



Republic v Director of Public Prosecutions & 2 others; Rapid Cosmetic Enterprises Limited (Interested Party); Farah & 2 others (Exparte) (Judicial Review Application E155 of 2023) [2024] KEHC 14898 (KLR) (Judicial Review) (1 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14898 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E155 OF 2023
JM CHIGITI, J
NOVEMBER 1, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

THE ANTI-COUNTERFEIT AGENCY 2ND RESPONDENT

CHIEF MAGISTRATE'S COURT, MILIMANI LAW COURTS 3RD RESPONDENT

AND

RAPID COSMETIC ENTERPRISES LIMITED INTERESTED PARTY

AND

MOHAMED ABDIRIZAK FARAH EXPARTE

LIBAN BASHIR MOHAMED EXPARTE

MARIYA GROUP LIMIT EXPARTE

JUDGMENT

The Applicants' case;

1. The Applicants are before this Court vide a Notice of Motion application dated 16th October, 2023 and filed under Under Sections 8 and 9 of the [Law Reform Act](#), Cap 26 Laws of Kenya, Order 53 Rules 1 and 2 of the Civil Procedure Rules 2010).



2. The Application seeks the following orders;
 - i. An Order of Certiorari do issue to bring into this Honourable Court and quash the decision of the 1st Respondent and on the recommendation of the 2nd Respondent, to charge the Applicants with criminal offences before Milimani Chief Magistrate's Court Criminal Case E379 of 2023;
 - ii. An order of Certiorari do issue to bring to this Honourable Court and quash the Charge sheet dated 20th June 2023 in Milimani Chief Magistrate's Court Criminal Case E379 of 2023;
 - iii. An Order of Prohibition do issue directed at the 1st Respondent prohibiting him from continuing with the prosecution of the ex-parte Applicants in Milimani Chief Magistrate's Court Criminal Case E379 of 2023 or any other proceedings that may be instituted on the same basis and touching on the subject matter of the impugned investigations;
 - iv. An Order of Prohibition do issue directed at the 2nd Respondent prohibiting it from carrying on with any further investigations touching on the Applicants in relation to the subject matter of the impugned investigations;
 - v. An Order of Prohibition do issue to prohibit the 3rd Respondent from taking evidence, conducting proceedings or carrying on with the trial of the Applicants in Milimani Chief Magistrate's Court Criminal Case E379 of 2023 or any other criminal proceedings that may be instituted on the same basis and touching on the Applicants relating to the subject matter of the impugned investigations; and
 - vi. The costs of this application be provided for.
3. The Application is supported by a Verifying Affidavit, dated on 12th October 2023 a Supplementary Affidavit dated 29th January 2024 Sworn by Mohamed Abdirizak Farah.
4. The Ex- Parte Applicants (herein after referred to as Applicants) deponed that the 1st Respondent has charged the Applicants with several cases Milimani Chief Magistrate's Court Criminal Case E379 of 2023 (the Criminal Case) with seven charges which charges relate to manufacturing, distributing and having in possession of counterfeit Criminal Case in the Industrial Property Tribunal IPTC Cases No. E003 and E004, all of 2023 and Milimani High Court HCCOMM No. E212 of 2023.
5. It is the Applicants' case that The 3rd Applicant, Mariya Group Limited (hereinafter "MGL") is the registered owner of Industrial Design numbers 1410 and 1450 (MGL designs), which are registered to protect the design of the bottles that it uses to package its products and that on or about March 2023, MGL discovered that RCL – The interested Party in this case was manufacturing and selling products bearing trademarks and industrial designs similar to those of MGL.
6. MGL issued RCL with a letter dated 24th March 2023 requiring it to cease and desist from infringing on MGL's trademarks and designs and RCL filed a complaint dated 4th April 2023 with the 2nd Respondent, Anti-Counterfeit Agency (hereinafter "ACA") alleging that MGL's designs were infringing on its industrial designs.
7. Acting on the complaint filed by the interested party, ACA raided MGL's premises and seized its products on 6th April 2023 despite proof that MGL had valid registered industrial designs over the alleged counterfeit goods.



