

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL, HUMAN RIGHTS & JUDICIAL REVIEW
DIVISION
CONSTITUTIONAL PETITION NO. 057 OF 2024

NEDIM MOHAMMED IBRAHIM.....1ST PETITIONER
SARAH ABDELLA ABDUSEMED.....2ND PETITIONER

-VERSUS-

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT
REGISTRAR CHIEF MAGISTRATES COURT.....2ND RESPONDENT

JUDGMENT

1. In a petition dated 10 September 2024, filed in this Honourable Court on 13 September 2024, the petitioners have sought reliefs that are, by and large, in the nature of judicial review reliefs; they have couched their prayers in the following terms:

“(1) A declaratory order that the prosecution of the Petitioners in Mombasa Chief Magistrate Criminal Case El217 of 2022, Republic vs Sara Abdella Abdusemed and Nedim Mohammed Ibrahim by the 1st Respondent is not in public interest nor the interests of the administration of justice as stipulated under article 157 of the Constitution of Kenya.

(2) A declaratory order that the prosecution of the Petitioners in Mombasa Chief Magistrate Criminal Case El217 of 2022, Republic vs Sara Abdella Abdusemed and Nedim Mohammed Ibrahim is an abuse of the Court process and misuse of powers

by the 1st Respondent contrary to article 157 of the Constitution of Kenya.

(3) An order of prohibition does issue against the 1st Respondent prohibiting the prosecution of the petitioners for the alleged offences of conspiracy to defraud, false statement by company officials, forgery, making a false document, uttering false documents with intent to defraud giving false information to a person employed in the public service based on the complaint by Abdulkarim Saleh Muhsin and in respect of the company known as Zumzum Investment Limited.

(4) An order of prohibition directed all Chief Magistrate's Courts in Kenya and in particular the Chief Magistrate's Court in Mombasa, barring and forbidding any magistrate from hearing and /or proceeding in any manner with the conduct of any prosecution of the Petitioners. herein based on the complaint of Abdulkarim Saleh Muhsin on the same fact as those involved in the petition and in particular in the conduct of the Mombasa Chief Magistrate Criminal Case E1217 of 2022, Republic vs Sara Abdella Abdusemed and Nedim Mohammed Ibrahim.

(5) A declaratory order does issue to the effect that the arrest, detention, arraignment and continued prosecution in in the Chief Magistrate's court in the matter E1217 of 2022 against

Petitioners was illegal and contrary to the Constitution of Kenya, 2010 namely:

a) In contravention of the Petitioners' right to equal protection of the law as guaranteed under Article 27 (1).

b) In contravention of the Petitioners' right and freedom to security of the person not to be arbitrarily deprived of freedom or without just cause under Article 29.

c) In contravention of the Petitioner's right to access justice and to a fair trial and hearing under 50 of the Constitution.”

The petitioners have also asked for costs of the petition.

2. In the affidavit filed in support of the petition, the 1st petitioner has sworn that the petitioners, who are man and wife, and one Abdulkarim Saleh Muhsin (whom I will hereinafter refer to as simply as Muhsin) were business partners and directors of a company called Zum Zum Investment Limited (hereinafter also referred to as “the company”). The company is said to have acquired interests in real estate, amongst its other business interests, in Mombasa and other parts of this country.
3. However, somewhere along the line, a misunderstanding arose between the petitioners, on the one hand, and Abdulkarim Saleh Muhsin, on the other hand. As a result, several court cases have been filed in court to

determine the parties' interests in several acquisitions made in the course of their relationship.

