SEWE, J

OCTOBER 17, 2024

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE CRIMINAL PROCEDURE CODE, CHAPTER 75 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE PENAL CODE, CHAPTER 63 OF THE LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR ORDERS OF PROHIBITION AND CERTIORARI

AND

IN THE MATTER OF MOMBASA MAGISTRATE'S CRIMINAL CASE NO. E1333 OF 2023

AND

IN THE MATTER OF AN APPLICATION BY CHRIS KINYUA

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 1ST RESPONDENT

MOMBASA CHIEF MAGISTRATE'S COURT ..... 2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE ..... 3RD RESPONDENT

AND

CHRIS KINYUA ..... EX PARTE APPLICANT

AND

ATTA KENYA LIMITED ..... INTERESTED PARTY

SHILHI BREAD COMPANY LIMITED ..... INTERESTED PARTY

Court affirms that a director can face criminal charges for company transactions despite the company's separate legal personality

The applicant, a director of the 2nd interested party company, sought to quash criminal charges of obtaining goods by false pretences. The court held that the mere fact that the impugned transactions were done by the applicant for and on behalf of the 2nd interested party was no reason to conclude that the applicant was wrongly charged. Further, the principle enunciated in Salomon v Salomon, per se, was no shield against the applicant's prosecution. The court also found that there was no bar to the same facts forming the basis of simultaneous prosecution of criminal and civil cases.

Reported by Kakai Toili

Judicial Review *– judicial review applications – documents annexed to judicial review applications – decisions complained of, in the application – failure to annex decisions complained of in the application - whether a judicial review application was incompetent for failure to annex the decision complained of where the decision was spent - Civil Procedure Rules, 2010, Order 53 rule 7.*

Commercial Law *– companies - directors of companies – liabilities of directors for alleged criminal conduct by companies – lifting the veil - whether a director of a company could be personally charged for an alleged offence committed by the company.*

Criminal Law *– institution of criminal cases - simultaneous prosecution of criminal and civil cases - whether the same facts could form the basis of simultaneous prosecution of criminal and civil cases - Criminal Procedure Code (cap 75); section 193A.*

Words and Phrases *– proceeding – definition of proceeding - the business conducted by a court or other official body; a hearing - Black's Law Dictionary, Tenth Edition.*

Brief facts

The application averred that the complaint, arrest and prosecution of the applicant arose from a civil dispute between the 1st interested party and the 2nd interested party, of which the applicant was a director. The applicant claimed that the 2nd interested party entered into a commercial arrangement with the 1st interested party for supply of wheat products and that owing to the *covid 19* pandemic, the 2nd interested party defaulted in payments. Therefore, the applicant contended that it was a business-to-business transaction involving two companies for which he was not personally liable.

The applicant contended that the 1st interested party was simply intent on exploiting the criminal justice system as a mechanism for harassing and intimidating him in a frantic effort to enforce payment of the debt owed by the 2nd interested party. The applicant further contended that the 1st respondent, the Director of Public Prosecutions' (DPP) decision to charge him was irrational, irregular, oppressive, vexatious and illegal; and that it was neither in the interest of the public nor in the interest of the administration of justice. The applicant thus sought for among other orders; an order of *certiorari* quashing the decision of the DPP to charge and prosecute the applicant with the offence of obtaining goods by false pretences.

Issues

i. Whether a judicial review application was incompetent for failure to attach the decision complained of where the decision was spent.
ii. Whether a director of a company could be personally charged for an alleged offence committed by the company.
iii. Whether the same facts could form the basis of simultaneous prosecution of criminal and civil cases.

Relevant provisions of the Law

Civil Procedure Rules, 2010

Order 53 Rule 7

7. Provisions as to orders of *certiorari* for the purpose of quashing proceedings [Order 53, rule 7]

(1) In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.

Held

1. Order 53 rule 7 of the Civil Procedure Rules was restricted to formal proceedings which gave rise to an order, warrant, commitment, conviction, inquisition or record. Where a decision had been taken and implemented the doctrine of mootness would kick in.
2. There was no merit in the argument by the Attorney General that the application was incompetent on the ground that the decision complained of was not annexed to the application. The decision was spent in that the applicant had already been charged and his case was pending prosecution before the 2nd respondent.
3. A limited liability company was a legal entity in its own right; an entity that was distinct and separate from its shareholders and directors, notwithstanding that as a juristic person, it operated through human members, directors and employees. Nevertheless, the mere fact that the impugned transactions were done by the applicant for and on behalf of the 2nd interested party was no reason to conclude that the applicant was wrongly charged. The principle enunciated in *Salomon v Salomon*, *per se*, was no shield against the applicant's prosecution.
4. Judicial review was concerned with the decision-making process as opposed to the merits of the decision. Some measure of merit review was acceptable to enable the court properly adjudicate a judicial review matter. The entrenchment of judicial review under the Constitution of Kenya elevated it to a substantive and justiciable right under the Constitution. Accordingly, judicial review was no longer a strict administrative law remedy but also a constitutional fundamental right enshrined in the Constitution. Thus, article 47 of the Constitution provided that every person had a right to an administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair.
5. The police were mandated to investigate the commission of criminal offences and in so doing they had powers *inter alia* to take statements and conduct forensic investigations. In order for the applicant to succeed he must show that not only were the investigations which were being done by the police being carried out with ulterior motives but that the predominant purpose of conducting the investigations was to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. There was no proof that the 3rd respondent acted outside its mandate. Indeed, none of the orders sought by the applicant was directed at the 3rd respondent.
6. It was the mandate of the DPP to make independent decisions on whether or not a prosecution ought to be mounted. Article 157 of the Constitution was explicit that the DPP was not bound by any directions, control or recommendations made by any institution or body, being an independent public office. Consequently, the court could only intervene in the exercise of the DPP's prosecutorial decision

