REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICAL REVIEW MISC APPLICATION NO. E114 OF 2025

UMESH BHOJWANI……...……...……1ST APPLICANT

KRYPTONITE INTERNATIONAL LIMITED……..…….2ND APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS……1ST RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS…….....2ND RESPONDENT

RULING ON LEAVE AND STAY

1. On 29/09/2025, the parties Counsel agreed and by consent, to have stay of the criminal proceedings at Dagoretti Chief Magistrate's Court in MCC CR E514/2025 until the application for leave to apply is heard and determined. The Court then gave directions that the chamber summons for leave dated 24th September, 2025 be heard by w ay of written submissions. however, the parties defaulted in filing the written submissions and therefore the court directed that the said application be heard by way of oral submissions in order to arrest the delay in the matter which had been filed under certificate of urgency.
2. In the application, the applicants seek leave of court to apply for judicial review orders of certiorari and prohibition, challenging the decision of the Respondents to charge them with the offence of cheating contrary to section 315 of the penal Code, vide Dagoretti Chief Magistrate's Court Criminal Case No. MCCR/E514 /2025 which had been scheduled for plea taking.

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3. According to the applicants, the criminal case arises from the contractual relationship between the parties and that therefore, the criminal charges are conscripted as a tool of debt recovery.
4. That the intended prosecution violates the National Prosecution Policy which prohibits prosecutions lacking a realistic prospect of conviction as stated in the **Ultrich Krueger v DPP [2018] e KLR** case among other cases cited by the applicants.
5. The applicants maintained that they are being prosecuted for a civil debt and that there is no material to justify the piercing of the corporate veil of the second applicant company and charging it with the criminal offence as per the annexed charge sheet, alongside its director, the 1st applicant.
6. The applicants claim that the criminal prosecution was being mounted against them for purposes of settlement of private commercial scores between the applicants and the interested party (who was nonetheless not enjoined to these proceedings).
7. The application is supported by the statutory statement and verifying affidavit sworn by the 1st applicant on 24th September, 2025, basically stating the facts as summarized above.
8. The respondents opposed the application and filed grounds of opposition dated 21st October, 2025. They contend that the application misapprehends the law on co-existence of civil and criminal proceedings as stipulated in section 193A of the Criminal procedure Code, which provides that the

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existence of a civil suit is not a bar to criminal prosecution over the same subject matter.

9. It was further contended that the factual matters relied on by the applicants are contested and that therefore, only the criminal trial court can hear and determine on merit, not this court, which is being asked to consider evidentiary material and the sufficiency of evidence in support of the charges against the applicants, which is not the role of this Court.

10. It is contended that these proceedings are akin to an appeal and intended to derail the criminal proceedings against the applicants hence the application is vexatious and frivolous and an abuse of legal process.

11. In their oral submissions, the parties' respective counsel reiterated their pleadings and depositions

Analysis and determination

12. I have considered the application and the opposition thereto. The main issue for determination is whether the leave and stay sought are merited, based on the material placed before this Court.

13. The High Court exercises supervisory jurisdiction over subordinate Courts and other bodies, persons and or authorities or tribunals exercising judicial or quasi-judicial functions. Article 165(6) and (7) of the Constitution vests in this Court supervisory jurisdiction in the following terms:

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165(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

14. Order 53 of the Civil Procedure Rules provides for the procedure for instituting judicial review proceedings and this provision implements section 9 of the Law reform Act.

15. As to why leave to apply is important in judicial review proceedings, the reasons have ahistorical perspective. Leave stage was intended to perform a "gatekeeping" function, ensuring that the supervisory jurisdiction of the High Court is invoked judiciously, efficiently and without undue harassment of public authorities, while weeding out frivolous and hopeless cases. In **Republic v County Council of Kwale & Another; Ex parte Kondo & 57 Others (Mombasa HCMC No. 384 of 1996)**, the High Court emphasized that the leave requirement in Order 53 of the Civil Procedure Rules is designed to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless, and to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is

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satisfied that there is a case fit for further investigation at a full inter partes hearing of the substantive application.

16. The Court of Appeal in **Mirugi Kariuki v Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8**, addressing the issue of whether or not leave to apply for judicial review orders should be granted stated as follows:

> ***"It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the matter of his complaint. If he fails to show, when he applies for leave, a prima facie case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers… In this appeal, the issue is whether the appellant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of the Act***

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was brought into question. Without a rebuttal to these allegations, the appellant certainly disclosed a prima facie case. For that, he should have been granted leave to apply for the orders sought."

17. Order 53 Rule 1 (4) of the Civil Procedure Rules additionally empowers the Court, where leave is granted, to direct that such leave do operate as a stay of the impugned decision pending the hearing of the substantive motion. This framework has been consistently upheld by the courts as serving an important gatekeeping function, enabling the court to weed out unmeritorious claims at the preliminary stage while preserving the status quo to prevent futility.