4. Besides, the court cases pitting the directors of Zum Zum Investment Limited against each other, Abdulkarim Saleh Muhsin also lodged a complaint against the petitioners to the Director of Criminal Investigations on what has been described as "*the internal affairs and commercial transactions conducted*" in their company.
5. Amongst other allegations, Muhsin alleged that the petitioners had violated his rights as a majority shareholder in the company, and, in particular, Muhsin's commercial interest in the company.
6. Subsequently, parties agreed how they would resolve their dispute and, to this end, they entered into what has been described as a "*mediation agreement*" dated 7 May 2017. In the agreement, it was agreed, *inter alia*, that:

"a) Vide the resolution dated 7th day of May 2017, we agreed to dispose all the issues and all claims, inter alia disputes regarding Zumzum Investment Limited.

b) In Clause 3 of the resolution, we unequivocally undertook and guaranteed that we had the express authority of the companies and the parties that formed part of the commercial disputes between the Complainant and I to enter into the agreement and that we had the authority to bind them.

c) Under Clause 12 of the Mediation Agreement dated 7th day of May 2017, the complainant agreed to resign as a Director and Shareholder of Zumzum Investment Limited and he shall execute all necessary transfers, letters, resolutions and consents for the surrender of shares and directorship therein.

d) Under Clause 16 of the Mediation Agreement dated 7th May 2017 it was agreed that the complainant shall withdraw the Complaint against the 2nd Petitioner and I at the Director of Criminal Investigations in Nairobi.”

7. Notwithstanding the mediation agreement, it is alleged that Muhsin failed, refused or neglected to co-operate with the petitioners to implement the terms of the agreement. Consequently, the petitioners sought for, among other prayers, for “*specific performance*” of the agreement in Mombasa High Court Civil Case No. E051 OF 2021. However, while this suit was pending for determination, the petitioners were arrested and charged in Mombasa Chief Magistrates Court Criminal Case No. E1217 of 2022 on a charge of a false statement by company officials contrary to section 329(a) of the Penal Code. They were arraigned on 19 October 2022 and 2 July 2023 to plead to the charge.
8. Even then, on 24 November 2023, the mediation agreement was upheld as valid and enforceable in Mombasa High Court Civil Case No. E051 OF 2021. This decision was brought to the attention of the trial court,

and, in particular the petitioners' counsel drew the attention of the trial court to that part of the mediation agreement according to which Muhsin was to withdraw his complaint against the petitioners at Directorate of Criminal Investigations.

9. In the meantime, Muhsin appealed, to the Court of Appeal, against the decision of this Honourable Court and also sought for stay of execution of that decision. However, the application for stay was declined. On the strength of the court's decision in case no. E051 of 2021, the petitioners' counsel wrote to the 1st respondent asking him to withdraw the charges against the petitioners or enter a *nolle prosequi* by a letter dated 19 February 2024. On 29 August 2024 the 1st respondent informed the court that he was intent on proceeding with the prosecution of the petitioners and that he had amended the charge sheet. According to the petitioners:

“...the purpose of the amendment was to enjoin the 2nd Petitioner and I to all the charges as co-accused and it also added a new charge of uttering false documents with intent to defraud contrary to section 353 of the Penal Code against the Petitioners.” (see paragraph 33 of the affidavit in support of the petition).

10. It is the petitioners' contention that the sole purpose of the criminal prosecution is to arm-twist the petitioners into renegotiating the mediation agreement. The criminal case, according to the petitioners,

ought to have been filed in Nairobi and not in Mombasa. That it has been filed in Mombasa is a demonstration enough of the 1st respondent's ulterior motive and also proof of a scheme to defeat the petitioner's rights in Zum Zum Investment Limited.

11. Chief Inspector of police Moreen Kioko swore a replying affidavit opposing the application. According to inspector Kioko, a complaint was lodged at Directorate of Criminal Investigations headquarters in Nairobi by Muhsin on 30 January 2017 to the effect that he was the majority shareholder and a director of Zumzum Investments Limited and that he had realized that on 9 January 2017, the petitioners who, as noted, are his co-directors in the company, had filed falsified company annual returns for the years 2011, 2012, 2013, 2014, 2015 and 2016 and omitted Muhsin's name as a director of the company.

