



**Republic v Inspector General of Police & 2 others; Macharia & another
 (Interested Parties) (Judicial Review Application E226 of 2024)
 [2025] KEHC 13260 (KLR) (Judicial Review) (26 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13260 (KLR)

**REPUBLIC OF KENYA
 IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E226 OF 2024

JM CHIGITI, J

SEPTEMBER 26, 2025

BETWEEN

REPUBLIC OF KENYA APPLICANT

AND

THE INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 3RD RESPONDENT

AND

LABAN MARABII MACHARIA INTERESTED PARTY

JOSEPH NJERU GITAU INTERESTED PARTY

JUDGMENT

1. The application that is coming up for determination before this court for determination is the one dated 25.10.24 where in the applicant for:
 1. An order of prohibition to prohibit the 1st and 2nd Respondents from arresting, preferring charges or charging the ex-parte Applicants based on the complaint filed by the Interested Parties.
 2. An order of prohibition prohibiting the 3rd Respondent from approving charges and or prosecuting the ex-parte Applicants based on the complaint filed by the Interested
 3. Parties against the ex-parte Applicants.



4. Costs of this application be provided for.
2. The application is supported by the verifying Affidavit of John Kioko Kimondiu who argues that the 1st and 2nd Interested Parties were joint venture business partners to the Applicants.
 - a. The Applicants case;
 - b. It is their case that in the month of February 2024, the 1st and 2nd Interested Parties agreed to jointly undertake routine road maintenance contracts in Kilifi County awarded by Kenya Rural Roads Authority (KeRRA) through a company jointly owned by the interested parties.
 - c. In May 2024 the interested parties and the applicant undertook similar projects in Machakos County.
 - d. The 1st and 2nd Interested Parties paid the necessary monies requested which sum was paid partly directly to hire equipment required for the works.
 - e. The 2nd Interested Party advanced to the applicant to enable me to complete road maintenance work in Makueni County.
 - f. It is the applicant's case that upon payment by KeRRA the applicants transferred funds to Megla Holding Company Limited which is co-owned by the 1st and 2nd interested parties as per the agreement with the interested parties.
 - g. The applicant argues that it has pending payments for the works done with the County Government of Makueni County that they intend to clear the pending balance of the amount advanced by the 2nd interested party.
 - h. Despite clearly agreeing with the interested parties that the applicants will clear the balance upon payment, the Interested Parties reported a bogus occurrence Book (O.B) at the Directorate of Criminal Headquarters offices and enlisted officers therefrom to unlawfully assist them in exerting unlawful pressure upon me to pay the monies owed.
 - i. It is its case that the 2nd Respondent through its officers has persistently harassed him by tracking and intercepting phone calls, and they have sent numerous threatening messages.
 - j. The 2nd Respondent's officers have warned the Applicant that unless they refund the monies to the Interested Parties, they will charge them with serious crimes including the offence of obtaining money by false pretenses.
 - k. The officer's conduct in the circumstances is in bad faith, capricious, unfair, oppressive and contrary to the principles of natural justice all done in total disregard for the rule of law and at the behest of and h the interest of the Interested Parties.

The Applicant's Submissions;

3. They refer to Prof. Ashburner in the fusion debate concerning common law and rules of equity observed, thus "...the two streams of jurisdiction, although they run in same channel, run side by side and do not mingle their waters, none of us however would advocate the continuation of unprincipled differences between law and equity..."
4. In so doing, they are inviting this court set a hard and fast distinction between the two systems to avoid abuse by the DCI and the Inspector General of Police (1st & 2nd Respondents herein)