where it was shown that the decision was made in disregard of the public interest or for some ulterior motive.

7. The best forum for testing the sufficiency or otherwise of evidence was the trial court. The essence of article 50(1) of the Constitution was the concept of a fair hearing; and it envisaged the context of the fair hearing to be a public hearing before a court or, if appropriate, another independent and impartial tribunal or body in which the accused person was afforded all the safeguards set out in article 50(2). It was always preferable that disputes about facts, such as those raised therein by the applicant, be ventilated before the subordinate court before which the impugned charges had been preferred, which was itself a creature of the Constitution pursuant to article 162 and 169 of the Constitution.
8. There was no bar to the same facts forming the basis of simultaneous prosecution of criminal and civil cases. Section 193A of the Criminal Procedure Code was explicit in that regard.
9. There being no proof that the criminal proceedings were instituted to perpetuate ulterior motives, there was no merit in the contention of the applicant that the respondents and the 1st interested party were exploiting the criminal justice process to effect debt recovery.

Application dismissed.

Orders

Each party to bear their own costs.

Citations

Cases

Kenya

1. *Anthony Murimi Waigwe v Attorney General & 4 others* Constitutional Petition 336 of 2019; [2020] KEHC 9746 (KLR) - (Explained)
2. *Dande & 3 others v Inspector General, National Police Service & 5 others* Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated); [2023] KESC 40 (KLR) - (Explained)
3. *Diamond Hasham Lalji & another v Attorney General & 4 others* Civil Appeal 274 of 2014; [2018] KECA 856 (KLR) - (Mentioned)
4. *Guantai, Joram Mwenda v Chief Magistrate, Nairobi* Civil Appeal 228 of 2003; [2007] KECA 496 (KLR) - (Explained)
5. *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance(NASA) Kenya & 6 others* Civil Appeal 224 of 2017; [2017] KECA 436 (KLR) - (Mentioned)
6. *Jirongo v Soy Developers Ltd & 9 others* Petition 38 of 2019; [2021] KESC 32 (KLR) - (Explained)
7. *Kamau, Michael Sistu & 12 others v Ethics and Anti-Corruption Commission & 4 others* Petition 230 of 2015; [2016] KEHC 6461 (KLR) - (Explained)
8. *Kenya National Examination Council v Republic ex Parte Geoffrey Gathenji Njoroge & 9 others* Civil Appeal 266 of 1996; [1997] KECA 58 (KLR) - (Explained)
9. *Kibiwott, Erick & 2 others v Director of Public Prosecution & 2 others* Civil Application 89 of 2012; [2014] KEHC 8095 (KLR) - (Explained)
10. *Lumiti, Alfred v Pethad Ranik Shantilal & 2 others* Civil Appeal 102 of 2012; [2016] KEHC 6978 (KLR) - (Mentioned)
11. *Maina, Peter Ngungiri v Director of Public Prosecutions & 2 others* Judicial Review 11 of 2016; [2017] KEHC 7431 (KLR) - (Mentioned)
12. *Manager, Nanak Crankshaft Ltd v Republic, through City Council of Nairobi* Criminal Revision 763 of 2007; [2008] KEHC 3991 (KLR) - (Mentioned)
13. *Njunge, Isaac Tumunu v Director of Public Prosecutions & 2 others* Miscellaneous Application 210 of 2016; [2016] KEHC 2673 (KLR) - (Explained)
14. *Republic v Attorney General & 4 others, Ex Parte Diamond Hashim Lalji & another* Miscellaneous Application 153 of 2012; [2014] KEHC 2238 (KLR) - (Mentioned)

15. *Republic v Chief Magistrate, Milimani, & another, Ex Parte Tusker Mattresses Ltd & 3 others* Miscellaneous Civil Application 179 of 2012; [2013] KEHC 6807 (KLR) - (Mentioned)
16. *Republic v Commissioner of Police and another, Ex Parte Michael Monari & another [* Judicial Review 68 of 2011; [2012] KEHC 4595 (KLR) - (Mentioned)
17. *Republic v Henry Rotich & 2 others* Anti-Corruption and Economic Crimes Case 32 of 2019; [2019] KEHC 3992 (KLR) - (Mentioned)
18. *Robert v Inspector General of Police & another; Chemweno & another (Interested Parties)* Petition E10 of 2023; [2023] KEHC 22991 (KLR) - (Mentioned)
19. *Saisi & 7 others v Director of Public Prosecutions & 2 others* Petition 39 & 40 of 2019 (Consolidated); [2023] KESC 6 (KLR) - (Explained)
20. *Ultimate Laboratories v Tasha Bioservice Limited* Civil Case 1287 of 2000 - (Explained)