12. Investigations revealed that indeed the complainant was the majority shareholder while the petitioners were his co-directors. Although the company commenced business in 1988, Muhsin and the petitioners only became directors on 7 November 2009.

13. It was also established during investigations that the annual returns for the years 2011 to 2016 showed the petitioners to be the only directors of the company. Although the returns are indicated to have been filed by one Anthony Ndonga Muriu R/CPSB/2426 as the company secretary, the said Muriu denied having worked for the company and, in particular, he

denied having filed any returns on behalf of the company. The investigators also established that the stamp impression and the signature appended on the documents were forgeries.

14. Upon reviewing the investigation report, the 1st respondent directed that the petitioners be charged. However, the petitioners' counsel wrote to the 1st respondent seeking review of his decision to charge and prosecute the petition in view of a mediation agreement of 7 May 2017 according to which the parties had agreed to withdraw the complaint against the 1st petitioner. The 1st respondent insisted that the prosecution should proceed but that the charges would be amended.

15. It is the 1st respondent's position that he was not party to the alleged mediation agreement and, therefore, not bound by it. In any event, as far as I understand the 1st respondent, the purported withdrawal was in respect of the complaint at the Directorate of Criminal Investigations and not the charges against the petitioners. As far as the decision in this Honourable Court Case No. 51 of 2021 is concerned, the same is subject to an appeal in the Court of Appeal.

16. As an interested party, Muhsin filed a replying affidavit opposing the petition. In his affidavit, he has sworn and confirmed that he is the complainant in Mombasa, Criminal case No. E1217 OF 2022. According to him, the contention by the petitioners that his criminal complaint has

been resolved and settled through a mediation agreement dated 7 May 2017 is false and misleading.

17. Muhsin concedes that he and the petitioners are business partners and that at some stage their business was profitable as a result of which they acquired “a sizeable” number of properties and assets in the County of Mombasa and across the Republic of Kenya. Their investment was through Zum Zum Investment Limited in which the petitioners and Muhsin were the only shareholders. Muhsin held the Majority Shareholding of 66.7% against the petitioners combined shareholding of 33.3%.

18. The petitioners, according to Muhsin, hatched a scheme to defraud him of his shareholding in the Company worth billions of shillings. In pursuit of this scheme, the petitioners deliberately and fraudulently authored, uttered, and engineered the filing of documents with the Registrar of Companies that were intended to purport that Muhsin was not a shareholder of the Company. This resulted in several suits and countersuits being filed in court. The suits have been listed in the affidavit as:

- i. Mombasa, HCCC No. 25 of 2015; (formerly Mombasa ELC No. 318 of 2014) Abdulkarim Saleh Muhsin vs Nedim Mohamed Ibrahim & 3 Others;*

ii. Mombasa, HCCC No. 116 of 2016; Regional Container Freight Station limited & 2 Others vs Zumzum Investment ltd;

iii. Mombasa, ELC No. 248 of 2014; Nedim Mohamed Ibrahim vs Abdulbasit Saleh Muhsin &Anor;

iv. Mombasa, HCCC No. 122 of 2014; Nedim Mohamed Ibrahim vs Ancient Inland Seas ltd & 2 Others;

v. Mombasa, HCCC No. 130 of 2012; Ethics & Anti-Corruption Commission &3 others vs African Safari Club ltd & 2 Others;

19. In an attempt to salvage their relationship and business ventures, several reconciliatory meetings were initiated directly, and through the intervention of their mutual friends and business partners or associates. However, none of these attempts bore any fruits.

20. At some point, the parties resolved to put on hold the various court cases to which reference has been made and to submit themselves to a mediation process headed by two mediators named as Suaor Nurrow Hussein and Aden Guleid Hassan. The mediation process resulted in the execution of an agreement dated 7 May 2017 that later formed the substratum of this Honourable Court Civil Case no. E051 OF 2021. The petitioners are said to have reneged on the agreement. That notwithstanding, this Honourable Court is said to have held in civil case no. 25 of 2015 that Mushin was the majority shareholder of the company.