5. The DCI officer made persistent phone calls and texts even at night demanding that they present at the DCI headquarters, serious crimes unit. This was further followed summons dated 9th September 2024.
6. They submit that the Police were being unreasonable and were hell bent to exert undue pressure to help or assist the interested parties to themselves get their monies due without due regard to agreement between the parties.
7. They submit that the events by the Respondents led to the ex-parte applicants to file the Application dated 25th October 2024 to challenge the decision by the Respondents to instigate and prosecute the Applicant over allegations of fraud and felonies as clearly admitted in their Replying Affidavit.
8. They set out the brief history of this case which they submit is a contract dispute with no criminal dimension whatsoever.
9. In buttressing their case on the doctrine of abuse of process they the rely on the House of Lords in English decisions in R. V Horseferry Road, ex parte Bennett that criminal proceedings could be stayed as an abuse of the process on account of improper police conduct. The doctrine was refined by the House of Lords in R. V Latif R. V Shahzad, where the house of Lords put it simply....broad considerations of the integrity of the criminal justice system... a court has the duty to act if failure to do so would compromise the legitimacy of a guilty verdict if such a verdict were to ensure, it would therefore be anomalous if a court were to be permitted to act staying 'tainted' proceedings but were not to be permitted to act by excluding an item of tainted evidence.
10. In R. V Mullen, the Court of Appeal also stressed on the doctrine of abuse of process and talked of an abuse which renders a fair trial impossible... it arises not from the relationship between the prosecutor and the Defendant, but from the relationship between the prosecutor involvement in the while prosecution process not limited to trial itself. Significantly, the court noted that certainty of guilt cannot displace the essential feature of this kind of abuse of process, namely, the degradation of the lawful administration of justice.
11. They submit the decision by the 1&2 Respondents to proceed with the investigations and prefer charges of the alleged fraud against the Applicants despite clearly agreeing and finding as stated in the Replying Affidavit that this was a business and contract dealing between Applicants and the interested parties are vexatious, harassment, coercion for payment of a civil debt between the parties is an abuse of the powers as granted under the Police Act, 2011 and Article 244 of *the Constitution*.
12. They submit that it is an abuse of the process for the police to get involved in what clearly belongs to another justice system and arrogate itself or usurp what belongs elsewhere and seek to perform the task which was ultra-vires.
13. It is clearly not the power of the police or the prosecution to resolve contractual disputes between parties or engage in debt collection, parliament has enacted enough laws to competently address disputes arising from contract disputes and it's not within police powers to get entangled with such disputes.
14. It is the submission of the ex-parte applicants as pointed out in the case of Stanley Munga Githunguri vs R (1986) EKLR where the three-judge bench while granting the prayers for prohibition agreed that the court legitimately halt intended prosecution where such prosecution becomes an abuse of court process, oppressive and vexatious and an abuse of the court process.
15. In the case of Republic vs The Chief Magistrate Court Mombasa exparte Gariee & Anor (2002) eKLR. In this matter the court granted an order of prohibition and observed that the interested party was



more interested in punishing the applicant under criminal law for a dispute that arose from a civil arrangement between the parties.

16. The court while quoting Kuloba J. stated in *Ganiee & Anor* (supra) where it was held that "... 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."
17. It is apparent that the decision by the 1st and the 2nd Respondents to instigate and prefer charge was informed by the existence of a civil contract between the ex parte applicant and the Interested Parties herein and in particular the delay to pay the balance of the funds as agreed which delay was occasioned by delayed payment by the counties. The delayed invoices were duly disclosed and shared with the interested parties at all times.
18. While it is in order for a complainant to pursue both civil and criminal proceedings simultaneously going by Section 193A of the Criminal Procedure Code, that right to pursue criminal proceedings should not be used to gain an upper hand in a civil matter.
19. In the case of the Commission of Police and the Director of Criminal Investigation Department and another versus Kenya Commercial Bank & 4 Others [20131 eKLR, the Court of Appeal stated as follows: - while it is the prerogative of the police to investigate crime, we reiterate that that power must be exercised responsibly, in accordance with the laws of the land and in good faith.....It is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations. We have no doubt in our minds that the belated involvement of the police in this purely civil dispute is an abuse of their power and or the process..... In the decision 2eKLR 69 observed in part; "The Court has power and indeed the duty to prohibit the Continuation of Criminal Prosecution if extraneous matters divorced from the goals of justice guide their litigation.
20. In situations where it is obvious that the apparent intention to prefer criminal charges is to achieve a collateral purpose, as it is apparent in this instance, a court through Judicial Review lenses should intervene with a view to stop the abuse of powers bestowed by law upon the Respondents or misuse of court processes to enforce contracts between parties.
21. They urge this Honourable Court to espouse the integrity principles by refusing to allow the police to abuse the process as a means of repudiating the impropriety and thus preserving the purity of the court and the criminal justice [process generally. The court whose duty is to apply and uphold the law must disassociate it from the illegality and impropriety of the police and the prosecution. The court is urged to come down decisively against the police by rendering a strong judicial condemnation so that going forward there is clear demarcation of what belongs to the Criminal Justice System and what to the Civil Justice System.

