

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW APPLICATION NO. E357 OF 2025

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR, PUBLIC PROSECUTIONS.....1ST
RESPONDENT

THE DIRECTOR, CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

THE CHIEF MAGISTRATE MILIMANI
CRIMINAL DIVISION.....3RD RESPONDENT

AND

EUNICE MBINYA MUSEMBI.....INTERESTED
PARTY

AND

GRACE KERUBO OMWENGA.....EX PARTE APPLICANT

RULING

1. This Ruling determines the Ex parte Applicant’s application dated 13th November 2025. The applicant seeks for the reinstatement/ and or adaption of the orders of Leave and Stay of prosecution granted by the High court sitting at Kiambu on 22nd September 2025 in JR No. E022 of 2025. He also prays that pending the hearing and determination of the instant application, interim orders staying the prosecution of the Applicant in Criminal Case No. E463 of 2025 Republic vs. Grace Kerubo be granted.

2. The applicant further prays that the said reinstated orders do remain in force pending the hearing and determination of the substantive Notice of Motion for Judicial Review dated 26th September 2025.
3. The application is supported by the affidavit of Grace Kerubo Orioko sworn on 13th November 2025.
4. The Applicant's case is that on 19th September 2025, she filed Judicial Review Application No. E022 of 2025 before the High Court at Kiambu, seeking leave to apply for orders of certiorari and prohibition to quash and restrain the decision of the Director of Public Prosecutions to charge her in **Criminal Case No. E463 of 2025 Republic vs. Grace Kerubo**.
5. That on 22nd September 2025, the Court granted leave and issued an order of stay of the intended prosecution pending hearing and determination of the substantive motion. However, that the said orders were set aside by the court on 5th November 2025 on grounds that the court did not have the supervisory powers and that the same would properly be exercised by Milimani Judicial Review Division. The Applicant states that the court directed the transfer of the entire file to the Judicial Review Division of the High Court at Nairobi.
6. According to the Applicant, the Court had expressly acknowledged that the applicant's case had met the threshold for the grant of leave and that the setting aside and transferr were therefore procedural. She states that it is only just and fair that this court adopts and reinstates the leave and stay

orders originally granted. The Applicant asserts that unless the stay orders are reinstated, the Respondents may proceed with the prosecution, rendering the substantive judicial review nugatory.

The Interested Party's Replying Affidavit

7. In response, the Interested Party filed a replying affidavit sworn 14th November 2025. The Interested Party gives an account of what transpired culminating in the filing of the complaint against the Ex parte Applicant. She states that the Applicant received Kenya Shillings 65 million as the purchase price for Villa No. 3 erected on L.R. No. 3734/1444(Original L.R. No. 3737/373) in Kileleshwa Area in Nairobi County. That the applicant refused to refund the money as per the Sale Agreement and put up the same Villa for sale to unsuspecting buyers.
8. That attempts to resolve the dispute have failed and efforts to have the Applicant find ways to repair the structural defects that have made the property inhabitable have not bore any fruits. The Applicant is said to have, despite everything, issued a completion notice requiring the Interested Party to pay the balance of Kenya Shillings 10 million.
9. The Interested Party states that as much as the matter pending in Milimani ELC E332 of 2025 is a civil matter, there were elements of fraud which led to investigations by the 2nd Respondent's Land Fraud Unit.

Submissions

10. During oral highlights made before the court on 26th November 2025, Counsel for the Applicant, Mr. Ogeto informed the court that as per paragraph 27 of the Court's (Chepkwony J) ruling, the court indicated that the only reason for vacating the orders was lack of territorial jurisdiction to supervise Milimani Chief Magistrate's Court.
11. That the orders were not set aside on merit but as a consequence of the transfer of the file to Milimani Judicial Review Court. Counsel further argued that as the 1st Respondent had not filed any grounds of opposition to the instant application, there was no rebuttal or factual basis upon which the Applicant's application is premised.
12. According to the applicant's counsel, even though the Interested Party filed a response, she is not the decision maker on matters to do with prosecution and that only the 1st Respondent can weigh in on or make a response to the instant application. Further, that the Interested Party's response goes to the merits of the substantive judicial review motion which is not permitted at the current stage.
13. In response, Mr. Kiarie, counsel for the Interested Party submitted that in the application before the court in Kiambu for striking out of the application for leave and stay the Interested Party raised the ground of multiplicity of suits in ELC, Misc Criminal revision and also challenged the territorial jurisdiction of the court. Counsel also urged that there is no

reason for the court to stay prosecution of the Applicant who is holding both the money and the house.