United Kingdom

1. *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 - (Explained)
2. *R v ICR Haulage Ltd* [1944] 1 KB 551; [1944] 1 All ER
3. *Salomon v Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22 - (Explained)

India

RP Kapur v State of Punjab AIR 1960 SC 866 - (Explained)

Regional Court

Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300 - (Explained)

Texts

1. Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn
2. Hogg, QM., (Lord Hailsham) et al (Eds) (1995), *Halsbury's Laws England* London: Butterworth 4th Edn Vol 17 para 10

Statutes

Kenya

1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 53 rule 3(1), (2); 7- (Interpreted)
2. Constitution of Kenya articles 23, 47, 50(1); 157; 162; 165; 169 - (Interpreted)
3. Criminal Procedure Code (cap 75) section 193A - (Interpreted)
4. Fair Administrative Action Act (cap 7L) sections 4, 7 - (Interpreted)
5. Law Reform Act (cap 26) sections 8, 9 - (Interpreted)
6. National Police Service Act (cap 84) section 35 - (Interpreted)
7. Office of the Director of Public Prosecutions Act (cap 6B) section 4 - (Interpreted)
8. Penal Code (cap 63) sections 23, 313 - (Interpreted)

Advocates

None mentioned

JUDGMENT

1. Before the Court for determination is the substantive notice of motion dated April 29, 2024. It was brought pursuant to articles 23, 47, 157 and 165(3)(d) of the *Constitution* of Kenya, 2010, Sections 8 and 9 of the *Law Reform Act*, Chapter 26 of the Laws of Kenya, sections 4 and 7 of the *Fair Administrative Action Act*, 2015 and order 53 rule 3(1) and (2) of the *Civil Procedure Rules*. It seeks that:

(a) An order of Prohibition be issued prohibiting the 2nd respondent from proceeding with or conducting any further proceedings whatsoever against the applicant in Mombasa Chief Magistrate's Criminal Case No E1333 of 2023: Republic v Chris Kinyua.

(b) An order of Certiorari be issued to bring to this Court and quash the decision of the Director of Public Prosecutions made on September 25, 2023to charge and prosecute the applicant with the offence of obtaining goods by false pretences contrary to section 313 of the Penal Code in Mombasa Chief Magistrate's Criminal Case No E1333 of 2023.

(c) An order of Prohibition be issued prohibiting the 1st respondent from instituting any further or future charges against the applicant based on the same complaint or facts the subject of the criminal charges in Mombasa Chief Magistrate's Criminal Case No E1333 of 2023.

(d) That costs of the application be provided for.

2. The application was premised on the grounds that the proceedings in Mombasa Criminal Case No E1333 of 2023 were instituted pursuant to a complaint lodged with the Police by the 1st interested party, Atta Kenya Ltd. It was averred that the complaint, arrest and prosecution of the applicant arises from a civil dispute between the 1st interested party and the 2nd interested party, Shilhi Bread Company Ltd, of which the applicant is a director.

3. The applicant explained that the 2nd interested party entered into a commercial arrangement with the 1st interested party for supply of wheat products. He further deposed that prior to the COVID 19 pandemic in 2020, supplies were made to the 2nd interested party and payments made promptly; and that owing to the COVID 19 pandemic, the 2nd interested party experienced financial challenges resulting in default in payments after the 2nd interested party's machinery and entire business was auctioned and employees laid off. Therefore, the applicant contended that this was a business-to-business transaction involving two companies for which he is not personally liable. He therefore took issue with the fact that, following the ensuing dispute, the 1st interested party resorted to police action by lodging a complaint against him for obtaining goods by false pretenses.

4. Consequently, it was the contention of the applicant that the 1st interested party is simply intent on exploiting the criminal justice system as a mechanism for harassing and intimidating him in a frantic effort to enforce payment of the debt owed by the 2nd interested party. The applicant asserted that the debt in issue was not incurred by him but by a separate legal entity with a distinct legal personality. It was therefore his contention that the 1st respondent's decision to charge him was irrational, irregular, oppressive, vexatious and illegal; and that it is neither in the interest of the public nor in the interest of the administration of justice.

5. The application was supported by the applicant's own affidavit, sworn on April 29, 2024. At paragraph 4 thereof, the applicant denied the assertion in the Charge Sheet filed in Mombasa Criminal Case No 1333 of 2023 that he obtained goods from the 1st interested party at Makupa Area in Mvita Sub County of the County of Mombasa. The applicant averred that the deliveries were made to the 2nd interested party at its business premises in Mlolongo.

6. The applicant explained that after purchasing the 2nd interested party's business, he failed to change the business premise and therefore had its property distrained for rent during the COVID 19 pandemic without any prior notice. The applicant annexed several documents to the Supporting Affidavit, including a copy of the Charge Sheet filed in the criminal case, to buttress the averments set out in the Supporting Affidavit. Thus, the applicant reiterated his avowal that the 1st interested party is exploiting the criminal justice system to enforce recovery of what is purely a civil debt.