The 1st & 2nd Respondents' Case;

22. It is their case that a complaint was lodged on 16th April, 2024 by the 2nd Interested party being one of the Directors of Megila Holdings Limited jointly with the 1st Interested party against the applicants.
23. In discharge of its functions, the Directorate of Criminal Investigations acts in fulfillment of the Objects and functions of the National Police Service as set out in Article 244 of *the Constitution* of Kenya, 2010.



24. Section 35 of the *National Police Service Act* No.11A of 2011 mandates the Directorate of Criminal Investigations (DCI) to, inter-alia;
 - i. undertake investigations on Serious Crimes including homicides, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crimes and cybercrime amongst others;
25. Section 3 Chapter 21 of the National Police Service Standing Orders allows receipt of complaints from members of the public.
26. The complainant (2nd Interested party) sought police assistance in investigations into an allegation that the 1st Applicant while acting in his capacity as the Director of Extra Mile construction company wherein he is a co-director with the 2nd applicant, approached the 1st and 2nd Interested parties seeking their financial assistance totaling to Ksh.3,338,930/= in facilitating the undertaking of two road rehabilitation projects in Kilifi County (Tender No.KERRA/08/KLF/39EQUASAV-22/23-106) and Makueni County (Tender No. 1289664/2022/2023) awarded to the Applicants' companies (Ndimu Contractors Company limited and Extra Mile Construction Company respectively).
27. The two interested parties were interviewed and their statements recorded during which they averred that they were induced to invest and advance the said Ksh. Ksh.2,809,868/= to Extra Mile Contractors K. Limited and Ndimu Contractors Company based on a false statement by the 1st Applicant in his capacity as a Director that the said monies would be paid back in full with 40% and 25% return on investment on the profits gained from the works for Makueni County and Kilifi County projects respectively as evidenced by the agreements between the applicants and interested parties.
 - i. The two Interested parties had mutual agreement that the applicant would pay back upon completion of the projects
 - ii. The interested parties further stated that the Applicant has consistently denied receiving payments from the two County Governments; an act intended to defraud them off their monies as they had received reliable information that the 1st and 2nd applicants were fully paid for the said tenders by the respective county Governments more than a year ago.
 - iii. These allegations touch on Criminal felonious offences under Section 329 of the Penal code which falls within the confines of the functions Directorate of Criminal Investigations.
28. It was further alleged that the 1st Applicant obtained a Total of Ksh. 1.9 million on false pretenses as brokerage fees for a tender the interested parties' company had purportedly been awarded at Mombasa County which turned out to be false.
29. These allegations relate to a criminal offence under Section 313 of the Penal, which, as demonstrated herein above, fall within the Mandate of the Directorate of Criminal Investigations.
30. The issues under investigation do not touch on agreement between the Applicants and interested parties in relationship to County Government Projects financed by the interested parties in Machakos County. However, preliminary investigations have established that the Ksh. paid to the 1st and 2nd Interested parties Company (Megla Holding) referred to in paragraph 9 of the 1st Applicant's Affidavit is in regard to finances advanced to the Applicants in Machakos County Project which is not a subject of our investigation and the payment is not related to the agreements to finance Makueni and Kilifi County projects as the applicant wants to make the court to falsely believe.



