



**Njuguna v Director of Public Prosecution; Emmaus Affordable Homes & Properties Limited (Interested Party) (Judicial Review Miscellaneous Application E005 of 2024) [2024] KEHC 16799 (KLR) (3 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16799 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**JUDICIAL REVIEW MISCELLANEOUS APPLICATION E005 OF 2024**

**NIO ADAGI, J**

**DECEMBER 3, 2024**

**IN THE MATTER OF: AN APPLICATION BY EVANS NJOROGE FOR JUDICIAL REVIEW ORDERS OF CERTIORARI & PROHIBITION**

**AND**

**IN THE MATTER OF: THE LAW REFORM ACT, CAP 26, LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE LAND ACT 2012 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE LAND REGISTRATION ACT 2012 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: ARTICLE 10 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: KITHIMANI CRIMINAL CASE NO. E387 OF 2024**

**BETWEEN**

**EVANS NJOROGE NJUGUNA ..... EXPARTE APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT**

**AND**

**EMMAUS AFFORDABLE HOMES & PROPERTIES LIMITED .... INTERESTED PARTY**



## RULING

1. The Applicant commenced the proceedings herein by an Exparte Chamber Summons dated 8th May 2024 filed under certificate of urgency seeking for Orders:-
  1. That the application be certified as urgent.
  2. That this Honourable court be pleased to grant leave to the Applicant to apply for judicial review orders of CERTIORARI to remove to the High court and quash the decision of the Respondents made on 20th March 2024 to charge and/or commence and/or institute any criminal charges and/or to prosecute the Applicant with an offence of Malicious Damage to Property contrary to section 334 of the *Penal Code*, 6 counts of Forcible Detainer Contrary to Section 91 of the *Penal Code* and Interfering with Boundary Features contrary to section 21(1) of the Penal Code made by the Interested Party herein.
  3. That this Honourable court be pleased to grant leave to the Applicants to apply for judicial review orders of CERTIORARI to quash the decision by the Director of Public Prosecution to institute Criminal Case Charges against the applicant under Kithimani Criminal Case No E 387 of 2024 or any other case.
  4. That an order for PROHIBITION directed to the Director of Public Prosecutions prohibiting them directly and/or through their servants and/or agents from prosecuting the charges brought against the applicants under Kithimani Criminal Case No E 387 of 2024 or any other case.
  5. That the Honourable Court grant leave do operate as stay of proceedings in Kithimani Criminal Case No E 387 of 2024.
  6. That this Honourable court be pleased to give further orders and/or directions as it may deem fit and just to grant.
  7. That costs of the application be provided for.
2. On 12th June 2024, prayers (1), (2) and (3) of the Exparte Chamber Summons application were granted and the Applicant was directed to file the substantive Notice of Motion within 21 days. The same was filed dated 22nd June 2024 and is the application now before this court for determination. The application seeks for Orders :-
  1. Spent
  2. That a Judicial Review Order Of Certiorari do issue by this Honourable court for the purpose of quashing the decision of the Director Of Public Prosecutions to charge the Applicant with offences of Malicious damage to the property in Kithimani magistrate's court case number MCCR/E387/2024.
  3. That this Honourable court do issue a Judicial Review Order Of Prohibition for purpose of stopping and preventing the DPP from continuing with criminal case MCCR/E 387/2024 until:
    - a. The MCL & E CASE NO. 18 OF 2022 is heard and determined



- b. The investigations by the Land Fraud Unit at DCI Headquarters are finalized and recommendations of culpable persons be established.
4. That the cost of this Application be awarded to the applicant.
3. The application was supported by the affidavit of Evans Njoroge Njuguna, the Applicant herein.
4. In opposition to the said application, the Respondent filed Grounds of opposition and a Replying Affidavit sworn on 19th July 2024 by No. 77983 PC John Songol and seeks to have the application dismissed with costs.
5. Similarly, the Interested Party, filed a Replying Affidavit sworn by it's Director Stephen Maingi Migichi on 11th June 2024 and also seeks to have the application dismissed with costs.
6. Parties were directed to canvass the application through written submissions. The Applicant's submissions are dated 5th August 2024, the Respondent's submissions are dated 23rd September 2024 and the Interested Party's submissions are dated 25th September 2024.