21. With the mediation agreement having failed, parties resolved to abandon it and proceed as if it never existed. The petitioners, it is contended, have not denied engaging in fraudulent activities that now form the basis of the criminal charges against them.

22. Of all the things the petitioners have said about their prosecution, they do appear to question the fact that the prosecution was preceded by a complaint, lodged against them, to the Director of Criminal Investigations. It is also not in dispute that the Director of Criminal Investigations undertook investigations into the complaint, made his report and submitted it to the Director of Public Prosecutions for action or advice.

23. It is worth remembering that the Directorate of Criminal Investigations is established under section 28 of the National Police Service Act. Although the office is headed by the Director of Criminal Investigations, it is “*under the direction, command and control of the Inspector-General*”. (see section 28 of the Act).

24. The functions of the directorate have been spelt out in section 35 of the Act. This provision of the law reads as follows:

35. Functions of the Directorate

The Directorate shall—

(a) collect and provide criminal intelligence;

- (b) undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber crime among others;*
- (c) maintain law and order;*
- (d) detect and prevent crime;*
- (e) apprehend offenders;*
- (f) maintain criminal records;*
- (g) conduct forensic analysis;*
- (h) execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157(4) of the Constitution;*
- (i) coordinate country Interpol Affairs;*
- (j) investigate any matter that may be referred to it by the Independent Police Oversight Authority; and*
- (k) perform any other function conferred on it by any other written law*

25. Thus, amongst the functions the Director of Criminal Investigations is enjoined to undertake, are the tasks of detecting and preventing crime and also apprehending offenders. Further, **Section 24 (e)** of the **National Police Service Act** provides for functions of the Kenya Police Service to include investigation of crimes.

26. The Director of Criminal Investigations was, therefore, quite in order and, more importantly, acted within the law, when he launched investigations into Muhsin's complaint to establish whether an offence had been committed. Indeed, as it turned out, several offences were established to have been committed, over and above the offence of making a false statement to public officials contrary to section 329(a) of the Penal Code which the petitioners suggested in their affidavit to be the only offence with which they were separately charged. As will become clearer in due course, these offences were captured in six different counts.

27. I need not belabour the point that if, based on the complaint, the Director of Criminal Investigations reasonably suspected the petitioner to have committed a crime, he not only had the constitutional and statutory mandate to investigate the complaint but also, he had the obligation to do so.

28. It should not be in dispute, therefore, that up to that point there was nothing unconstitutional about the Director of Criminal Investigations conducting investigations into the complaint lodged against the petitioners. The Director's actions are in tandem with section 35 (d) of the National Police Service Act and this Honourable Court cannot be seen to stand in the way of the Director's execution of his statutory mandate.

29. This Honourable Court addressed this point *Muhiato v Director of Criminal Investigations & 2 others (Constitutional Petition E026 of*

2023) [2024] KEHC 2093 (KLR) (29 February 2024) (Ruling), where it held as follows:

“22. There is no gainsaying that it is the duty of the police to investigate the commission of crimes. Accordingly, unless it is demonstrated that there is clear abuse of process for ulterior motives, the Court ought to be reluctant to intervene in the exercise of lawful duty imposed not only by dint of Articles 244 and 245 of the Constitution but also by Sections 24(e) and 35 of the National Police Service Act.

23. Indeed, in Republic v Commissioner of Police & Another, Ex Parte Michael Monari & Another (2012) eKLR (supra), it was emphasized that: -

“The police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”

30. Once the investigations were complete the baton was passed to the 1st respondent. As was held by the Privy Council in **Appeal Council Appeal No. 29 of 1968; Inspector Shaaban bin Hussein and others versus Chong Fook Kam and Another:**

“Suspicion arises at or near the starting-point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage.”