31. The agreement to advance the monies in question for the Makueni County Project was entered on 4th June, 2023 and the said Contract awarded to the applicants on 25th May, 2024.
32. It is not possible for the applicants to have paid back monies that were yet to be advanced to them in the future and before the tender that was financed by the interested parties had been awarded to them.
 - i. The Applicants application is thus clearly dishonest and an act of mischief intended and calculated to frustrate and delay the ongoing investigations against the interests of justice.
33. In observing the principles of natural justice that no person shall be condemned unheard and in-order to ensure the investigations are fair and objective, we summoned the 1st and 2nd applicant as per Section 52(1) of the National Police Act No.11A of 2011 which were properly served electronically through their mobile devices on WhatsApp and which the applicants have to date failed to honour.
34. The investigating officer called the applicants as a follow-up to the summons to confirm whether they will be visiting our offices in response to the summons or reschedule the same for their convenience but found all their phones switched off.
35. The investigating officer texted the 2nd applicant reminding her that we were expecting them as earlier proposed by their Advocate one Mr. Musau.
36. No such threatening messages or any proof of such tracking have been availed by the applicants in support of these assertions.
 - i. The investigations are still ongoing and no charges have been preferred against the applicant as that depends on the outcome of the investigations.
 - ii. If the decision to charge is to be reached, it shall be based on an independent review by the Director of Public Prosecution based on the available evidence and not subject to any influence.
 - iii. The Applicants rights to fair and just investigations are well guaranteed and protected.
37. The prayers sought by the applicant are calculated to delay and/or frustrate the ongoing investigations and if granted would likely grievously injure the interests of justice by denying the complainant (interested parties herein) to have their complaint dealt with in a fair, effective, lawful and timely manner.

The 3rd Respondent's Case;

38. In opposing the application, the third respondent filed the following Grounds of opposition;
 1. THAT the instant Application is misconceived, bad in law and incompetent as there no cause of action disclosed against the 3rd Respondent or any wrong done attributable to the 3rd Respondent.
 2. THAT Applicants having failed to disclose any complaint or wrong doing on the part of the 3rdRespondent, it's clear that the 3rd Respondent is wrongly enjoined in the instant proceedings thus, shall apply at the opportune time to have him removed from the proceedings.
 3. THAT the application is unmerited since it has not met the threshold of the Judicial Review Application as was espoused in the case of Commissioner of Income Tx -Versus- Pan African Paper Mills (EA)Ltd.(2018) eKLR as was quoted by Justice Ngaah in the case of Republic -Versus- Joe Mucheru, Cabinet Secretary Ministry of Information Communication and Technology & 2 others; Katiba Institute & another (Exparte); Immaculate Kasait,



Data Commissioner (Interested Party) (Judicial Review Application E1138 of 2020) [2021] KEHC 122 (KLR) (Judicial Review) (14 October 2021), there is no demonstration that the 3rd Respondent has done anything illegal or irrational or disproportionate or unfair or procedurally wrong or improper or done anything beyond its powers.

39. They argue that no investigation file that has been availed to the 3rd Respondent relating to the Applicants herein to warrant the grant of an order of prohibition against as sought by the Applicants.
40. It is their case that the application offends the doctrine of exhaustion and ripeness as there is no decision that had or has been made by any of the Respondents herein that may prompt the court to issue any judicial review orders.