### **Applicant's Submissions**

7. The Applicant submitted that no investigations were conducted before the decision to charge him were made. This is because whereas all the documents indicates that the land known as MACHAKOS MATUU/4350 is only 5.6 hectares, the prosecution represented that this land is actually 16 hectares and thus the encroached land of the Applicant belong to the Interested Party. That the dispute between the parties involve land and that prosecutorial powers are limited under Article 157 (11) of [\*the Constitution\*](#). [\*The Constitution\*](#) does not envisage a situation in which the Criminal process is to be used to assist a party in the advancement or frustration of their case in civil court. In the instant case, the Applicant has already instituted a Land case being MCL&E No. E018 OF 2022 in Kithimani Magistrate Court. The Defendant in that case is the Interested Party herein. Using the Criminal Justice System to coerce the Applicant to drop that case is in contravention of Article 157(11) in which the Respondent is directed to have regard to the interest of Administration of Justice and to prevent and avoid abuse of legal process. In this case, the Interested Party clearly is influencing the Respondent with an aim of settling dispute of civil nature using criminal process. The Applicant prays that this honourable court stops and prevents the Respondent from assisting the Interested Party to frustrate the Applicant in the Civil dispute he has with the Interested Party. The Applicant relied on the the case of Republic vs Chief Magistrates Court at Mombasa ex purte Ganijee & Another (2012) eKLR where it was held that :-

“ ... It is not the purpose of criminal investigation or a criminal charge or criminal prosecution to help individuals in the advancement or frustration of their civil cases”

The Applicant also relied on the case of Republic vs AE and 4 Others: Exparte Kenneth Kariuki Githii [2014] eKLR where the court held:-

“It is therefore clear that whereas the discretion given to the Respondent to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt.”



He also cited the case of Kuria & 3 others vs AG [2002/ eKLR the court held that:-

“Machinery of criminal justice is not to be allowed to become a pawn in personal feuds and individual vendetta”

8. The Applicant submitted that there were no proper investigations that were carried out. He submitted the investigations diary in which the investigating officer submitted that the Interested Party owns a parcel of land known as MACHAKOS MATUU 4350 measuring 16(sixteen) Hectares. He also submitted the title for the said land and it only measures 5.6 Ha. Clearly this indicate that there was no investigation done and if any, it does not meet the threshold of charging a person. He cited the case of Republic vs Chief Magistrates Court at Milimani Law Courts: DPP & 2 Others (Interested Purties) Ex parte Applicant: Pravin Galor [2020]eKLR where it was held that:-

“A prosecution should not be instituted or continued unless there is admissible. substantial and reliable evidence that a criminal offence known to the law has been committed by the accused.”

9. That in this matter if the prosecution is to be continued, it will be perceived as counter-productive by bringing the law into disrepute. All the documents produced by the Applicant indicate that the land belong to him. He has produced a title and mutation that indicate that the land belongs to him. He has produced the report by the Sub-County surveyor indicating that the Interested Party has encroached on the Applicant's parcel of land. This superior court has a duty to prevent the misuse of the court's criminal justice processes for the improper purpose of settling scores and/or civil disputes;

10. That there exists a court order of injunction against the Interested Party herein in which the court preserved the subject matter of the suit. In the said criminal case in Kithimani, some of the complainant for the charge of Forcible Detainer are people who have bought land from the Interested Party in contravention of the court order dated 31st May 2022 and submitted by the Applicant in this application. The continuation of the said criminal case in Kithimani MCCR/E 387/2024 will be upholding contravention of the court order which will result in an absurdity. The applicant cited the case of Republic *v Director of Public Prosecution & 3 Others; CWW & another xparte* (*Judicial Review E001 of 2020*) [2021] KEHC 372 (KLR) (29 November 2021) where the court held that:-

“In the instant case, there is no dispute that the ELC issued orders of maintenance of the status quo until further orders in the four (4) consolidated suits. The orders are still subsisting. It is not shown that these interlocutory orders have been set aside or vacated. To me, therefore. the intended prosecution of the Applicant is in clear violation of the said orders. I think that in the peculiar circumstances of the case, and there being an order as stated. it was out rightly wrong to proceed to prosecute the Applicant.”

