

REPUBLIC OF KENYA
HIGH COURT OF KENYA AT BUSIA
JUDICIAL REVIEW NO. E002 OF 2024

REPUBLIC.....APPLICANT

VERSUS

INDEPENDENT POLICING OVERSIGHT AUTHORITY

(IPOA).....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS - BUNGOMA.....2ND

RESPONDENT

THE CHIEF MAGISTRATE'S COURT, BUNGOMA.....3RD

RESPONDENT

EX PARTE:

**ROLEX CHARO NYOKA, KENNEDY ODERO OWINO AND VINCENT OUMA
NGALA**

JUDGEMENT

1. These Judicial Review proceedings relate to criminal proceedings that are projected to be conducted by a court at Bungoma, to be prosecuted by a prosecutor based at Bungoma, based on an investigation undertaken by an agency based at Kakamega, and these proceedings are themselves mounted by an Advocate based at Bungoma. 2, of the 3 respondents, are based at Bungoma. As the events being challenged, are by persons and entities based at Bungoma, it would have been prudent to mount these Judicial Review proceedings at the High Court at Bungoma. It smacks of forum-shopping, to initiate them at Busia, even if the events, that provoked them, arose at Busia.
2. Be that as it may. These Judicial Review proceedings were initiated, by the *ex parte* applicants, under a Motion, dated 10th June 2024, for *certiorari* and prohibition orders, directed at the respondents, to have their proposed prosecution, and the documents upon which the proposed prosecution is founded, quashed, and prohibited, on grounds and facts that are set out on the face of the Motion, and in the statutory statement, dated 10th June 2024, plus the affidavit verifying it.
3. I doubt that Judicial Review proceedings can be initiated by way of Motion, in the manner that the *ex parte* applicants have approached the court herein. The relief of Judicial Review is provided for by the

Law Reform Act, Cap 26, Laws of Kenya, at Part IV, sections 8 and 9. Section 9 provides that the rules of procedure, with respect to Judicial Review, are to be made by whatever entity is conferred with “*power to make rules of court to provide for any matters relating to the procedure of civil courts.*”

4. The power, that section 9 of the Law Reform Act refers to, is vested in the Rules Committee, by section 81 of the Civil Procedure Act, Cap 21, Laws of Kenya. The Rules Committee has come up with the Civil Procedure Rules, Order 53 of which provides the procedure in Judicial Review proceedings. Under Order 53 rule 1, an application for the Judicial Review orders cannot be made unless leave has been granted. I have not seen, in the record before me, any evidence of leave having been granted, for the filing of an application for the orders that have been sought in the Motion, dated 10th June 2024. The Motion, is, therefore, not properly before me, for it was initiated without the permission of the court.
5. I note too that the Motion is purported to be premised on Order 53 rules 1 and 2 of the Civil Procedure Rules. These provisions have nothing to do with a filing of a Motion for the orders sought. They deal with applications for leave, which ought to be made *ex parte*, to a Judge in chambers, and with the timelines within which such applications could be brought. Rule 1 is limited to the application for leave, while Rule 2 is about time within which such applications could be brought.
6. Order 53 rule 1 of the Civil Procedure Rules provides:
 - “1. *Applications for mandamus, prohibition and certiorari to be made only with leave [Order 53, rule 1]*
 - (1) *No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.*
 - (2) *An application for such leave shall be made ex parte to a judge in chambers, and shall be accompanied by —*
 - (a) *a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought; and*
 - (b) *affidavits verifying the facts and averment that there is no other cause pending, and that there have been no previous proceedings in any court between the applicant and the respondent, over the same subject matter and*

that the cause of action relates to the applicants named in the application. [L.N. 22/2020, r. 25.]

(3) The judge may, where leave denotes stay, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution. [L.N. 22/2020, r. 26.]

(4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise:

Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.”