7. On behalf of the respondents, a replying affidavitwas filed herein sworn on May 27, 2024 by No 260719 PC Ishmael Rampei, the investigating officer in the criminal matter. He averred that vide OB No 27 of March 26, 2022, a representative of the 1st interested party, one Victor Ouma, filed a report at Makupa Police Station, alleging that one Chris Kinyua as the owner of the 2nd interested party, had obtained wheat flour from the 1st interested party valued at Kshs 4,547,500 between November 15, 2019 and November 20, 2019 for which he issued bad cheques.

8. The investigating officer further averred that, as part of the investigations he recorded statements from witnesses who confirmed that indeed the 1st interested party supplied wheat to the 2nd interested party on several occasions; and that the 2nd interested party failed to pay for the goods, after issuing cheques which were subsequently dishonoured on presentation. The investigating officer posited that the applicant's prayer to bar the 1st and 3rd respondents from prosecuting the criminal case is only tenable where a public body or official acts in excess of their powers; which is not the case in this instance. Thus, the investigating officer urged for the dismissal of this suit, contending that the trial court in Criminal Case No E1333 of 2023 has the jurisdiction to determine whether the charge is well-founded in law.

9. The 1st interested party filed Grounds of Opposition as well as a replying affidavit dated May 3, 2024 and June 3, 2024, respectively. The Replying Affidavit was sworn by Mr Victor Ouma, the Operations Director and Human Resources Manager of the 1st interested party. The 1st interested party thereby deposed that the applicant was the sole director of Shilhi Bread Co Ltd (the 2nd interested party); and that on or about the November 4, 2019, the applicant applied for a customer sales account and personally signed the documents in that regard.

10. The 1st interested party further averred that, between the November 1, 2019and September 30, 2023, the applicant obtained wheat products from it on the false pretence that he was in a position to pay for the same. The goods were duly received by both the applicant and the 2nd interested party; and that the applicant personally signed and issued the cheques for the payment of the goods. The 1st interested party further averred that the cheques were dishonoured on presentation for reasons that the funds in the account were insufficient. It was therefore the contention of the 1st respondent that the applicant and his company thereby defrauded it in the sum of Kshs 4,466,000.

11. In the 1st interested party's view, an offence arose ipso facto, in respect of which it lodged a complaint with the Police for appropriate action. The matter was investigated, after which the applicant was arrested and arraigned before court in Mombasa Chief Magistrate's Criminal Case No E1333 of 2023: *Republic v Chris Kinyua*. The 1st interested party added that the charges are well grounded in law and that all parties shall be heard during the trial. Annexed to the interested party's affidavit were copies of the Ledger Account Statement, the dishonoured cheques, returned cheque advice and Journal Voucher, as well as copies of the invoices/delivery notes.

12. The substantive application was canvassed by way of written submissions, pursuant to the directions of the Court dated 6th June 2024. On behalf of the applicant, written submissions were filed herein by Ms. Kamoing dated 20th June 2024. The applicant proposed the following issues for determination:

    (a) Whether the application contravenes the provisions of order 53 rule 7of the *Civil Procedure Rules*.

    (b) Whether the application contravenes the provisions of article 157(10) of the *Constitution of Kenya*.

    (c) Whether the applicant can be sued in his personal capacity.

13. The applicant relied on order 53 rule 7 of the *Civil Procedure Rules* and the case of *IEBC v the National Super Alliance (NASA) Kenya & 6 others*, Civil Appeal No 224 of 2017 for the proposition that failure to annex the decision being challenged together with the application for leave is not fatal as the same can be produced at a later stage.

14. On whether the decision to prosecute the application amounts to a contravention of article 157(10) of the Constitution, the applicant placed reliance on *Edwin Harold Dayan Dande & 3 others v The Inspector General, National Police Service & 5 others* (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment) and *Robert v Inspector General of Police & another; Chemweno & another* (Interested Parties) (Petition E10 of 2023) [2023] KEHC 22991 (KLR) (3 October 2023) (Judgment) in which it was held that the Court has the constitutional mandate to investigate and make a determination on the exercise of the DPP's discretion to charge.

15. On whether the applicant can be sued in his personal capacity, his counsel submitted that the 2nd interested party is a duly registered company which is capable of suing and being sued in its own name; and that as a director, the applicant can only appear in court as a representative of the company. In support of the argument, the applicant relied on *Republic v Henry Rotich & 2 others* [2019] eKLR and *Nanak Crankshaft Ltd v Republic through City Council of Nairobi* [2008] eKLR. Based on the foregoing, the applicant prayed that his application be allowed and the orders sought therein granted.

16. On behalf of the 1st respondent, written submissions were filed herein dated July 9, 2024. On whether the criminal prosecution is tenable against the applicant, the 1st respondent relied on section 23 of the *Penal Code*, Chapter 63 of the Laws of Kenya and *R v ICR Haulage Ltd* [1944] 1 KB 551; [1944] 1 All ER and submitted that a limited liability company can be charged and prosecuted through its directors; the directors being the directing mind and will of the company.