11. That what is at stake is the constitutional right of the Applicant to own property. The threat of criminal trial and denying the Applicant his liberty and freedom is meant to coerce him to surrender his land to the Interested party. He cited the case of Reuben Mwangi vs DPP and 2 Others [2012] eKLR the court held that:-

“It is, hence, a settled legal principle and position that whenever a Petitioner sufficiently demonstrates the stifling of or threats or infringement of rights, fundamental freedoms of *the Constitution* and/or the law by the investigative and prosecutorial agencies. A Court



should not hesitate to intervene and stop such a prosecution. Such intervention by the Courts should, however be in clearest of the cases."

12. The Applicant submitted that this is clearly a case in which the fundamental right and freedom is being threatened for no just cause.

That since there exist the ELC case being MCL& E CASE NO. 18 OF 2022, it is the Applicant humble prayer that the prosecution awaits the outcome of this case. There is no prejudice that will be suffered by the Respondent since the criminal matters are not barred by effluxion of time. He again referred to the case of Republic *v Director of Public Prosecution & 3 others; CWW & another (Exparte) (Judicial Review E001 of 2020)* [2021]KEHC 372 (KLR) where the court held that:-

"There will be no prejudice if the respondents await the conclusion of the 4 cases before the Environment and Land Court Nakuru. Suppose the Applicant is successful in his suits or any of them, then wouldn't the prosecution directly conflict with the orders issued? That situation will place the two courts in an embarrassing situation. I therefore think that the right thing is to have the intended prosecution to await the outcome of the four (4) suits. After all the Criminal case has no limitation period".

### Respondent's Submissions

13. The Respondent submitted that the Respondent's State powers as enshrined in Article 157 of *the Constitution* of Kenya, 2010 cannot be interfered with. The Respondent is an independent office that cannot be directed by any authority or person in exercising their duties to commence or discontinue criminal proceedings against any person. The Respondent has cited the case of Douglas Maina Mwangi vs Kenya Revenue Authority and Another High court constitutional Petition No. 528 of 2013 where D.S Majanja J held that:-

".....I do not find any reason or ground to intervene in that decision nor is it the obligation of the court to supervise the minutiae of investigation and prosecution"

14. The Respondent submitted that the Applicant has failed to demonstrate how the Interested Party is influencing the Respondent with an aim of settling a dispute that is civil in nature using the criminal process. The Respondent further submitted that nothing stops criminal proceedings from being instituted despite there being civil proceedings, both cases can run concurrently. The Respondent relied on Section 193 (A) of the *Criminal Procedure Code* Cap 75 Laws of Kenya which provides that:-

"notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any civil proceedings shall not be ground for any stay, prohibition or delay on criminal cases."

15. That nothing stops the Respondent from instituting criminal proceedings against the Applicant with the pendency in court of the ELC case.

The Respondent cited the case of Republic v Director of Public Prosecution & 2 Others Ex-parte Francis Njakwe Maina & another {2015} eKLR, in which Justice G.V Odunga stated 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 the office. The fact however that the facts constituting the basis of the criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore, the



concurrent existence of the criminal proceedings and civil proceedings would not, ipso fact, constitute an abuse of the process of the court 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 recognized aim."

16. In submitting on the Applicant's allegation that no investigations were conducted in the matter, the Respondent cited the case of Republic vs Chief Magistrate Court at Milimani Law Courts: DPP & 2 Others (Interested Parties) Ex parte Applicant: Pravin Galot [2020] eKLR where it was held that:

"A prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the accused"

17. The Respondent submitted that once the resultant file was perused by the Respondent at Kithimani the evidence threshold was reached to warrant criminal proceedings being instituted as against the Applicant.

Further *the Constitution* in Article 157(11) provides that

"the Director of Public Prosecutions shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process"

18. It was the Respondent's submission that the decision to charge the Applicant was based on evidence and the items as quoted were considered. That the Applicant has not shown this court that the Respondent's decision to charge him was an abuse of the legal process and that decision is being utilized to settle scores in the civil courts.
19. In submitting on the Applicant's allegation that there is a court order of injunction against the Interested Party preserving the subject matter of the suit, the Respondent stated that matters of the injunction are not an issue in the criminal proceedings before the court and advised the Applicant to seek the available avenues of redress if there is any contravention of such court orders. This cannot warrant the criminal proceedings being seized.
20. The Respondent also submitted that the Applicant has not shown to this court that his right to own property has been infringed or there have been threats of infringement into his rights and fundamental freedoms to own property. The criminal proceedings do not in any way interfere with the Applicant's right to own property.
21. The Respondent submitted that in the absence of any evidence of bad faith or abuse of process of the court, judicial intervention should be limited to acts that are decision-maker reached a wrong decision influenced by other considerations other than the law, evidence, and the duty to serve the interests of justice.
22. The Respondent concluded that it is trite that an order of the court should not be issued in vain. Consequently, the Orders of Prohibition and Certiorari sought by the Applicant ought not to be granted. In any case, the Applicant has not provided any material basis for the grant of the order of certiorari. The Respondent cited the case of Kingori & 4 others vs Mwangi & another (1994) eKLR 297