8. The Applicants also state that On 19th May 2023, the High Court granted it orders which sought to restrain ACA from raiding, seizing, confiscating or otherwise interfering with its manufacturing and packaging of products bearing its trademarks and industrial designs.
9. That Despite the confirmation by Kenya Industrial Property Institute (KIPI) that MGL owns the industrial designs alleged to be counterfeits to the Interested Party's designs, the 1st Respondent, acting on the recommendations of the 2nd Respondent, preferred charges against MGL and its two directors, (the 1st and 2nd Applicants), based on the complaint filed with ACA by the Interested Party.
10. It is the Applicants case that they have been packaging their products in bottles bearing the designs shown in the representations set out in our Certificates of Registration and their designs were registered in 2021 while the Interested Party's designs were registered in 2022. The assertion by ACA that the Interested Party's claim is novelty in the neck and cap of its bottles fails to consider MGL's registered designs as shown in the representations set out in the Certificates of Registration.
11. The Applicants further deponed that upon being served with the Notice of Seizure they issued ACA with explanations and evidence on the validity of their registered designs but ACA proceeded with the seizure without conducting any investigations.
12. It is the Applicants case that they are challenging the process followed by the 1st and 2nd Respondents in making the decision to charge and recommending respectively in Milimani Chief Magistrate's Court Criminal Case E379 of 2023.
13. The Applicants state that they do not challenge the jurisdiction of the 3rd Respondent however they acknowledge that this court has supervisory jurisdiction over it and has jurisdiction to stop criminal proceedings before the 3rd Respondent where it finds that such proceedings are an abuse of the court process.
14. The Applicants argue that under section 2 of the [Anti-Counterfeit Act](#), counterfeiting cannot materialize against an owner of protected goods such as MGL. It was therefore illegal, un-procedural and improper for ACA to recommend their prosecution when it knew that they had valid registrations over the alleged infringing designs.
15. The Applicants filed written submissions dated 29th January, 2024 where they submitted that the criminal case against them is an abuse of court process and that Article 157(11) of [the Constitution](#) of Kenya, 2010 provides that in exercising the prosecutorial powers, the 1st Respondent herein "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".
16. Further they submit that the dint of section 4(f) of the [Office of the Director of Public Prosecutions Act](#), 2013 sets out the need to prevent and avoid abuse of the legal process as a guiding principle in discharge of prosecutorial powers. Consequently, any decision of the 1st Respondent that disregards this provision fails the test of legality and is thus subject of review by this Court.
17. They rely on the case of *Satya Bhamu Gandhi v Director of Public Prosecutions & 3 others* [2018] eKLR, where Justice Mativo described abuse of court process as follows: -

“...the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents...it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party.”



18. The Applicants also in arguing their case rely on the case of Republic v Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & another [2002] eKLR, Waki J (as he then was), cited with approval the decision in H.C.Misc. Appl.839 and 1088/99 Vincent Kibiego Saina v. The Attorney-General where Justice Kuloba held that: -

“So, it is not the purpose of a criminal investigation or a criminal charge or prosecution, to help individuals in the advancement of frustration of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other and ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest (Emphasis added). When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice. No one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth.”

19. It is the Applicants submission that the 1st Respondent failed to consider relevant considerations in making the decision to charge the ex-parte Applicant and rely on the case of Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Pelt Security Services Limited [2018] eKLR, where Justice Mativo held that the court will interfere with a decision where the decision-maker fails to take relevant considerations into account.

20. The Applicants also submit that the decision to charge them was irrational and failed the fair, objective and independent test in arriving to the decision to charge them and they rely on Republic v Director of Public Prosecutions & 2 others; Evanson Muriuki Kariuki (Interested Party); Ex parte James M. Kahumbura [2019] eKLR where the court held: -

“mere or reasonable suspicion that the DPP did not act independently, would be sufficient to taint the criminal proceedings”.

21. In Republic v Chuka University Ex-Parte Kennedy Omondi Waringa & 16 others [2018] eKLR, Aburili J held that:

“...an administrative body that makes its own rules must be prepared to adhere to those rules regulating execution of its business and where it fails to do so, then the court will not hesitate to intervene to declare the actions or failure to adhere to those Rules ultra vires.”