7. Rule 2, on the other hand, provides:

“2. Time for applying for certiorari in certain cases [Order 53, rule 2]

Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

8. The Motion is supposed to be filed after leave is granted, and the filing of the Motion is provided for under Rule 3.

9. Rule 3 provides as follows:

“3. Application to be by notice of motion [Order 53, rule 3]

(1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave

has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.

(2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the

3) An affidavit giving the names and addresses of, and the place and date of service on, all persons who have been served with the notice of motion shall be filed before the notice is set down for hearing, and, if any person who ought to be served under the provisions of this rule has not been served, the affidavit shall state that fact and the reason why service has not been effected, and the affidavit shall be before the High Court on the hearing of the motion.

(4) If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.”

10. The matter before me has not been brought before the court in accordance with Order 53 rules 1, 2 and 3 of the Civil Procedure Rules, and, therefore, the same is not properly before me.

11. The Motion is not supposed to be founded on material other than what was placed before the court at leave stage, under Order 53 rules 1 and 2 of the Civil Procedure Rules. It is on account of that that Rule 4 requires service of the material that was filed at that stage. Introduction of other material after that can only be with leave of the court.

12. Rule 4 of the Civil Procedure Rules provides:

“4. Statements and affidavits [Order 53, rule 4]

(1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or

any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.

(2) The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits.

(3) Every party to the proceedings shall supply to any other party, on demand, copies of the affidavits which he proposes to use at the hearing.”

13. As there is no evidence that an application for leave was ever filed, I cannot tell whether the documents, that Rule 4 talks about, were ever served on the other parties. What I see, on the record, is a statutory statement filed contemporaneously with the Motion, and the affidavit verifying that statement. I do not see any of the papers filed at the first stage, if at all any such papers were ever filed. Clearly, these proceedings started on a very wrong footing.
14. The remit of a court exercising Judicial Review jurisdiction has been discussed in a number of cases.
15. In *Municipal Council of Mombasa vs. Republic, Umoja Consultants Limited* [2002] eKLR (Kwach, Omolo & O’Kubasu, JJA), the court discussed what ought to be considered when judicial review orders are sought. It should be about the process leading up to the making of the impugned decision. That would naturally raise the issue of jurisdiction to make the decision as the first criteria. The next would be issues around natural justice, whether the parties affected had been given an opportunity to be heard prior to the decision-making. The issue of what was considered, and an assessment of whether what was considered was relevant. It would not be a review of the merits of the decision, but the process of decision-making. *Pastoli vs. Kabale Local Government Council & others* [2008] 2 EA 300 (Kasule, J) brought into the matrix consideration of issues around legality, irrationality and procedural impropriety. These summarise jurisdiction, natural justice and fair administrative action.

16. Regarding prohibition, it was said, in *Kenya National Examinations Council vs. Republic ex parte Geoffrey Gathenji Njoroge & 9 others* [1997] KECA 58 (KLR) (Omolo, Tunoi & Shah, JJA), that it is directed at an inferior tribunal or body, forbidding it from acting or continuing to act in excess of jurisdiction or absence of it, or from departing from the rules of natural justice. It is not a merit review exercise, and the court does not seek to correct the decision, or course or practice or procedure of the inferior tribunal or body. It would issue where there is assumption of unlawful jurisdiction or excess jurisdiction. The function of the order is to forbid encroachment into jurisdiction, and to prevent implementation of orders or decisions made outside jurisdiction.
17. The matter arose out of an operation carried out by the police, ostensibly with the support of the County Government, in which the 3 *ex parte* applicants were party, during which members of the public were allegedly assaulted and injured, and damage was caused to their property. Criminal proceedings were initiated, in Bungoma CMCCRC No. E043 of 2021, against the *ex parte* applicants and others, but the said proceedings were subsequently terminated on 1st February 2021, under section 87(a) of the Criminal Procedure Code, Cap 75, Laws of Kenya, at the behest of the prosecution. The 1st respondent subsequently took over the matter, and recommended prosecution of the 3 *ex parte* applicants, based on material in their file IPOA/INV/00170/2020, and it subsequently generated a charge sheet, dated 14th May 2024, charging the 3 *ex parte* applicants, with various offences. Copies of these documents are attached to the verifying affidavit.
18. The matter has everything to do with the 1st respondent; the other respondents are largely nominal parties. One issue is whether the 1st respondent could investigate and prosecute the 1st and 2nd *ex parte* applicants, who are police officers, given that they had already been investigated and disciplined by other agencies, and undertaking a criminal prosecution, founded on the same facts and material, would amount to exposing them to double jeopardy. The second issue is about selective prosecution, given that there were 21 other police officers recommended for prosecution by the 1st respondent. They raise the issue of discrimination. The third issue is in connection with the 3rd *ex parte* applicant, who is not a police officer, but an employee of the Busia County Government.