## Interested Party's Submissions

23. The Interested Party in their submissions cited Section 193A of the [Criminal Procedure Code](#) which provides that:

Concurrent criminal and civil proceedings:

“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.”

24. Generally, the Courts only block parallel proceedings in special circumstances. An Applicant may move for a stay to block parallel proceedings, which will be granted only if the Applicant can prove either that the government is acting in bad faith and using malicious tactics to circumvent the strict criminal discovery rules, or that there is a due process violation
25. The High Court in *Kuria & 3 Others vs. AG (2002)* eKLR appreciated the validity of existence of concurrent civil and criminal proceedings when it made the following findings: -

“.... The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution...A prerogative order should only be granted where there is an abuse of the process of the law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution... It is not enough to state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the Applicant are under serious threat of being undermined by the criminal prosecution. In the absence of concrete grounds.... it is not mechanical enough that the existence of a civil suit precluded the institution of criminal proceedings based on the same set of facts. The effect of criminal prosecution on an accused person is adverse but so also are their purpose in the society, which are immense... an order of prohibition cannot also be given without any evidence that there is manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial. (emphasis added).

26. For a Court to so halt a criminal case or investigations, there must be more to the pendency of a civil claim. In this case, the Applicant has not demonstrated how the criminal case will prejudice the civil case and infringe his right to fair trial. Their claim is largely based on the fact that there exists a civil suit which has to be heard and determined first. He has not adduced any evidence showing any form of impropriety on the part of the Respondent.
27. In *Alfred Lumiti Lusiba vs Pethad Pank Shantilal & 2 others [2010]* eKLR the court held that:

“The law is clear that the pendency of a civil suit is not a bar to criminal proceedings; it acknowledges the fact that the trial of the tortfeasor in a criminal prosecution need not be affected by the pending civil action against him. It is implied, therefore, that a civil suit cannot be stayed because of the prosecution of the tortfeasor for the obvious reason that the



cause of action is neither rooted in the prosecution of the tortfeasor nor in his subsequent conviction... The conclusion that one can draw from Section 193A of the *Criminal Procedure Code* together with the decisions of the learned judges in aforementioned cases is that both civil and criminal jurisdictions can run parallel to each other and that neither can stand in the way of the other unless either of them is being employed to perpetuate ulterior motives or generally to abuse of the process of the court in whatever manner. The upshot of this discussion is that the learned magistrate misdirected herself on law by staying the civil case against the respondents on the ground that the case was based on a judgment which was a subject of an appeal that was pending for determination. I find merit in the appellant's appeal and I hereby allow it. The appellant will also have the costs of the appeal."

28. The criminal charges arise from distinct criminal acts namely malicious damage to property, setting fire to trees, and boundary interference, which are separate from the issues in the civil suit. The Applicant has therefore not demonstrated any prejudice that would arise from the continuation of the criminal proceedings.
29. As was stated in *Nelson Kinyua Wambutu v County Government of Nyeri & another* [2016] eKLR Certiorari being an extraordinary remedy, the party who seeks to avail of the same must strictly observe the rules laid down by law. The extraordinary writ of certiorari may be availed of only upon showing, in the minimum, that the Respondent has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion.
30. 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."
31. The Court of Appeal in *Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others* [2018] eKLR referred to the Supreme Court of India in *State of Maharashtra & others v Arun Gulab & others*, Criminal Appeal No 590 of 2007, where the court stated:

"The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the FIR/complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the court do not confer an arbitrary jurisdiction to the court to act according to its whims or caprice. However, the court, under its inherent powers, can neither intervene at an uncalled for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings."
32. The Respondents' actions, including the institution of the criminal case, falls within their lawful powers, and there is no indication that the Applicant's rights will be compromised by allowing the criminal case to proceed.
33. As stated in the above decisions, the pendency of a criminal suit is not a bar to civil proceedings, provided that such concurrent matters are filed and pursued lawfully and in good faith.
34. Apart from the existence of the civil suit and the criminal case arising from the same matter, the Applicant has not adduced any evidence to prove that the criminal case is meant to exert pressure upon



the Applicant and compel him into submission, neither has he adduced any evidence showing that the Respondent's actions in instituting criminal proceedings were marred with abuse of court process.