22. It is also the Applicants’ submission that they do not dispute that civil and criminal proceedings can run concurrently as per section 193A of the Criminal Procedure Act however this provision does not apply in its case as civil cases before the Tribunal and the High Court and the Criminal Case are not concurrent proceedings. They rely on Maina [§ 4 others v Director of Public Prosecutions § 4 others \(Constitutional Petition E106 § 160 of 2021](#) (Consolidated)) [2022] KEHC 15 (KLR) where the court held that: -

“In an article titled ‘Unjust Justice in Parallel Proceedings: Preventing Circumvention of Criminal Discovery Rules, the author, Randy S Eckers, defines concurrent proceedings as



independent, simultaneous investigations and prosecutions involving substantially the same matter and parties.”

23. The Applicants further submit that they have demonstrated that the criminal case was initiated in bad faith with an intention to frustrate, irritate and annoy them thus an abuse of the criminal justice system.
24. The Applicants thus prays that this Court grants them the Judicial Review orders sought in the Notice of Motion dated 16th October 2023 plus costs.

The Respondent's case;

25. In opposition to the Applicants' Application, the 2nd Respondent filed a Replying Affidavit sworn by Abdi Dube dated 19th December 2023 and written submissions dated 22nd July 2024.
26. The 2nd Respondent is a criminal investigating agency created under Section 2 of the *Office of the Director of Public Prosecutions Act*, 2013 whose purpose is to investigate instances of criminal abuse of intellectual property rights under the provisions of the *Anti-Counterfeit Act*.
27. The 2nd Respondent deponed that it received a formal complaint from the Interested Party concerning the abuse of its registered industrial designs and proceeded to act in accordance to its statutory mandate to conduct investigations against the Applicants as provided for under Section 33 of the *Anti-Counterfeit Act* as read together with Regulation 13 of the Anti-Counterfeit Regulations, 2010.
28. The 2nd Respondent further states that the Interested Party has registered industrial designs that characterizes them from any other industrial design registration that is its "shape and ornamentation of the design entitled "bottle" characterized by a cylindrical neck with a cap" and when upon inspecting the Applicant's' premises it found that not only were they in production/manufacturing but also in possession of bottles with cylindrical neck and a cap that resembles the Interested Party's registration.
29. It further avers that after inspection it seized the offending goods and entered them in an Inventory serial no 001136 dated 6th April 2023 and after forwarded the same for analysis after which an Analysis report dated 20th April 2023 was availed.
30. The 2nd Respondent further states that the 3rd Applicant's industrial designs as registered do not make any reference in terms of novelty to a cylindrical neck and a cap and consequently the ex-parte Applicants have not been using bottles as registered but have been making and using the industrial design registration of the Interested Party which constitutes a violation susceptible to enforcement action.
31. The 2nd Respondent also states that pursuant to Section 23(1) of the *Anti-Counterfeit Act*, 2008 it acted with reasonable suspicion and thereafter being convinced by its findings in the investigations referred the matter to the Director of Public Prosecutions who preferred criminal charges against the Applicants.
32. It relies on the case of *Maura Muigana v. Stellan Consult Limited & 2 Others*, High Court of Kenya at Nairobi Constitutional Petition No. E033 of 2021 where the Court stated as follows: -

“69. In an Article titled 'Unjust Justice in Parallel Proceedings: Preventing Circumvention of Criminal Discovery Rules, the author, Randy S. Eckers, defines concurrent proceedings as independent, simultaneous investigations and prosecutions involving substantially the same matter and parties.”