The 3rd Respondent's Submissions;

41. From the Application filed herein, there is only one issue for determination, namely, whether there is a competent a Judicial Review Application for hearing and grant of the orders of prohibition sought herein.
42. The Supreme Court of Kenya's decision of *Dande & 3 Others -Versus- Inspector General of Police & 5 Others* (Petition 6(E007),4(E005) & 8(E010) OF 2022(Consolidated) [2023] KESC 40(KLR) (16 June 2023) (Judgment) the consideration of the instant Application shall be confined within the strict administrative law remedy of prohibition as pleaded.
43. In the case of *Public Procurement Administrative Review Board & Another Exparte Intertek Testing Services (EA) PTY Ltd.& Authentix Inc & 2 Others* Justice A.K. Ndungu quoting the case of *Pastoli -Versus- Kabale District Local Government Council & Others* (2008)2 EA 300 where the court had held as follows;

“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 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. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission.....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 a 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-observation 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”.



44. Reliance is also placed in the case of Republic -Versus- County Government of Kiambu Exparte Robert Gakuru & Another (2016) eKLR where Justice G.V. Odunga quoted the Halsbury’s Laws of England 4th Edn.Vol.1(1) para 12-page 270 which state;
- “The remedies of quashing orders (formerly known as orders of certiorari), prohibition orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus) ...are all discretionary. The court has a wide discretion whether to grant relief at all and if so what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief.....”
45. The Applicants Application is based on the grounds that the officers of the 1st and 2nd Respondents are harassing them by tracking and intercepting their phone calls and they have sent them threatening messages. The Applicants have not availed the threatening messages and appears there is no tangible step or decision has been made the 1st and 2nd Respondents that can warrant any intervention by the court.
46. The remedy of the Applicants if whatever they are saying is indeed true lies elsewhere. The Applicants should have simply sought for anticipatory bail not the instant Application.
47. They further submit that under section 24 read with Section 35 of the National Police Service Act,2011 the 1st and 2nd Respondents are mandated among other duties to prevent and detect crime, collect criminal intelligence, investigate crime and apprehend offenders.
48. Thus, the Interested Parties herein having lodged a complaint with the 1st and 2nd Respondents, the said Respondents were and still are duty bound to investigate the same and have the resultant investigation file forwarded to the 3rd Respondent to make a decision on whether or not to prefer charges against the Applicants herein based on the evidence that shall be vailed and pursuant to Article 157 of the Constitution as read with the ODPP Act,2013.
49. The Respondents herein having not made any tangible decision and the 1st and 2nd Respondent being their constitutional and statutory duty to act of complaint lodged with them, the instant Application is premature, misconceived and incompetent hence the same should be dismissed with costs.

The 1st and 2nd Interested Parties Case:

50. Through Anthony Karanja their advocate, they argue that the Application as filed is not meritorious and only seeks to prevent the Interested parties from enjoying that which has been legally earned.
51. Courts can only intervene with possible prosecution where the said prosecution amounts to an abuse of the court process and is oppressive and vexatious.
52. The Applicants admit that indeed money was paid to them, no pending bill remains on the part of the Interested parties yet they have neglected and/or refused to fulfill their part despite completion of the agreed tasks.
53. The particulars of this case are as follows;
- a. On the 30th of March 2023, the 1st Interested Party and the 1st Exparte party entered into an Agreement where they Mutually agreed that they would assist each other in works needed for Tender No. KeRRA/08/KLF/39/EQUASAV22/23-106 which was awarded Kshs. 2,362,746.00. The Interested parties were to get 25% of the profit gained from the work.