31. It is this “next stage”, the prosecution of the petitioners, that this Honourable Court is now concerned with in this petition. Based on the report from the Directorate of Criminal Investigations, the 1st respondent came to the conclusion that the petitioners could be competently charged with six counts of various offences.

32. A copy of an amended charge sheet shows that petitioners were respectively arrested on 2 July 2023 and 17 October 2023 and arraigned for various counts ranging from conspiracy to defraud contrary to section 317 of the Penal Code to giving false information to a person employed in the public service contrary to section 129(b) of the Penal Code. To be precise, the charges were drawn as follows:

“COUNT 1: Conspiracy to defraud contrary to Section 317 of the Penal Code.

1.NEDIM IBRAHIM MOHAMMED 2. SARA ABDELLA ABDUSEMED: On the 19th December 2016 at the Registrar of Companies offices in Nairobi County within the Republic of Kenya being Directors of Zum Zum Investment Limited conspired with intent to defraud the majority shareholder and director of Zum Zum Investment Limited on Abdulkarim Saleh Muhsin the company shares by way of filing false company annual returns; falsely stating that they were the true annual returns of Zum Zum Investment Limited for the years 2011, 2012, 2013, 2014, 2015 and 2016.

COUNT II

False statement by company officials contrary to Section 329 (a) of the Penal Code

1.NEDIM IBRAHIM MOHAMMED 2. SARA ABDELLA ABDUSEMED: On the 19th December 2016 at the Registrar of Companies offices in Nairobi County within the Republic of Kenya, being Directors of Zum Zum Investment Limited jointly concurred in filing company annual returns for the years 2011, 2012, 2013, 2014, 2015 and 2016 which were to your knowledge false with intent to defraud ABDULKARIM SALEH MUHSIN the majority shareholder and Director of Investment Limited the company shares.

COUNT III

Forgery contrary to section 345 as read with section 349 of the Penal Code

1.NEDIM IBRAHIM MOHAMMED 2. SARA ABDELLA ABDUSEMED: On the 19th December 2016 at unknown time and unknown place within the Republic of Kenya with intent to defraud forged the company annual returns of Zum Zum Investment Limited for the years 2011, 2012, 2013, 2014, 2015 and 2016 purporting them to be the genuine company annual returns of Zum Zum Investment Limited for the years 2011, 2012, 2013, 2014, 2015 and 2016.

COUNT IV

Making a false document contrary to section 347 (d) (i) as read with section 349 of the Penal Code.

1.NEDIM IBRAHIM MOHAMMED 2. SARA ABDELLA ABDUSEMED: On the 19th December 2016 at unknown time and unknown place within the Republic of Kenya being the director (sic) of Investment Limited with intent to deceive or defraud, made false documents namely investment limited company annual returns for 2011, 2012, 2013, 2014, 2015 and 2016 purporting them to be genuine and made by Anthony Ndonga Muriu (P/CPSB/1102 Number 2426).

COUNT V

Uttering false documents with intent to defraud contrary to section 353 of the Penal Code.

1.NEDIM IBRAHIM MOHAMMED 2. SARA ABDELLA ABDUSEMED: *On the 19th December 2016 at the Registrar of Companies offices in Nairobi County within the Republic of Kenya with intent to defraud, knowingly and fraudulently uttered forged investment Zum Zum Limited Company annual returns for the years 2011, 2012, 2013, 2014, 2015 and 2016 purporting to be made by Anthony Ndonga Muriu (P/CPSB/1102 Number 2426).*

COUNT VI

1.NEDIM IBRAHIM MOHAMMED 2. SARA ABDELLA ABDUSEMED: *On the 19th December 2016 at the Registrar of Companies offices in Nairobi County within the Republic of Kenya being Directors of Zum Zum Investment Limited Informed the Registrar of Companies an employee in the public service that for the years 2011, 2012, 2013, 2014, 2015 and 2016 Zum Zum Investment Limited had only two directors namely NEDIM IBRAHIM MOHAMMED and SARA ABDELLA ABDUSEMED with a secretary namely Anthony Ndonga Muriu (P/CPSB/1102 Number 2426) a fact you both knew to be false, intending thereby*

to defraud ABDULKARIM SALEH MUHSIN OF his lawful position as the majority shareholder and Director of Zum Zum Investment Limited.”