17. The 1st respondent submitted that it has a constitutional mandate under article 157 of the *Constitution* to ensure that offences are prosecuted and those culpable attended to as the law requires; and that, in the performance of his duty, the 1st respondent also has the responsibility to ensure that the applicant was not subjected to an unwarranted criminal process. The 1st respondent added that termination of the criminal case would only serve to frustrate instead of advance the rule of law.

18. On whether the remedies of Certiorari and Prohibition are available against the respondents, counsel for the 1st respondent made reference to Article 157 of the *Constitution* and section 4 of the *Office of the Director of Public Prosecutions Act*, No 2 of 2013 to buttress the submission that, although the 1st respondent is not bound by any directions or control by any institution, the court has the power under article 165(3)(d) of the Constitution to intervene if it is shown that the 1st respondent improperly discharged its function. Counsel relied on *Peter Ngunjiri Maina v Director of Public Prosecutions & 2 others* [2017] eKLR to buttress this argument, and added that, in this instance, the applicant failed to show that the 1st respondent overstepped its mandate.

19. In respect of the investigative mandate of the 3rd respondent counsel relied on section 35 of the *National Police Service Act* and the cases of *Republic v Commissioner of Police and another, Ex Parte Michael Monari & another* [2012] eKLR, *Diamond Hasham Lalji & another v Attorney General & 4 others* [2018] eKLR, *Republic v Chief Magistrate, Milimani, & another, Ex Parte Tusker Mattresses Ltd & 3 others* [2013] eKLR, *Republic v Attorney General & 4 others, Ex Parte Diamond Hashim Lalji & another* [2014] eKLR and *Alfred Lumiti v Pethad Ranik Shantilal & 2 others* [2016] eKLR to underscore the submission that, whereas the Police have a duty to investigate any complaint once made, irrespective of whether a civil claim would also ensue; not all investigations lead to prosecutions.

20. I have given careful consideration to the application, the averments set out in the applicant's supporting affidavit as well as the replying affidavit filed on behalf of the respondents and the written submissions filed herein. There is no dispute that the applicant is a director of the 2nd interested party; or that the 1st and 2nd interested parties entered into a business arrangement whereby the 2nd interested party would obtain wheat products from the 1st interested party on account.

21. The applicant conceded that the 2nd interested party was indeed indebted to the 1st interested party as of the time of the filing of the criminal complaint for investigations. He explained that prior thereto, the two interested parties enjoyed a cordial relationship in which goods ordered on account would be paid for in time. Hence, at paragraphs 5 and 6 of the supporting affidavit, the applicant deposed that:

> "5 ...during the covid 19 pandemic the landlord levied for distress for rent, all notices were sent to the previous lessees and the business was auctioned without the Applicant and the 2nd interested parties notice.
>
> 6. That prior to the 2nd interested party's unfortunate auctioning and covid 19 challenges, the 2nd interested party enjoyed a good commercial relationship with the 1st interested party and paid for the wheat products supplied. Annexed are copies of cheques that were issued to the 1st interested party and cleared and a letter from the bank showing that indeed the cheques were issued in the name of the 2nd interested party in favour of the 1st interested party..."

22. In their replying affidavit, the respondents confirmed that the complaint to the Police was filed by the 1st interested party; that it was investigated by the 3rd respondent and a decision taken by the 1st respondent to charge and prosecute the applicant with the offence of obtaining goods by false pretences contrary to section 313 of the *Penal Code*. The criminal case was filed before the 2nd respondent as Mombasa Chief Magistrate's Criminal Case No E1333 of 2023: *Republic v Chris Kinyua*.

23. In the circumstances, the issues for determination are:

    (a) Whether the suit is incompetent for want of compliance with order 53 rule 7 of the *Civil Procedure Rules*.

    (b) Whether the applicant can be personally prosecuted in respect of an alleged offence committed by the 2nd interested party, a separate legal entity.

    (c) Whether the applicant is entitled to the remedies sought.

A. On Whether the suit is incompetent for want of compliance with Order 53 Rule 7 of the Civil Procedure Rules:

24. In his Grounds of Opposition, the Attorney General had postulated that the application for leave was incompetent because it had been brought in contravention of order 53 rule 7 of the *Civil Procedure Rules*. The court ruled on the issue at paragraphs 11 and 12 of the Ruling dated April 11, 2024 and said it had been raised prematurely at the leave stage. Apparently the respondents did not pick it up in their submissions in respect of the substantive application I find it unnecessary to pronounce myself on it. In any event, the said provision states:

    (1) In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has

lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.

25. To my mind, the provision is restricted to formal proceedings which give rise to an order, warrant, commitment, conviction, inquisition or record. I say so because, according to *Black's Law Dictionary*, Tenth Edition, "proceeding" is defined to mean:

> " The business conducted by a court or other official body; a hearing..."

26. Moreover, the Supreme Court made it clear in the *Dande* Case that where a decision has been taken and implemented the doctrine of mootness would kick in. The court held:

> " The doctrine of mootness required that controversy had to exist throughout judicial proceedings including at the appellate level. An appeal or an issue was moot when a decision would not have the effect of resolving a live controversy affecting or potentially affecting the rights of parties. Such a live controversy must be present not only when the action or proceeding was commenced but also when the court was called upon to reach a decision. The doctrine of mootness was therefore based on the notion that judicial resources ought to be utilized efficiently and should not be dedicated to an abstract proposition of law and that courts should avoid deciding on matters that were abstract, academic, or hypothetical.