- b. On the 4th of June 2023, the 1st Interested Party and the 1st Exparte party entered into an Agreement where they Mutually agreed that they would assist each other in works needed for Tender No. 1289664/2022/2023 which was awarded Kshs. 2,809,868.00. The 1st Interested party was to assist in the hire of machines for road works in Kee Ward. The 1st Interested party was to get 40% of the profit gained from the Work in line with the Agreement.
 - i. Both projects were done to completion and the certificate of completion awarded to 1st Ex-Parte party as he was the one who was awarded both
 - ii. Tenders.
 - c. In a bid to ensure that both parties were secure in terms of payment and money owed to them the Exparte applicant came up with a list of Expenditure which was duly sent to Interested party and no objection.
 - i. In 2020, Cabinet Secretary (john Mbadi) publicly declared that all Counties had been paid and there was no pending bill to Counties.
54. It is their case that it would then have been the Applicants to follow up on the payments due were they good faith.
55. They have instead resorted to Cat and Mouse games and the interested parties have apprehension that the Applicants desirous of taking away with their hard-earned money.
56. In the month of February 2024, the Applicants and Interested parties entered into a Memorandum of Understanding where the Applicants undertook to offset the outstanding amount in full by the 15th of March 2024.
57. It's now been 10 months since the memorandum was executed yet no payment has been made.
58. The Interested Parties decision to report the matter to the Directorate of Criminal Investigations was to aide in proper and professional investigations.
59. After the Investigations were carried out, including statements from the complainants, and the Applicants granted an opportunity to present their side of the story, the 3rd Respondent commenced prosecution of the Applicants.
60. It is further their case that the Exparte parties already visited KERRA offices and Makueni County Government offices and they indeed confirmed that the Interested Party had been paid after one and a half months following the completion of the scope of work indicated.
61. This court not lightly interfere with the Constitutional mandate given to the Director of Public Prosecutions especially since the 3rd Respondent has evidence to sustain prosecution.

Analysis and Determination:

Following are the issues for determination;

1. Whether the Applicant is entitled to an orders sought.
2. Who shall be the cost.

Whether the Applicant is entitled to the orders sought:



In determining this issue, this court is guided by the case of Republic v Principal Kadhi, Mombasa Ex-parties Alibhai Adamali Dar & 2 others; Murtaza Turabali Patel (Interested Party) [20221 eKLR, where the Court rendered itself thus:

“The Order of “Prohibition” issues where there are assumptions of unlawful jurisdiction or excess of jurisdiction. It’s an order from the High Court directed to an inferior tribunal or body as in this case the Kadhi’s Court. Its functions are to prohibit and/or forbids encroachment into jurisdiction and further to prevent the implementation of orders issued when there is lack of jurisdiction.

“Although prohibition was originally used to prevent tribunals from meddling with cases over which they had no jurisdiction, it was equally effective and equally often used, to prohibit the execution of some decision already taken but ultra vires. So long as the tribunal or administrative authority still had power to exercise as a consequence of the wrongful decision, the exercise of that power could be restrained by prohibition. Certiorari and prohibition frequently go hand in hand, as where certiorari is sought to quash the decision and prohibition to restrain its execution. But either remedy may be sought by itself.”

62. Section 35 of the [National Police Service Act](#) No.11A of 2011 mandates the Directorate of Criminal Investigations (DCI) to, inter-alia;
 - i. Undertake investigations on Serious Crimes including homicides, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crimes and cybercrime amongst others.
63. The two Interested Parties as the complainants were interviewed and their statements recorded.
64. In observing the principles of natural justice that no person shall be condemned unheard and in-order to ensure the investigations are fair and objective, the Applicants were summoned to give their side of the story by the 1st and 2nd Respondents in line with Section 52(1) of the National Police Act No.11A of 2011 electronically through their mobile devices on WhatsApp.
65. The Applicants don’t deny that they were called later as a follow-up to the summons to confirm whether they would honour the summons.
66. The Investigating Officer texted the 2nd Applicant reminding her that they were expecting them as earlier proposed by their Advocate one Mr. Musau.
67. The Applicants have not tendered any evidence to show that there were threatening messages or ant phone tracking as alleged.
68. Under Section 24 as read with section 35 of the [National Police Service Act](#),2011 the 1st and 2nd Respondents are under a duty to prevent and detect crime, collect criminal intelligence, investigate crime and apprehend offenders.
69. The procedure for handling crime that is embraced under our criminal justice system is initiated by way of a complaint with the police.