Although the charge sheet shows that the petitioners were charged together, it also shows they were separately arraigned on 10 July 2023 and 19 October 2022 respectively.

33.Indeed, the record of court proceedings in the Chief Magistrates Court Criminal Case no. E1217 of 2022, shows that the 2nd petitioner took plea on 19 October 2022, the same day she was arrested.

34.According to the proceedings of 12 September 2023, the 1st petitioner had been charged separately in the same magistrates’ court criminal case no. E009 OF 2023. On that day the two cases were consolidated and the petitioners took the plea afresh upon amendment of the charge sheet.

35.What seems to have prompted this petition is what transpired in court on 29 August 2024. On that date, Mr. Kiprop, the learned counsel appearing for the 1st respondent is recorded to have stated as follows:

“The file has been reviewed and the decision to charge was properly made and the matter to proceed to its logical conclusion. We have an amended charge sheet which has been filed and will be served to defence with a copy. Pray for a mention date for the

accused person to appear before court to take plea on the amended charge sheet. Pray for summons to the accused.”

36. Thus, despite what appeared to be incessant efforts from the petitioners' learned counsel to have the complaint against his clients withdrawn on the basis of a mediation agreement which, according to the learned counsel had been endorsed by this Honourable Court as an enforceable contract, the Director of Public Prosecutions was determined to proceed with the prosecution of the petitioners. The question that this Honourable Court is now confronted with is whether the 1st respondent should be stopped in his tracks and the prosecution halted.

37. To begin with, there should not be any doubt that Director of Public Prosecutions made his decision to charge the petitioners based on the evidence that had been gathered by the Directorate of Criminal Investigations. In reaching this decision, the Director of Public Prosecutions exercised his discretion under article 157 (6) (a) of the Constitution, according to which he has the discretion to institute and undertake criminal proceedings against any person. This provision of the Constitution reads 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;

38. The Director of Public Prosecutions does not exercise his powers under this provision at whim because under article 157(11) of the Constitution, he is enjoined to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process, in exercising the powers conferred upon him. With this in mind, this Honourable Court's noble and solemn duty is to maintain the balance between protection of the rights of the individual against misuse of prosecution powers and the need to maintain law and order, and in particular, the need to prosecute where circumstances are such that the prosecution is necessary.

39. Speaking of this balance, Lord Salmon expressed himself in **D.P.P versus Humphrey's (1976) 2 ALL ER 497 at 527-8** as hereunder:

“A judge has not and should not appear to have any responsibility for the institution of prosecutions, nor has he any power to refuse to allow a prosecution to proceed merely because he considers that as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to interfere. Fortunately, such prosecutions

are hardly brought but the power of the court to prevent them is, in my view, of great constitutional importance and should be jealously preserved". (Emphasis added)

40. In my humble opinion, although this statement was made in a case that was decided in a foreign jurisdiction, many years before the promulgation of the Constitution of Kenya, 2010, it, in some considerable measure, sums up articles 157(6) (a) and 157(11) of the Constitution and, to a greater degree, it captures the intention of the people of Kenya as expressed in those provisions.

41. More often than not, this balancing act comes to the fore whenever the facts upon which any particular prosecution is based are also in issue in a civil suit in which the complainant and the accused in the criminal case are parties. Ordinarily, the argument against prosecution in such instances is that the prosecution is for purposes other than the pursuit of criminal justice and that it is only meant to bring pressure to bear upon the accused to yield to the claim against him in the civil proceedings. Where the court is satisfied that indeed this is the case, it intervenes to stop what, in the words of Lord Salmon in **D.P.P versus Humphrey's**, is an abuse of the process of the court and is oppressive and vexatious, and that it is in such case that the judge has the power to interfere. In doing so the court stops the abuse of power of prosecution.