27. Accordingly, I find no merit in the argument by the Attorney General that the application is incompetent on the ground that the decision complained of was not annexed to the application. In this instance, the decision is spent in that the applicant has already been charged and his case is pending prosecution before the 2nd respondent.

B. Whether the applicant can be personally prosecuted in respect of an alleged offence committed by the 2nd interested party, a separate legal entity:

28. It is a tested and tried principle that a limited liability company is a legal entity in its own right; an entity that is distinct and separate from its shareholders and directors, notwithstanding that as a juristic person, it operates through human members, directors and employees. The principle was enunciated in *Salomon v A Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22 thus:

> " The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act..."

29. Nevertheless, the mere fact that the impugned transactions were done by the applicant for and on behalf of the 2nd interested party is no reason to conclude that the applicant was wrongly charged. Section 23 of the *Penal Code* is explicit in this regard that:

> " Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part,

he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission."

30. Hence, in *Halsbury's Law of England* 4th Edition at paragraph 10 it is opined thus:

> "Notwithstanding the effect of a Company's incorporation, in some cases, the Court will 'pierce the corporate veil' in order to enable it to do justice by treating a particular company for the purpose of the litigation before it, as identical with the persons who control the company. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature. In such cases, the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders and will consider who are the persons as shareholders or even as agents directing and controlling the activities of the company."

31. Similarly in Nairobi HCCC No 1287 of 2000: *Ultimate Laboratories v Tasha Bioservice Limited*, it was held:

> "...that fundamental principle of incorporation may be disregarded, lifted, or pierced in exceptional circumstances both under express statutory provisions (of which section 323 of the Companies Act is but one example only) and under judicial interpretation or intervention. As regards the latter, English authorities establish the broad principle that the corporate veil will be lifted by the courts if, among other situations, corporate personality is being used as a mask for fraud or improper conduct..."

32. I therefore have no hesitation in holding, as I hereby do, that the principle enunciated in Salomon v Salomon, per se, is no shield against the applicant's prosecution.

C. On whether the applicant is entitled to the remedies sought:

33. The applicant seeks judicial review orders of Prohibition and Certiorari. In *Kenya National Examination Council v Republic, Ex Parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR, the Court of Appeal held:

> "...These remedies are only available against public bodies such as the Council in this case. What does an order ofProhibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See *Halsbury's Law of England*, 4th Edition, Vol 1 at pg 37 paragraph 128. When those principles are applied to the present case, the Council obviously has the power or jurisdiction to cancel the results of an examination. The question is how, not whether, that power is to be exercised. If the Council of prohibition would be ineffectual against the conviction because such an order would not quash the conviction. The conviction could be quashed either on an appeal or by an order of certiorari. The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition."

34. The same position was reiterated by the Court of Appeal in *Joram Mwenda Guantai v The Chief Magistrate*, Nairobi Civil Appeal No 228 of 2003 [2007] 2 EA 170, as follows:

> " It is trite that an order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court."

35. As for Certiorari, the Court of Appeal held as follows in *Kenya National Examination Council v Republic, Ex Parte Geoffrey Gathenji Njoroge & 9 others* (supra):

> " ...Only an order of Certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons..."

36. The judicial review jurisdiction of the Court was discussed in the Ugandan case of *Pastoli v Kabale District Local Government Council & Others*, [2008] 2 EA 300, in which it was held:

> " 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 BahikirweMuntu 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)."

37. Ordinarily, judicial review is concerned with the decision-making process as opposed to the merits of the decision. Accordingly, in *Republic v Attorney General it was held: & others, Ex Parte Diamond Hasham Lalji & another* (*supra*) it was held:

91. 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.

38. This aspect was reiterated by the Supreme Court in *Saisi & 7 others v Director of Public Prosecutions & 2 Others* (*supra*) as follows:

76. Be that as it may, it is the court's firm view that the intention was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in section 11(1) and (2) of the *Fair Administrative Action Act*. Third, the court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in section 11(1) (e) and (h) of the *Fair Administrative Action Act*. The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this court held in the case of *Kenya Vision 2030 Delivery Board v Commission on Administrative Justice, Attorney General and Eng Judah Abekah*, SC Petition 42 of 2019; [2021] eKLR, in matters involving the exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised.

39. It is now trite that some measure of merit review is acceptable to enable the Court properly adjudicate a judicial review matter. The Supreme Court acknowledged as much in the Saisi thus:

> "For the court to get through an extensive examination of section 7 of the *FAAA*, there had to be some measure of merit analysis. That was not to say that the court had to embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly in the circumstances of the case without examining those circumstances and measuring them against what was reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. It was to be limited to the examination of uncontroverted evidence. The controverted evidence was best addressed by the person, body or authority in charge. There was nothing doctrinally or legally wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter. Rather a failure to do so, out of a misconception that judicial review was limited to a dry or formalistic examination of the process only led to intolerable superficiality. That would be against article 259 of the *Constitution* which required the courts to interpret it in a manner that inter alia advanced the rule of law, permits the development of the law and contributes to good governance."