70. After the Interested Parties lodged a complaint, the Respondents were under a duty to investigate the crime then ensure that the investigation file was forwarded to the 3rd Respondent who was under a duty to make a decision on whether or not to prefer charges against the Applicants pursuant to Article 157 of *the Constitution*.
71. In Civil Appeal No. E064 of 2022 Esther Wamuyu v Grace Wangari Mwangi (2024) KEHC, the court pronounced itself as such;
- “26. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows: “In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”
27. It follows that the Respondent herein had the duty to prove her claim against the Appellant. Courts have belabored the burden and standard of proof in civil cases which I find necessary to lay down as below.
72. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:
- “As a general proposition under Section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”
73. It follows that the initial burden of proof was with the Plaintiff, but the same may shift to the Defendant, depending on the circumstances of the case and the evidence tendered.
74. The Applicants have not proven that the Respondents have arrived at a decision to charge them. The instant Application is predicated on a non-existing foundation and it is in the circumstances premature.
75. The Applicants have not tendered any evidence at all to prove that the 2nd Respondent’s officers warned them that unless they refund the monies to the Interested Parties, they would charge them with serious crimes including the offence of obtaining money by false pretenses.
76. The Respondents denied the allegations that they threatened the Applicants leaving the burden of proof on the Applicants’ shoulders. The least that the Applicants would have done was to produce their phone numbers or those of the Respondents to this court. None was tendered.
77. This court is satisfied that no charges have been preferred against the Applicants since that depends on the outcome of the investigations which it is clear have not been completed given that the Applicants are yet to respond to the summons.



78. It is this court's finding that The Applicants rights to a fair and a just investigation process were preserved, promoted and protected when they were called to record statements which they declined to honour.
79. There is no evidence to prove that the Respondents did anything illegal or irrational or disproportionate or unfair or procedurally wrong or improper. They did not act beyond their powers as to warrant the issuance of the prohibition orders as sought.
80. This court further makes a finding that the existence of a Civil case is not a bar to the institution of criminal; proceedings as set out in Republic v Chief Magistrate Criminal Division & Another, ex parte Mildred Mbuya Joel (2013) eKLR where the court delivered itself in the following words:

“It is not enough to simply state that the criminal proceedings ought to be halted because there are pending civil proceedings touching on the same subject matter. Neither does it suffice to be content with stating 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 absence of concrete grounds for supposing that a criminal prosecution is an “abuse of process”, is a “manipulation”, “amounts to selective prosecution” or such other processes, or even supposing that the applicants might not get a fair trial as protected in *the Constitution*, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. As rightly submitted on behalf of the Respondents, section 193A of the Criminal Procedure Code Cap 75 Laws of Kenya provides for concurrent civil and criminal proceedings.”

81. From the foregoing analysis it is my finding that the suit offends the doctrine of exhaustion and ripeness as there is no decision that has been made by any of the Respondents herein that can inform or prompt the court to issue any judicial review orders.
82. In the case of Pastoli -Versus- Kabale District Local Government Council & Others (2008)2 EA 300 where the court had held as follows;

“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 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. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission.....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 a 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-observation 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”.

Costs:

83. In *Joseph Oduor Anode v. Kenya Red Cross Society*, Nairobi High Court Civil Suit No. 66 of 2009; [2012] Eklr Odunga, J. thus observed:

“...whereas this Court has the discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute [the *Civil Procedure Act*] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so. In my view it is the failure to follow the general principle without reasons that would amount to arbitrary exercise of discretion ...” [emphasis supplied].

84. The Applicants shall bear the cost of the suit.

Disposition:

85. In the case of *Kenya National Examination Council versus Republic Exparte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR, the Court stated the grounds upon which such an order of prohibition may issue as follows;

“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 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, and Vol.1 at pg. 37 paragraphs 128”

86. The Applicants have not made out a case that can inform the grant of the reliefs sought and the application lacks merit.

Order:

The application is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2025.

.....

J. CHIGITI (SC)

JUDGE