33. The 2nd Respondent avers that they are aware that on 21st June 2023 the Applicants filed an application before the 3rd Respondent seeking to have the criminal charges levelled against them struck-off, the application was opposed and in its pronouncement the 3rd Respondent upheld the provisions of Section 89(5) of the Criminal Procedure Code and proceeded to order that the matter before it to go into full hearing.
34. The 2nd Respondent does not dispute that it is not a party to the proceedings at the Industrial Property Tribunal, which cases are still pending determination.
35. The 2nd Respondent argues the Applicants have offended the doctrine of sub judice as they have filed a similar matter with same parties and same subject matter as the one before this court in the High Court Commercial and Tax Division however it filed Notice of Preliminary Objection dated 26May 2023 on grounds that the court lacked jurisdiction to hear and entertain the matter filed.
36. It submits that the Applicants posit and assert that the goods are packaged in the industrial designs consistent with their own registrations which results in huge factual contestations as to which particular industrial designs the seized bottles are consistent with, that of the 3rd Applicant or that of the Interested Party. The novelty in the industrial designs of the Interested Party include a cylindrical neck while those of the 3rd Applicant do not and it is the case of the 2nd Respondent and the Interested Party that the goods seized from the ex-parte Applicants have cylindrical necks. This is a matter of fact that cannot be the subject of judicial review proceedings.
37. It further submits that the dispute therefore revolves largely and majorly on determination of the fact of the actual appearance of the seized goods vis-à-vis the actual registrations as appears in the certificates of registration of the various industrial designs.
38. It is the Respondent's submission that the Applicants are in violation of the provisions of rule 9 of the Oaths and Statutory Declarations Rules which provides as follows-
- “9. All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification.”
39. It also submits that the Applicants only provided a charge sheet and no exhibits to prove their case. They rely on the Court of Appeal case of Commissioner General, Kenya Revenue Authority through [*Republic v. Silvano Onema Owaki Vs Marenga Filling Station, Civil Appeal No. 45 of 2000*](#) where the Court held as follows:
- “We would observe that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1 (2) of Order LIII.
40. It relies on the case of [*Geoffrey Makana Asanyo v. Kenya Agricultural Research Institute, Civil Case No.151 of 2003*](#) where it was held as follows-
- “The other issue is that of sealing and stamping the annexures to the affidavit. There is no dispute that there is no stamp and seal on each and every document attached to the affidavit. What there is a paper on top of each bundle of documents which is sealed, stamped and marked. I concur with counsel for the respondent that this does not comply with rule 9 made under S.6 of the [*Oaths and Statutory Declarations Act*](#). True courts should not be tied down by rules but in this case it is not even clear what the documents are. For instance, in para.4 of the affidavit the deponent states.



"Annexed herewith and marked bundle "GMI" are the letters of allotment and receipts." He does not say how many letters or receipts are in the bundle. If one is missing the court has no way to know that. He should have clearly indicated them. He should have stamped and sealed them. His explanation that they are many pages is not borne out. Though "many" may be objective what is referred to "GM1" has only 6 pages, GM2 only three, GM3 three pages. What was so difficult in sealing stamping and marking those pages. The Hon. Justice Onyango Otieno-as he then was put is very clear in the case of West Kenya Sugar Co. Ltd Vs. Panachand Jivraj Shah & others HCCC.NO.907 OF 1999 (Milimani). He stated that if a mere paper is sealed and signed one cannot ascertain the same exhibits referred to in the affidavit are the same exhibits the Commissioner of oaths did see and certify to be correct in the affidavit.

"It is therefore clear that the sealing and signing of the annexures are improper and the preliminary objection would succeed to that extent. Counsel for the Respondent asked court to expunge par.4,5,6,9,10 and 13 of the applicant's affidavit which will leave the affidavit just a skeleton and as such the application will not be supported by any affidavit. This seems to be the thing to do.

The Interested Party's case;

41. In further opposition to the Applicants' Application, the Interested Party filed a Replying Affidavit sworn by Mohamed Ahmed Noor dated 13th May 2024 and written submission dated 8th July 2024.
42. The 1st Respondent is the Manager, Design and Innovation of the Interested Party who also doubles up as the in charge sales and marketing.
43. The 1st Respondent avers that he designed the Industrial design no. 1480 and 1481 and that an industrial design cannot be registered if it is identical with or substantially similar to an existing one and that every industrial design must meet certain criteria for registration which includes visual features of the shape and configuration.
44. It is the Interested Party's (herein after referred to as IP) case that the statements of novelty is a cylindrical neck with cap which the 3rd Ex- parte Applicant has no mention to a cylindrical neck at all.
45. The IP does not dispute that on 24th March 2023 it received a letter demanding it to desist infringing on the 3rd Ex-parte applicant's industrial designs action which then triggered it to carry out a market survey to investigate the concern of the two parties selling similar products and proceeded to file a formal complaint to the 2nd Respondent.
46. The IP further deponed that the 2nd Respondent seized the products from the Ex- Parte applicants and upon analysis ascertained that the same were counterfeit and abuse to its Intellectual Property Rights.
47. The IP by dint of Section 92(1) of the *Industrial Property Act* aver that they registered owner of the industrial designs a right which precludes third parties from abusing it. The Section provides that:

Registration of an industrial design shall confer upon its registered owner the right to preclude third parties from performing any of the following acts in Kenya- reproducing the industrial design in the manufacture of a product: importing, offering for sale and selling a product reproducing the protected industrial design: or stocking of such a product for the purposes of offering it for sale or selling it.



48. It further submits Section 92(3) of the *Industrial Property Act* vests in it as a registered owner the right to institute court proceedings against infringement or abuse and section 33(1) of the *Anti-Counterfeit Act* vests in a registered owner of an industrial design intellectual property right.

49. The IP also submits that the matter before this court does not pass the Judicial Review ripeness test and rely in the Court of Appeal case Komu Revenue Authority & 2 Cherse Darusa Investments Limited Civil Appeal No. 24 of 2018 where the court held: -

“(49) We are also of the view that it has now become a settled principle that judicial review remedies are not available in matters where facts are disputed.”

50. It is the IP’s further submission that his court lacks jurisdiction to hear this matter and rely on the Court of Appeal case of Jitendru Bruhmbhutt v Dynamics Engineering Limited, where the court held as follows: -

“It would therefore seem that even if *mula fides*, or even malice, is established in this case. Upon which it might be thought to be difficult to make a finding on affidavits alone in which there are allegations, counter allegations, and repudiations, all of which are untested in cross-examination, this should not affect the conclusion as to whether a *prima facie* case for winding up exists.”

51. The Interested Party also in arguing their case rely on Republic of Notional Water Conservation & Pipeline Corporation & another *ex parte* Evans Ngibuini & 9 Others, where the court held as follows: -

“59. Once a judicial review court fails to sniff any illegality, irrationality or procedural impropriety, it should down its tools forthwith. That is what I will do in this case. The Applicant’s case therefore fails and it is dismissed.”

Analysis and Determination;

52. I have considered the arguments advanced by the *Ex parte* Applicants herein and one issue crystallizes for determination and this is whether the *Ex parte* Applicants have satisfied this court to grant the orders sought in the application.

53. The Notice of Motion application dated 16th October, 2023 as at the eve of this judgment was not paid for which raises the question if there existed a suit for consideration before this court. In the case of *Mombasa Cement Ltd v Speaker, National Assembly & Another* (2018) eKLR the Court was faced with similar dilemma of non-payment of requisite court fees and its consequences. Hon. Justice J.M Mativo aptly held: -

“The filing of a civil case requires the payment of filing fees. It follows that failure to pay Court fees renders the suit incompetent because there is no competent suit filed before the Court. Whereas the Court has inherent powers to allow a party who has not paid fees time to remedy the situation, where a party as in this case is afforded the opportunity to remedy the situation or demonstrate that he paid, and fails to remedy the situation or offers out rightly conflicting explanations as happened in this case which culminated in the above affidavit. In such circumstances as has happened in this case, the Court is left with no option but to declare the suit incompetent and strike it off as I am compelled to in this case. Consequently, I find and hold that failure to pay the requisite Court filing fees, which is a prerequisite for instituting suits renders this Petition incompetent.”



54. However, in the interest of Access to Justice the court has allowed the Applicants to remedy the situation and confirm that after their admission they made payment on 30th October, 2024 vide receipt number RA-0250533. The issues raised in their instant application now follows.
55. On the first issue of unlawful decision to charge the Applicants, a useful guide to what an unlawful decision entails, is the case of Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410 where the learned Judge stated as follows: -

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

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

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

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

56. Therefore, I find that the Applicants have failed to demonstrate unlawfulness on the part of actions of the Respondents.