40. The foregoing position was reiterated in the *Dande* case (*supra*) by the Supreme Court as follows:

> "Judicial review was introduced to Kenya from England in 1956 through sections 8 and 9 of the *Law Reform Act*, Cap 26. The jurisdiction to hear and determine judicial review was then vested in the High Court. Under that system, the High Court could issue orders of mandamus, prohibition, and certiorari. The grounds for the issuance of such orders were borrowed from common law. Prior to the promulgation of the *Constitution* of Kenya, 2010, there were two legal foundations for the exercise of the judicial review jurisdiction by the Kenyan courts found in sections 8 and 9 which constituted the substantive basis for judicial review of administrative actions on the one hand, and, order 53 of the *Civil Procedure Rules* which was the procedural basis of judicial review of administrative actions, on the other hand.

The entrenchment of judicial review under the *Constitution of Kenya*, 2010 elevated it to a substantive and justiciable right under the Constitution. Accordingly, judicial review was no longer a strict administrative law remedy but also a constitutional fundamental right enshrined in the Constitution. Thus, article 47 of the *Constitution* provided that every person had a right to an administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair.

> "...
>
> When a party approached a court under the provisions of the Constitution then the court ought to carry out a merit review of the case. However, if a party filed a suit under the provisions of order 53 of the *Civil Procedure Rules* and did not claim any violation of rights or even violation of the Constitution, then the court could only limit itself to the process and manner in which the decision complained of was reached or action taken and not the merits of the decision per se."

41. The applicant approached the court under articles 23, 47, 157 and 165 of the *Constitution* in addition to sections 4 and 7 of the *Fair Administrative Action Act*. He has, in essence, challenged the decision to charge and prosecute him for the offence of obtaining goods by false pretences, contrary to section 313

of the *Penal Code*. His contention was that since the goods were supplied to the 2nd interested party, his prosecution was premised on a faulty basis. Hence the basic issue for consideration is whether the decision can be faulted on the grounds of illegality, irrationality or procedural impropriety.

42. The mandate of the 3rd respondent was aptly captured in *Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others* [2016] eKLR, it was held:

> 42. ...the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers inter alia to take statements and conduct forensic investigations. In order for the applicant to succeed he must show that not only are the investigations which were being done by the police being carried out with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence.

43. Similarly, in *Republic v Commissioner of Police & another, ex Parte Michael Monari & Another* (*supra*), it was held:

> "The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said not to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene."

44 There is no proof that the 3rd respondent acted outside its mandate in this instance. Indeed, none of the orders sought by the applicant is directed at the 3rd respondent.

45. As against the 1st respondent, the applicant alleged that in sanctioning his prosecution, the 1st respondent acted prematurely and without sufficient proof of wrongdoing on his part. It is unquestionable that it is the mandate of the 1st respondent to make independent decisions on whether or not a prosecution ought to be mounted. Article 157 of the Constitution is explicit that the DPP is not bound by any directions, control or recommendations made by any institution or body, being an independent public office. Consequently, the court can only intervene in the exercise of the 1st respondent's prosecutorial decision where it is shown that the decision was made in disregard of the public interest or for some ulterior motive.

46. In *Jirongo v Soy Developers Ltd & 9 others* (Petition 38 of 2019) [2021] KESC 32 (KLR) (16 July 2021) (Judgment), the Supreme Court held:

> 81. Under article 157(6) of the *Constitution,* the DPP is mandated to institute and undertake criminal proceedings against any person before any court. Article 157(6) provides as follows:
>
> (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."
>
> Article 157(4) provides that:

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

However, article 157(11) stipulates that:

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

82. Although the DPP is thus not bound by any directions, control or recommendations made by any institution or body, being an independent public office, where it is shown that the expectations of article 157(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."

47. Likewise, in the case of *Anthony Murimi Waigwe v Attorney General & 4 others* [2020] eKLR, the court held: -

48. It is no doubt clear that under article 157 (1) of the *Constitution* the ODPP is enjoined in exercising the powers conferred by the aforesaid Article to have regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. Interest of the administration of justice dictates that only those whom the DPP believes have a prosecutable case against them be arraigned in court and those who DPP believes have no prosecutable case against them be let free. This is why article 159(2) of the *Constitution* is crying loudly everyday, every hour that "justice shall be done to all, irrespective of status". Justice demands that it should not be one way and for some of us but for all of us irrespective of who one is or one has.

49. The petitioner in support of interest of administration of justice Dictates referred to the National Prosecution policy, revised in 2015 at page 5 where it provides that: "Public Prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, Public Prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available?

50. In the case of *Republic v Director of Public Prosecution & another ex parte Kamani*, Nairobi Judicial Review Application No 78 of 2015 while quoting the case of *R v Attorney general ex Kipngeno Arap Ngeny* High Court Civil Application No 406 of 2001; the court held;

> "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."