19. On the first issue, as to whether the authorities could prosecute the 1st and 2nd *ex parte* applicants, with respect to matters over which they had been subjected to disciplinary proceedings, in line with police standing orders, a submission could be made that that would amount to double jeopardy. Double jeopardy only applies to criminal proceedings that are subject to the processes in the Criminal Procedure Code. Proceedings under internal police disciplinary regulations are not governed by the Criminal Procedure Code, and the principle and defence of double jeopardy would not apply to them. Those internal disciplinary proceedings are regulated by subsidiary legislation, while proceedings under the Criminal Procedure Code are governed by a substantive piece of legislation passed by Parliament.
20. The fact of having been taken through internal police disciplinary proceedings, and subjected to penalties or sanctions, under those proceedings, would not be a bar to prosecution, for perceived commission or omission of an offence or offences committed under the Penal Code or other Act of Parliament, prosecuted in accordance with the Criminal Procedure Code. The Criminal Procedure Code deals with criminal conduct, which is offensive to the public in general, and prosecution is undertaken for the benefit of the general public. The internal police disciplinary mechanisms are undertaken for police purposes, not to safeguard the public directly or as such, but to maintain and enforce internal discipline within the police force or service. The 2 processes are separate, and are conducted to meet different objectives. Nothing bars the 2 processes running parallel to each other.
21. A decision, by either the National Police Service, or the Directorate of Criminal Investigations, to recommend the criminal prosecution of a police officer, who, in their opinion, has committed some prosecutable offence, under the Penal Code or other penal law, would not be outside jurisdiction or improper, even if the police officer has been subjected to internal police disciplinary mechanisms, and has been sanctioned accordingly.
22. The same principle would apply where the 1st respondent is concerned, given that the 1st respondent has oversight over any person employed by the National Police Service, by virtue of section 2 of the Independent Policing Oversight Authority Act, Cap, 86, Laws of

Kenya. The 1st and 2nd *ex parte* applicants were, at all material times, employees of the National Police Service. The 1st respondent could investigate them, and recommend their prosecution, despite whatever might have happened when they were subjected to the internal police disciplinary procedures.

23. The second issue is about selective or discriminatory investigation, and recommendation for prosecution. The complaint being that several police officers were involved in the events in question, said to be 20 or so in number, but the 1st respondent has generated a charge sheet targeting just 2 of them.
24. The mandate and jurisdiction of the police, including that of the 1st respondent, is to investigate any suspected criminal activity, by anyone, within their jurisdiction and power, and to eventually arrest and charge the person, should there be adequate evidence, gathered to support any charges against him. A problem would only arise where the mandate is exceeded, or is exercised in a manner which offends the principles of natural justice and fair administrative action. See *Commissioner of Police & The Director of Criminal Investigations Department & another vs. Kenya Commercial Bank Limited & 4 others* [2013] eKLR (Maraga, Ouko & Murgor, JJA),
25. The decision, as to the number of persons, from the pool of suspects, that ought to be subjected to prosecution, should be in the hands of the investigation and the prosecutorial entities, founded on the material gathered by the investigators, and informed by such factors as the chances of getting a conviction, the ease of establishing the offence charged based on that material, and the need to undertake such number of prosecutions as are practically possible to be undertaken successfully.
26. I am not aware of any principle of law, and none has been pointed out to me, that would require that all those that are suspected of having committed an offence, or are mentioned by the witnesses, must be subjected to prosecution, regardless of their level of complicity. It is not unusual for investigators and prosecutors to turn some of the suspects into witnesses. The 1st and 2nd *ex parte* applicants have not demonstrated that the other officers bore greater responsibility, for what is alleged, so much as to require that they too be prosecuted. They have not zeroed on any of them as examples of who else should