14. In a rejoinder, Mr. Ogeto argued that the orders sought are available under the Constitution, Order 53 of the Civil Procedure Rules, Law Reform Act and the Fair Administrative Act. That it is the Applicant's right to approach this court to seek orders provided for in the law, to challenge the decision by the 1st Respondent to prosecute her in connection with a dispute that is purely commercial, involving sale of a house between her and the Interested Party.

15. Counsel also submitted that this court can decide whether the legal threshold for an arguable case to warrant leave and stay has been met. Further, that the suit in ELC Milimani was filed by the Interested Party against the Applicant, seeking to preserve funds held in her bank accounts.

Analysis and Determination

16. I have considered the application and affidavit in support together with the response by the Interested Party. I have given equal consideration to the oral highlights made by counsel. The main issue for determination is whether this Court, having received the matter by transfer, can reinstate or revive ex parte orders that were previously set aside by the court which transferred the matter, on the ground that it lacked supervisory and territorial jurisdiction.

17. According to the Applicant, the setting aside of the said orders by the court was only a matter of procedure and was not done on merit and that as such, this court has the power to reinstate the same.

18. In determining this issue, while the contents of the said ruling are within the knowledge of the parties, it is important for this court to provide an excerpt of the said ruling for context. The Kiambu High Court in its reasoning from paragraph 20 stated thus:

“20. However, the foregoing notwithstanding, since it is common ground that the present judicial review proceedings arise from proceedings in Milimani Chief Magistrates Court Criminal Case No. E463 of 2025 - Republic vs. Grace Kerubo Orioki. Guided by the provisions of Article 165(b) of the Constitution which vests the High Court with supervisory jurisdiction over the subordinate courts with the High Court and any person, body or authority exercising a judicial or quasi-judicial function, this court reiterates that the administrative structure and judicial practice dictates that such supervisory jurisdiction is exercised territorially through the relevant High Court stations established across the Republic ,each with defined geographical mandates.

21. Given that it is undisputed that the impugned criminal proceedings in Nairobi Chief Magistrates Court Criminal Case No. E463 of 2025 - Republic -vs- Grace Kerubo Orioki, are proceedings

of a subordinate court situate within Nairobi County, the High Court at Milimani, and in particular its Judicial Review Division, is the division specifically vested with supervisory and Judicial Review jurisdiction over all subordinate courts and tribunals within Nairobi County.

22. The principles governing territorial competence of High Court stations were succinctly expressed that although the High Court enjoys countrywide jurisdiction, matters ought to be filed before the station exercising supervisory control over the subordinate court or authority in question, both for administrative orderliness and efficient dispensation of justice

23. In the present case, the Ex-parte Applicant challenges actions and decisions directly arising from proceedings before the Milimani Chief Magistrates Court and the ultimate decision in this case should it be successful shall affect the said proceedings. Consequently, the proper forum for initiating and determining these Judicial Review proceedings is the Milimani High Court Judicial Review Division, not the Kiambu station.

24. The Court therefore finds that while the High Court at Kiambu and that at Milimani are coordinate in status under Article 165, this particular cause falls squarely within the supervisory remit of the Milimani Judicial Review Division, and the filing of the same at

Kiambu was procedurally irregular and contrary to the principle of forum convenience.

25. This Court also observes that Judicial Review is a special jurisdiction meant to supervise subordinate judicial and administrative bodies within the Court's territorial purview. Entertaining the present proceedings at Kiambu would therefore amount to an exercise of supervisory powers beyond its territorial limits, which this Court declines to do.

On the Stay Orders

26. The Ex-parte orders of 22nd September, 2025, which granted leave to commence Judicial Review proceedings and directed that the said leave operates as a stay of the criminal proceedings before the Milimani Chief Magistrates Court, were granted Ex-parte at the leave stage

27. However, now that this Court has found that it lacks territorial competence to exercise supervisory jurisdiction over the Milimani Chief Magistrates Court, it follows that the said stay orders cannot properly subsist. Continuing to enforce them would amount to perpetuating orders made without the proper territorial jurisdiction.