57. Judicial review is entrenched as a constitutional principle pursuant to the provisions of Article 47 of *the Constitution* which provides for the right to fair administrative action, and Section 7 of the *Fair Administrative Action Act* which provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision.
58. On the issue of quasi-judicial function. Article 165(6) of *the Constitution* provides that this Court has supervisory jurisdiction over any person, body or authority that exercises a quasi-judicial function or a function that is likely to affect a person's rights.
59. On the next issue, on abuse of investigative and prosecutorial powers, it is important to first deal with the applicable principles and circumstances under which the Court will grant an order prohibiting the commencement or continuation of a criminal trial process. In this respect, 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.
60. The merits of the case, and particularly whether the criminal proceedings have a likelihood of success, or that the Applicant has a good defence is not a ground for halting criminal proceedings by way of judicial review.
61. However, if an Applicant demonstrates that the criminal proceedings constitute an illegality or abuse of process, this Court will not hesitate in putting a halt to such proceedings, as that fall squarely within its mandate as a judicial review Court. The cases of Peter Ngunjiri Maina v DPP & 2 others (2017) eKLR, and R v DPP & 2 others Ex parte Nomoni Saisi (2016) eKLR identified various scenarios that would require interrogation to warrant a review of the unfettered discretion of the Director of Public Prosecutions as follows: (a) Where there is an abuse of discretion; (b) Where the decision-maker exercises discretion for an improper purpose; (c) Whether decision-maker is in breach of the duty to act fairly; (d) Whether decision-maker has failed to exercise statutory discretion reasonably; (e) Where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (f) Where the decision-maker fetters the discretion given; (g) Where the decision-maker fails to exercise discretion; and (h) Where the decision-maker is irrational and unreasonable.
62. In this regard, the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court as recognized by Section 193A of the Criminal Procedure Code; unless the commencement of the criminal proceedings is meant to force the Applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim.
63. In Johnson Kamau Njuguna & Another vs Director of Public Prosecutions (2018) eKLR, the court also restated the said principles:

“It is settled law that the role of the court in a judicial review application of this nature is to ensure that an applicant is not dragged willy-nilly into court on criminal charges when there is no substantial evidence to sustain an indictment. The DPP has the authority and discretion to decide who, when and how to prosecute within the bounds of legal reasonableness. That role cannot be usurped by the court. If the DPP acts outside the bounds of legal reasonableness, however, he acts ultra vires and the court can intervene, because it is the court's high responsibility and inherent power to secure fair treatment for all persons brought before the court, and to prevent an abuse of the court's process.”
64. I thus find that the 1st Respondent conducted itself within its statutory right and did not in any way act ultra vires to warrant intervention by this court.



65. Section 193(A) of the Criminal Procedure Code provides the fact there is pending matter in civil Proceedings does not act as bar to criminal action. In court case of J in Stephen Mburu Ndiba – vs- Ethics & Anti-Corruption Commission & Another [2015] eKRL in which court stated that:
- “It is beyond peradventure then that the existence of a civil suit per se cannot be a bar to criminal proceedings simply because the subject matter in the criminal proceedings is directly in issue or substantially in issue in the pending civil suit. Where civil proceedings exist side by side with criminal proceedings, the latter would only be stayed or terminated altogether if there is every indication that they were initiated to bring pressure to bear upon a party to settle the civil suit: in that regard, the criminal proceedings are for ulterior motives and not for the purpose of which they are meant, which is, upholding criminal law.”
66. It is also not the duty of the judicial review court to engage in an examination of the merit or otherwise of the charges to be preferred. The sufficiency or otherwise of the charges or evidence is left to the trial court.
67. Further, the power of prosecution under Article 157(6) of *the Constitution* rests with the 3rd Respondent, and under Article 157(10), he does not require the consent of any person to commence prosecution, and shall be independent in the execution of his or her duties.
68. This Court therefore finds that insufficient evidence has been brought by the Applicants to show any malice, bad faith or ulterior motives on the part of the Respondents in investigating and prosecuting them for a criminal offence.
69. I find that as the Respondents have not been shown to have acted illegally, or in abuse of their powers, no grounds have been established for the orders of certiorari, and prohibition sought by the Ex-parte Applicants. In addition, the Respondents cannot be restrained from undertaking their Constitutional and statutory duties.

Order:

The Notice of Motion dated 16th October, 2023 is dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF NOVEMBER, 2024.

J. M. CHIGITI (SC)

JUDGE