42. Two of the many local decisions that speak to this point are **Kuria & 3 Others vs. Attorney General (2002) 2 KLR 69** and **Republic vs. Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & Another (2002) 2 KLR 703**. In the former decision, the court held as follows:

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society’s senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court’s) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil

process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer.....”

43. And in **Republic vs. Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & Another**, the court held as follows:

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

oppressive or vexatious, prohibition and/or certiorari will issue and go forth... When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... The predominant purpose is to further that ulterior motive and that is when the High Court steps in...”

44. Turning back to the petitioners’ case, there is no dispute that the mediation agreement upon which the petitioners’ petition turns was made after the complainant had lodged his complaint with Directorate of Criminal Investigations. As a matter of fact, the case in civil suit no. 51 of 2021 whose subject matter was the same mediation agreement was filed and subsequently decided several years after the complaint had been lodged. I cannot see how it can be urged, in these circumstances, that Muhsin’s complaint against the petitioner’s and their subsequent prosecution of the petitioners are intended to bring pressure to bear upon the petitioners to yield to any terms in the mediation agreement or any

claim in suits that may have been filed after the complaint had been lodged.

45. An equally pertinent question is whether, parties can enter into an agreement to, among other things, insulate either themselves or any of them from prosecution where it is established that a criminal offence has been committed. A related and perhaps a more fundamental question is whether, by an agreement between themselves, parties can bar the 1st respondent from initiating a criminal prosecution where such a prosecution is sustainable. The answer to this question lies in article 157 (6)(a) of the Constitution according to which the 1st respondent has the discretion “*to 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*”.

46. Speaking of discretion to act in any particular manner in judicial review reliefs, the court in **Chief Constable of the North Wales Police versus Evans (1982) 1 WLR 1155 (at 1160F)** stated as follows:

“The remedy by way of judicial review under RSC...is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and ... administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the

decisions. It is intended to see that the relevant authorities use their powers in a proper manner...and not to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law.” (Per Lord Hailsham at 1160E-H).”

47. Similar observations were made by Lord Diplock in **Secretary of State for Education and Science v Tameside Metropolitan BC [1976] 3 All ER 665 at 695, [1977] AC 1014 at 1064** where he noted:

“The very concept of administrative discretion involves a right to choose between more than one possible course of action on which there is room for reasonable people to hold differing opinions as to which is to be preferred.”

48. And to the specific question whether the order of mandamus can issue where a statute leaves it to the discretion of a public officer on the performance of any particular duty, **HALSBURY’S LAW OF ENGLAND, 4th Edition Volume 1** says that it is not available. At page 111 paragraph 89, it states as follows:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be

done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.'(emphasis added).

49. In the case before court, it is the Constitution and not just a statute that imposes a duty and leaves the discretion as to mode of performing the duty in the hands of the 1st respondent, of course subject to the article 157(11) of the Constitution. Article 157(10) underscores the point that the Director of Public Prosecutions cannot be directed to exercise his discretion in any particular manner; it reads as follows:

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.

50. Against this legal and constitutional background, it may not matter that the petitioners and the complainant entered into some agreement to which, in any event, the Director of Public Prosecutions was not privy, to insulate themselves from prosecution. For purposes of determination of this petition, I would say that such an agreement would not only be

against public policy but it would also be in contravention of articles 157 (6)(a) and 157(10) of the Constitution.

51. For the reasons I have given, I do not find any merit in the petitioners' petition. It is hereby dismissed. Parties will bear their respective costs. Orders accordingly.

Signed, dated and delivered on 17 November 2025

Ngaah Jairus
JUDGE