18. The decision whether or not to grant a stay pursuant to leave granted is thus an exercise of judicial discretion, and that discretion must be exercised judiciously, as was held in **Mirugi Kariuki v Attorney General (supra)** that:

"The decision whether or not to grant a stay pursuant to leave is no doubt an exercise of judicial discretion and that discretion like any other judicial discretion must be exercised judiciously. The circumstances under which the Court may grant an order that the grant of leave do operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise is

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now settled. Where the decision sought to be quashed has been implemented leave ought not to operate as a stay, as was held in George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.In Nicodemus Kebaso v Chairman of the Board of Governors Matongo Lutheran Theological College [2000] eKLR the court held that: "Applying the principles of the three cases to the facts of this application it is clear that it has not been stated that the college is going to close down, it has not been stated that there is not going to be any more graduation ceremonies and neither has it been stated that the Plaintiff/Applicant cannot join any other graduation group in future after his affairs have been sorted out by this Court. Definitely third parties are involved, innocent parties too are involved and it is not fair and just that these other third parties and innocent parties be inconvenienced and be treated as sacrificial lambs, in a matter they are not involved. I am sure they would have liked to be together with the Plaintiff/Applicant had it not been for the unfortunate situation that the Plaintiff/Applicant finds himself in."

19. This Court, however, underscores that the grant of leave does not, in any way, imply that the application will ultimately succeed. The threshold at the leave stage is deliberately low, intended only to filter out hopeless or frivolous claims. The grant of leave merely signifies that the applicant has

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established an arguable case worthy of further judicial inquiry, but the eventual determination of the merits awaits the substantive hearing where all parties will have an opportunity to present their evidence and arguments. As was observed in **Republic v County Council of Kwale & Another ex parte Kondo & 57 Others (supra)**, the purpose of leave is to prevent abuse of the court process by ensuring that only cases raising a legitimate issue proceed to the substantive stage.

20. It is equally important to observe that the remedy of judicial review has, under the current constitutional framework, been elevated to a constitutional remedy pursuant to Article 23 of the Constitution, as a means for enforcing and protecting fundamental rights and freedoms. Consequently, unless an application is plainly hopeless or frivolous, for instance, where it is statute-barred, filed after inordinate delay, the applicant is guilty of laches, there has been failure to exhaust mandatory and effective internal dispute resolution mechanisms, or there is material non-disclosure, this Court will ordinarily not deny an applicant leave to commence judicial review proceedings.

21. Indeed, where the issues raised at the leave stage disclose contested matters between the parties, such disputes often suffice to demonstrate the existence of a prima facie arguable case, warranting consideration at the substantive hearing.

22. It is further important to observe that with the enactment of the Fair Administrative Action (Judicial Review Procedure) Rules, 2024, a new legal

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regime now exists giving full effect to Article 47 of the Constitution and the Fair Administrative Action Act, 2015. Under this framework, an applicant alleging that their right to fair administrative action has been violated, denied, or threatened may directly institute judicial review proceedings without the necessity of first seeking leave of the Court. It therefore follows that a party may properly approach this Court under the Fair Administrative Action Act and the 2024 Rules, as promulgated in October 2024, where the claim is premised on a violation or threatened violation of a constitutional or statutory right to fair administrative action.

23. That said, it must be emphasized that the requirement for leave to apply for judicial review has not been entirely abolished. The new regime under the Fair Administrative Action Act and the 2024 Rules operates alongside the traditional procedure prescribed under Order 53 of the Civil Procedure Rules.

24. Consequently, where an applicant elects to proceed under Order 53, the requirement to seek leave remains applicable. It is only where proceedings are instituted directly under the Fair Administrative Action Act and the accompanying 2024 Rules that such leave is no longer a prerequisite. The two procedural avenues now co-exist, and it is incumbent upon litigants to clearly indicate the legal framework under which they seek the Court's intervention.

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25. In the present case, the Applicants invoked the traditional judicial review procedure under Order 53 of the Civil Procedure Rules and accordingly sought leave to apply for the orders of certiorari and prohibition.

26. This Court has therefore considered the application within that procedural framework. Had the Applicants elected to proceed under the Fair Administrative Action Act and the 2024 Rules, the requirement for leave would not have arisen. Nonetheless, regardless of the procedural path chosen, the substantive principles governing the grant of judicial review remedies, including timeliness, exhaustion of alternative remedies, and the avoidance of issuing orders in vain, remain applicable and binding upon all litigants.

27. The Respondents' position is that the Applicants, through the present proceedings, are in effect seeking to challenge the merits of the decision to charge them, yet they will have an opportunity to be heard and to present their defence at the trial. They contend that there exists sufficient evidence to warrant the prosecution of the Applicants for the offences preferred in the charge sheet.

28. The respondents further argue that the application seeks to interfere with the constitutional powers of the Director of Public Prosecutions under Article 157 of the Constitution, which grants the DPP independent authority to institute and undertake criminal proceedings. In addition, reliance is placed on Section 23 of the Penal Code, which provides that directors and officers

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of a company may be held personally culpable for criminal acts where they are directly involved in, or have authorized, the commission of the offence. The Respondents therefore maintain that the decision to charge the 1st Applicant does not amount to an impermissible lifting of the corporate veil of the 2nd Applicant, but rather arises from direct involvement in the alleged criminal conduct.