35. In light of the above, the Applicant has not met the threshold required for halting criminal proceedings. He has failed to demonstrate how the criminal case would prejudice the pending civil case or infringe upon his right to a fair trial. The Interested Party submitted that this Honorable Court should dismiss the application with costs to the Interested Party.

### **Analysis & Determination**

36. I have carefully read and considered the application and the Supporting Affidavit thereof, the Respondent's Grounds of Opposition and Replying Affidavit as well as the Interested Party's Replying Affidavit. I have also read and considered and weighed the rival Counsel submissions on the application and taken into consideration the judicial decisions cited.
37. What I gather in brief, is that on 14th March 2024 the Director of the Interested Party lodged a complaint at Matuu Police Station where a case of malicious damage was reported as against the Applicant. Consequently, the matter was assigned to a police officer PC John Songol to investigate.
38. The matter had been similarly reported by the Interested Party's worker on 8th March 2024 and O.B number 25/8/3/2024 was issued.
39. As the matter was being investigated it emerged that there were several other complaints against the Applicant. Subsequently the investigating officer concluded the investigations and forwarded the resultant file to the Respondent. Upon perusal, the Respondent opined that there was sufficient evidence to prefer charges as against the Applicant. Consequently, charges were preferred against the Applicant who was charged before the Kithimani Magistrate Court in Criminal Case No. E387 of 2024 R -vs- EVANS NJOROGI NJUGUNA with the offence of malicious damage to property contrary to Section 334 of the *Penal Code*, Six counts of Forcible Detainer Contrary to Section 91 of the *Penal Code* and Interfering with boundary Features contrary to Section 21(1) of the *Penal Code*.
40. The Applicant has approached this court in the instant application seeking orders of Judicial Review in the nature of Prohibition and Certiorari to stop the Respondent from instituting criminal charges to prosecute him, quash the decision of the Respondent to institute Criminal Case No. E387 of 2024 at Kithimani Magistrate's court.
41. There is also a civil case at Kithimani Magistrate Court No. MCELC E018 of 2022 instituted by the Applicant against the Interested Party arising from the same land dispute and which the Applicant wants to be heard and determined first before the hearing and determination of Criminal Case No. E387 of 2024 at Kithimani Magistrate's court.
42. In my view, the issues for determination are as follows:
- a. Whether the Applicant is entitled to the judicial review orders sought.
  - b. Who shall bear costs of the application?

#### **a. Whether the Applicant is entitled to the judicial review orders sought.**

43. This being a Judicial Review application, the Applicant is required to prove his case on the required standard of balance of probabilities.



44. Article 157(6) of *the Constitution* of Kenya, 2010 places the state powers of prosecution on the office of the Director of Public Prosecutions. It states that:

“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;
- (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
- (c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph(b).

45. Further Article 157(10) of *the Constitution* indicates that the Director of Public Prosecutions shall not require the consent of anyone while commencing and instituting criminal proceedings. It provides that:

“The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”

46. In *Municipal Council of Mombasa -Vs- Republic, Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2007(2002) eKLR*, the Court of Appeal held that:-

“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at. Did those who make the decision have the power i.e the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review”.

Further, circumstances under which orders of Judicial Review can be issued were elaborated by Justice Kasule in the Uganda case of *Pastoli ...Vs..Kabale District Local Government Canal & Others* (2008) 2EA 300 at pages 300-304.

“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.

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 provision 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.

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 to act 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 legislature instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehidswi...Vs...Secretary of State for the Housing Department* (1990) AC 876”.

47. What Judicial Review Orders entails was also elaborated in the case of *Kenya National Examination Council...Vs...Republic Exparte Geoffrey Gathenji & 9 Others*, Nairobi Civil Appeal No.266 of 1996, where the Court held that: -

“That now bring us to the question we started with, namely the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the council in this case. What does an Order of Prohibition 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 or 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, 4<sup>th</sup> Edition vol.1 at Pg.37 paragraph 128.”