be prosecuted, to lend credence to the claim that there is partiality and discrimination.

27. The third issue is about the 3rd respondent. He is a civilian, not a police officer. The issue is whether the 1st respondent can investigate him and recommend his prosecution. The material before me appears to place him in the mixture, for he was working together with the 1st and 2nd *ex parte* applicants, and other police officers, in the impugned operation. He was 1 of the Busia County Government Enforcement Officers, according to paragraph 15 (page 4) of the statutory statement, embedded into the police operation, in what is described, in those pleadings, at paragraphs 6 and 7 (page 3), as a multi-agency team. The multi-agency team was under police command. The mandate of the multi-agency team was, according to paragraph 6, “To enforce and implement curfew orders and directions.”

28. The mandate of the 1st respondent extends to persons who are exercising police powers, for section 2, of the Independent Policing Oversight Authority Act, defines “*police*,” “*to include the National Police Service*,” and “*any person or body - employed by it*,” that is the National Police Service, “*or acting on its behalf, under its control or at its behest; and any other person for the time being exercising police powers under any written law*.”

29. By his own pleadings, the 3rd *ex parte* applicant has averred that he was part of a team, which included the police, which went out, under the command and control of the police, to exercise police powers, by way of enforcing curfew orders. By so acting, the 3rd *ex parte* applicant brought himself within the purview of the 1st respondent, and exposed himself to investigation by the 1st respondent, over any excesses by him, in the exercise of police powers, at that material time, for which he could be prosecuted. The 3rd *ex parte* applicant cannot, in the circumstances, be heard to argue that the 1st respondent had no mandate over him, as a civilian.

30. There was, of course, the withdrawal of the charges in Bungoma CMCCRC No. E043 of 2021, under section 87(a) of the Criminal Procedure Code, in that ruling of 1st February 2021. The grievance, by the 3 *ex parte* applicants, appears to stem from that, that the case against them is being revived, yet they had been let off the hook. A withdrawal of a prosecution, under section 87(a) of the

Criminal Procedure Code, is not a bar to future prosecution, founded on the same facts and material, as that in the withdrawn case. It is not the equivalent of an acquittal. It does not afford, the accused persons involved or affected, the defence of *autrefois* acquit.

31. The 3 *ex parte* applicants have not demonstrated that the 1st respondent has acted in a manner that exceeds its power and jurisdiction, by way of acting illegally or unlawfully, or in an oppressive and vexatious way, or in a manner amounting to abuse of fundamental rights and freedoms, in view of what I have discussed above.

32. I am not persuaded, therefore, that the application, for the Judicial Review orders of *certiorari* and prohibition, is substantiated, and I find that it lacks merit. It is hereby dismissed. The Motion herein, dated 10th June 2024, is disposed of in those terms. Orders accordingly.

**DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA,
THIS 15TH DAY OF OCTOBER 2025.**

**W MUSYOKA
JUDGE**

Mr. Arthur Etyang, Court Assistant.

Advocates

**Mr. Wekesa, instructed by Amani Wekesa Associates Advocates,
Advocates for the *ex parte* applicants.**

Ms. Maureen Maina, Advocate for the 1st respondent.

**Mr. Onanda, instructed by the Director of Public Prosecutions, for the
2nd respondent.**