48. Hence, in the *Jirongo Case* (*supra*) the Supreme Court relied on a decision rendered by the Supreme Court of India, namely *RP Kapur v State of Punjab* AIR 1960 SC 866 in which the factors to be considered by the court in similar circumstances were discussed. Hence, it was held that the court can intervene:

(a) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or where the quashing of the impugned proceedings would secure the ends of justice; or

(b) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, eg want of sanction; or

(c) Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; or

(d) Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.

49. In this instance, the respondents contend that the allegations of against the applicant were investigated and a report made to the 1st respondent for perusal and advice. The 1st respondent thereupon made an independent decision to have the applicant prosecuted. The decision to prosecute was therefore within the constitutional and legal mandate of the 1st respondent.

50. As to whether there is sufficient evidence to back up the decision authorities abound to show that the best forum for testing the sufficiency or otherwise of evidence is the trial court itself. For instance, in *Erick Kibiwott & 2 others v Director of Public Prosecution & 2 others* [2014] eKLR it was held that:

> "...In determining the issues raised herein the court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial court. In dealing with the merits of the application, it is trite that the court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under article 157 of the *Constitution*. There mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings..."

51. Additionally, and more importantly, article 50(1) of the *Constitution* provides that:

"(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

52. Needless to mention that the essence of article 50(1) of the *Constitution* is the concept of a fair hearing; and that it envisages the context of the fair hearing to be a public hearing before "...a court or, if appropriate, another independent and impartial tribunal or body..." in which the accused person is afforded all the safeguards set out in article 50(2) of the *Constitution*. It is for the foregoing reasons that it is always preferable that disputes about facts, such as those raised herein by the applicant, be ventilated before the subordinate court before which the impugned charges have been preferred, which is itself a creature of the Constitution pursuant to article 162 and 169 of the *Constitution*.

53. The Supreme Court reiterated the foregoing in the *Saisi case* as follows:

88. It is our considered opinion that these are not issues concerning the propriety or otherwise of the decision by the DPP to charge them. These appear to be serious contentions of fact, evidence and interpretation of the law better suited to be examined by a trial court. Certainly, not for the High Court while exercising its judicial review jurisdiction. In *Hussein Khalid and 16 others v Attorney General & 2 others*, SC Petition No 21 of 2017; [2019] eKLR this court held that it was not for the High Court as a constitutional court to go through the merits

and demerits of the case as that is the duty of the trial court. Similarly, and as we have held hereinabove, it not for the judicial review court to undertake the merits and demerits of a matter based on controverted evidence and contested interpretations of the law.

89. We are emphatic that the High Court, whether sitting as a constitutional court or a judicial review, may only interfere where it is shown that under article 157(11) of the *Constitution,* criminal proceedings have been instituted for reasons other than enforcement of criminal law or otherwise abuse of the court process. We reproduce the words of this court in *Hussein Khalid and 16 others v Attorney General & 2 others* [supra] as follows;

> "[105] It is not in dispute that every statutory definition of an offence comprises ingredients or elements of the offence proof of which against the accused leads to conviction for the offence. Inevitably, proof or otherwise of elements of an offence is a question of fact and that largely depends on the evidence first adduced by the prosecution and where the accused is placed on his defence, the accused evidence in rebuttal. This in our view is an issue best left to the trial court as it will not only have the benefit of the evidence adduced but will weigh it against the elements of the offence in issue. It is not automatic that once a person is charged with an offence (s) he must be convicted. Every trial is specific to the parties involved and a blanket condemnation of the statutory provisions is in our view overreaching. The presumption of innocence remains paramount." [Emphasis added]

54. The applicant also impugned the decision to charge and prosecuted him contending that the prosecution is hinged on what he considered to be a purely civil matter. There is however no bar to the same facts forming the basis of simultaneous prosecution of criminal and civil cases. Section 193A of the *Criminal Procedure Code* is explicit in this regard. It provides:

> "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."

55. Again, the Supreme Court had occasion to pronounce itself on the implications of section 193A above in the *Donde* Case and held:

> "From section 193A of the *Criminal Procedure Code*, both civil and criminal jurisdictions could run parallel to each other and neither could stand in the way of the other unless either of them was being employed to perpetuate ulterior motives or generally to abuse of the process of the court in whatever manner."

56. There being no proof that the criminal proceedings were instituted to perpetuate ulterior motives, I find no merit in the contention of the applicant that the respondents and the 1st interested party are exploiting the criminal justice process to effect debt recovery. I therefore find it apt to reiterate the expressions of Lord Hailsham of St Marylebone in *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 that:

> "The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court."

57. In conclusion, I am of the same mind as the three-judge bench in *Michael Sistu Kamau & 12 others v Ethics and Anti-Corruption Commission & 4 others* [2016] eKLR, that:

> "The trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words, unless the Petitioners demonstrate that the circumstances of the impugned process render it impossible for them to have a fair trial, the High Court ought not to interfere with the trial ... "

58. For the foregoing reasons, it is my considered view that the notice of motion dated April 29, 2024lacks merit. The same is hereby dismissed with an order for each party to bear their own costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 17TH DAY OF OCTOBER 2024

OLGA SEWE

JUDGE