29. The respondent asserts that the applicants should instead have appealed against the ruling of the magistrates' court of 9/10/2025 wherein the initial charges were dropped by the prosecution and the charge sheet amended to introduce the charge of cheating contrary to section 315 of the Penal Code.

30. This Court is fully cognizant that the decision to institute or discontinue criminal proceedings lies within the exclusive mandate of the Director of Public Prosecutions under Article 157(6) of the Constitution. This Court will therefore be slow to interfere with the exercise of that discretion, save in the clearest of cases where it is demonstrated that the DPP acted without or in excess of jurisdiction, or that the prosecution was commenced in bad faith, for an ulterior motive, or in flagrant abuse of the court process. The jurisprudence is settled that the Court's role in judicial review is not to evaluate the sufficiency or quality of evidence to sustain a criminal charge, that is the exclusive province of the trial court. See **Meixner & Another v Attorney General [2005] 2 KLR 189.**

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31. This Court is further alive to the fact that, in many instances, parties appearing at the leave stage tend to advance arguments that touch on the merits and demerits of the intended substantive motion. It is, however, necessary to reiterate that the proceedings at this stage are not concerned with the determination of the substantive merits of the case. As earlier stated, the Applicants are only required to demonstrate the existence of a prima facie arguable case worthy of further consideration at the substantive stage. Correspondingly, the Court is not expected to interrogate or determine the merits of the intended motion at this point, as doing so would prejudice the parties and pre-empt the full hearing of the matter.

32. Having heard the parties on the application for leave, I am not satisfied that the application by the applicants is hopeless or frivolous. There are many arguable issues which the parties have brought out in their pleadings and submissions which this court will have the opportunity to consider in-depth at the substantive hearing.

33. For that reason, I grant leave to the applicants to apply for judicial review orders sought in the chamber summons dated 24th September, 2025. The main motion to be filed and served within seven 7 days of today and in a separate fresh substantive judicial review file, not miscellaneous application.

34. On whether the leave so granted should operate as stay of the criminal proceedings, Order 53 Rule (4) of the Civil Procedure Rules provides that:

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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:

35. The decision whether or not to grant a stay pursuant to leave granted is thus an exercise of judicial discretion, and that discretion must be exercised judiciously, as was held in ***Mirugi Kariuki v Attorney General Civil Appeal No. 70 of 1991*** **[1990-1994] EA 156; [1992] KLR 8** that:

> ***"The decision whether or not to grant a stay pursuant to leave is no doubt an exercise of judicial discretion and that discretion like any other judicial discretion must be exercised judiciously. The circumstances under which the Court may grant an order that the grant of leave do operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise is now settled. Where the decision sought to be quashed has been implemented leave ought not to operate as a stay, as was held in George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.In Nicodemus Kebaso v Chairman of the Board of Governors Matongo Lutheran Theological College [2000] eKLR the court held that: "Applying the principles of the three cases to***

the facts of this application it is clear that it has not been stated that the college is going to close down, it has not been stated that there is not going to be any more graduation ceremonies and neither has it been stated that the Plaintiff/Applicant cannot join any other graduation group in future after his affairs have been sorted out by this Court. Definitely third parties are involved, innocent parties too are involved and it is not fair and just that these other third parties and innocent parties be inconvenienced and be treated as sacrificial lambs, in a matter they are not involved. I am sure they would have liked to be together with the Plaintiff/Applicant had it not been for the unfortunate situation that the Plaintiff/Applicant finds himself in."

36. Stay is intended to preserve the status quo so that the subject matter of the substantive motion may not dissipate or the criminal proceedings be determined before the main motion is heard, which will render the motion an academic exercise, should the applicant be successful.

37. In this case, I am satisfied that no prejudice will be occasioned to the parties if the stay sought is granted, noting that parties had by consent agreed to a temporary stay pending hearing of this application for leave and that the complainant in the criminal case has the opportunity to advance her claim through the civil courts for a remedy, since the standard and burden of proof in criminal proceedings is higher than that in civil proceedings and the fact

that the criminal process may necessarily not compensate her adequately, assuming she has a good case against the applicants. In other words, and as correctly submitted by the respondents' counsel, section 193A of the Criminal Procedure Code permits concurrent civil and criminal proceedings and none of the two would prejudice the other. The section provides:

> ***193A. 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.***

38. I therefore order that the criminal proceedings in Dagoretti MCCR E514 OF 2025 shall be stayed until the main motion if filed is heard and determined on merit.

39. I further order that the applicants to enjoin the interested party who is the complainant in the criminal case to the main motion.

40. I make no orders at to costs.

41. This file is closed.

Dated, Signed and Delivered at Nairobi this 13th Day of November, 2025

R.E. ABURILI
JUDGE

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