48. From the foregoing cases, the applicable law in cases of Judicial review have already been established and this Court will now consider the above applicable law and further consider the available facts to determine whether the Applicant is deserving of the orders sought.
49. The Applicant seeks for orders of Certiorari to quash the decision of the Respondent to charge him with offences of malicious damage to property in Kithimani Magistrate Court case No. MCCR/E387 of 2024 and Orders of Prohibition to stop and prevent the Respondent from continuing with criminal case Kithimani MCCR/E387 of 2024 until land case Kithimani MCELC No. E018 of 2022 he has filed against the Interested Party is heard and determined and until the investigations by the LAND FRAUD UNIT at DCI Headquarters are finalized and recommendations of culpable persons be established.
50. The Applicant contends that the said decision was made without conducting proper investigations and that the Interested Party is influencing the Respondent with the aim of settling a dispute of civil nature using the criminal process.
51. The Applicant alleges that there exists a court order of injunction against the Interested Party in which the court preserved the subject matter of the suit and that the continuation of the said criminal case in Kithimani MCCR/E387 of 2024 will be upholding contravention of the court order which will result in absurdity. I have considered the case of *Republic v Director of Public Prosecution & 3 Others; CWW & another xparte* (*Judicial Review E001 of 2020*) [2021] KEHC 372 (KLR) (29 November 2021) cited by the Applicant and I find it to be distinguishable to the Applicants’ case in that in this



- case, it is the Applicant who is alleged to have committed criminal acts of malicious damage to the suit property calling for him to be charged. He is the one who acted contrary to the orders of the court.
52. The Applicant cannot be allowed to ride onto a court order to commit criminal acts and expect the law not to take its course, in fact I find that it is the Interested Party who had a right to protection of his property from malicious damage by the Applicant.
  53. I am alive to the fact that an order of Certiorari can be made if the Court is satisfied that the Respondent made a decision in excess of its jurisdiction, and further the Court can also issue an order of prohibition prohibiting the said Respondent from proceedings with the such proceedings.
  54. From the foregoing, I find and hold that the Respondent had jurisdiction under Article 157 (6) of *the Constitution* of Kenya, 2010 to charge and prosecute the Applicant once investigations had been conducted and completed by the Police Investigating Officer following a complaint lodged by the Interested Party. The Applicant has failed to demonstrate how the Interested Party is influencing the Respondent with an aim of settling a dispute that is civil in nature using the criminal process.
  55. In addition, the Applicant has not demonstrated that the prosecution of the criminal case at Kithimani Magistrate's court is being conducted unprocedurally and in contravention of any law. The Applicant has therefore failed to meet the threshold required for stopping criminal proceedings, he has failed to demonstrate how the criminal case will prejudice the pending civil case or infringe upon his right to a fair trial. Under Section 193(A) of the *Criminal Procedure Code*, Cap 75 of the Laws of Kenya nothing stops criminal proceedings from being instituted despite there being subsisting civil proceedings, both cases can run concurrently.
  56. Further, the Applicant has not shown that there are ongoing investigations by the LAND FRAUD UNIT at DCI Headquarters as alleged.
  57. Having found that the Respondent acted within its jurisdiction and that the criminal proceedings against the Applicant cannot be stopped, I find that the Applicant's Judicial Review Application is unmerited and the same is dismissed entirely.
  58. Further, the Respondent is hereby ordered to proceed with prosecution of Kithimani Criminal Case No E387 of 2024 or any other case in which the Applicant is lawfully charged unless the Respondent considers otherwise.

**b. Who shall bear costs of the application?**

59. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. In *Jasbir Singh Rai & 3 others Vs Tarlochan Singh Rai & 4 others SC. Petition No. 4 of 2012:za[2014] eKLR*. The Supreme Court held that costs follow the event and that the Court has the discretion in awarding such costs.
60. The Applicant will bear half the costs of the Respondent and of the Interested Party on the application.
61. This being a miscellaneous file, the same is hereby closed.

It is so ordered.

**RULING WRITTEN, DATED & SIGNED AT MACHAKOS THIS 3RD DECEMBER 2024**

**NOEL I. ADAGI**

**JUDGE**



**DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 3RD DECEMBER 2024**

In the presence of :

Odhiambo..... for Applicant

Agatha..... for Respondent

MillyGrace..... Court Assistant

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