28. Accordingly, the Ex-parte stay orders issued on 22nd September, 2025 are hereby set aside, to pave way for the proper

*exercise of supervisory powers by the High Court at Milimani
Judicial Review Division*

*29. In view of the foregoing, and guided by the provisions under
Article 165(6) and (7) of the Constitution, Section 11 of the Civil
Procedure Act, this Court makes the following final orders:*

- a) This Court finds that it lacks supervisory and territorial
jurisdiction to entertain Judicial Review proceedings arising
from the Milimani Chief Magistrates Court Criminal Case No.
E463 of 2025- Republic -vs- Grace Kerubo Orioki.*
- b) The Judicial Review Application Kiambu HC JR No, E022 of
2025, is hereby transferred to the High Court of Kenya at
Nairobi (Milimani), Judicial Review Division, being the court
seized with supervisory jurisdiction over the Milimani Chief
Magistrates Court.*
- c) The Ex parte stay orders issued on 22nd September, 2025 are
hereby vacated and set aside to enable the Milimani Judicial
Review Court to issue such further or other directions as it may
deem just and expedient in exercise of its supervisory
jurisdiction.*
- d) The Deputy Registrar of this Court to forthwith transmit the
entire file to the Deputy Registrar, Judicial Review Division,*

High Court of Kenya at Milimani, for mention and further directions before a Judge of that Division.”

19. It is common ground that the High Court sitting at Kiambu, upon hearing the parties before it, expressly found that it lacked supervisory and territorial jurisdiction. Consequently, upon that finding, it set aside the ex parte orders that it had earlier issued. That determination went to the root of the matter, as it was a finding that the court had no authority to entertain the proceedings *ab initio*.

20. The question of jurisdiction is foundational in any judicial or quasi-judicial proceeding. Jurisdiction is not merely a procedural matter it goes to the very heart of a decision-maker's competence to entertain a dispute. As was famously stated by Nyarangi, JA in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

21. Jurisdiction is not assumed. It must be affirmatively established and it is trite that a court of law cannot arrogate itself of jurisdiction that it does not have. Further, that the moment a court finds that it has no jurisdiction

to entertain a matter, then it must down its tools. This jurisdictional principle finds anchorage in **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, where the Supreme Court made it clear that:

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power on Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

22. Be that as it may, the legal consequence of a finding of want of jurisdiction is that any orders made are rendered a nullity and that is exactly what the court in Kiambu High Court made. Such orders for leave and stay cannot be sustained, enforced, or revived, as they are deemed to have been issued without lawful authority.
23. Thus, the subsequent transfer of the matter to this Court, which is properly clothed with supervisory and territorial jurisdiction, does not alter the status of those earlier orders which were set aside by the same Court that set them aside.
24. A transfer of suit cures the forum prospectively but does not retrospectively validate or resurrect orders that were set aside for want of jurisdiction. There is therefore no subsisting order capable of reinstatement.
25. Although this Court now has jurisdiction to entertain the dispute, that jurisdiction arises only from the point at which the matter came before it. To revive the orders which were vacated and set aside by the High Court at Kiambu is tantamount to this Court sitting on appeal over the jurisdictional determination made by the transferring court, which matter was heard and determined *inter partes*. To do so would amount to conferring jurisdiction retrospectively, a course that is not allowed in law.
26. Judicial review proceedings under Order 53 of the Civil Procedure Rules are *sui generis* and are commenced only upon the grant of leave by the

Court. Leave is not a mere procedural formality it is a substantive jurisdictional threshold intended to filter out frivolous, vexatious, or premature claims, and to ensure that the Court's supervisory jurisdiction is invoked only where an arguable case is disclosed.

27. The discretion to grant leave is exercisable only by a court properly seized of jurisdiction at the time the application is made. Consequently, where leave has been granted by a court that subsequently finds that it lacked such jurisdiction, and such court having vacated the orders for leave and stay, leave and stay cannot subsist, as they are rendered void by the jurisdictional defect.

28. The proper course available to the Applicant is not to seek reinstatement of orders that were set aside for want of jurisdiction, but to properly invoke the jurisdiction of this Court afresh. This requires the filing of a fresh application for leave, together with any attendant prayers for interim relief, to be considered on their own merits and in accordance with the applicable legal principles.

29. In my view, the order of transfer of the proceedings to this Court was an empty order.

30. In the premises, the application dated 13th November 2025 is found to be devoid of any substance and the same is hereby dismissed.

31. For avoidance of doubt, the Ex parte Applicant remains at liberty to file a fresh application invoking the jurisdiction of this Court, should she be so advised.

32. I order that each party shall bear their own costs.

33. I so order.

34. This file is closed.

**Dated, Signed & Delivered virtually at Nairobi this 30th Day of December
2025**

**R.E ABURILI
JUDGE**

ORIGINAL