

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MARSABIT**  
**JUDICIAL REVIEW APPLICATION NO E001 OF 2025**

**IN THE MATTER OF APPLICATION FOR ORDERS OF**  
**PROHIBITION AND CERTIORARI**

**BETWEEN**

**REPUBLIC.....**  
**APPLICANT**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTION.....1<sup>st</sup>**  
**RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE.....2<sup>nd</sup>**  
**RESPONDENT**

**SHUGE CHUDE LARE.....3<sup>rd</sup>**  
**RESPONDENT**

**AND**

**ATHI ALI SORCHA.....EX PARTE**  
**APPLICANT**

**JUDGMENT**

**A.Introduction**

1. The Ex parte Applicant moved this court through her chamber summons Application dated 16<sup>th</sup> January 2025 seeking leave to institute judicial review

proceedings in the nature of **CETRIORARI AND PROHIBITION** to call into this court and quash the criminal proceedings brought against her by the respondents through **Marsabit Principal Magistrate Criminal Case No E135 of 2024** and simultaneously sought that leave so granted to operate as stay of the said criminal proceedings pending hearing and determination of the substantive motion to be filed.

2. On considering the said application, the court did grant her leave to file the substantive notice of motion Application, which she subsequently filed on 30<sup>th</sup> January 2025 seeking for orders inter Alia that;

**(a) THAT an order of CETRIORARI and PROHIBITION do issue to call and/or move, MARSABIT PRINCIPAL MAGISTRATE'S COURT, CRIMINAL CASE NO E135/20224 for purposes of it being quashed.**

**(b) THAT Costs of this Application be borne by the respondents.**

3. The said Application was supported by the grounds stated on the face thereof, the supporting affidavit of the Ex parte applicant dated 16.01.25 & 30.01.25, statement of facts and further supporting Affidavit dated 19.06.25, and opposed by the 3<sup>rd</sup> respondent through his replying Affidavit dated 20.05.25. The 1<sup>st</sup> and 2<sup>nd</sup> respondents despite being served did not file

any pleadings nor did they participate in these proceedings.

## **B. Parties Pleadings**

### **(i) The Motion Application**

4. The Ex parte Applicant averred that she was the daughter of one **ALI GUYO SORCHA**, an elder citizen and a resident of Marsabit county, who legal owner of adjoining parcels of land known as **L.R. MARSABIT/JIRME/126 and 127**, While the 3<sup>rd</sup> respondent, was their neighbor on one side and owned land parcel no **L.R. MARSABIT/JIRME/1372**. There had been a long standing boundary dispute arose between her father and the 3<sup>rd</sup> respondent, culminating in the 3<sup>rd</sup> respondent filing, **MARSABIT ELC CASE NO 36 of 2018** where he claimed that her father had trespassed into his parcel of land but the suit was eventually dismissed. Aggrieved by the said decision, the 3<sup>rd</sup> respondent filed an Appeal vide **MERU ELC APPEAL NO E102 of 2021**, which was equally was dismissed and the matter settled at that.

5. Still not satisfied by the out come of the suits filed and due to bad blood prevailing between the two families, the 3<sup>rd</sup> respondent on various dates including on 29.03.24 & 30.03.24 did make a false report to the

police in Marsabit that the she while accompanied by other unidentified persons had entered into his parcel of land, and proceeded to destroy crops therein and committed acts of arson, when in essence the same was not true as they had only worked within their portion of land and not the 3<sup>rd</sup> respondents portion of land.

6. It was the Ex parte Applicants further contention that the 3<sup>rd</sup> respondents' action was laced with malice and bad faith as he had lost his civil claim before court and was just acting with spite and malice to destroy her profession career. As a result of the said complaint, the 1<sup>st</sup> and 2<sup>nd</sup> respondent's had opted to prefer criminal charges ( ***Marsabit Senior Principal Magistrate Court Criminal Case No E135 of 2024*** ) against her based on falsehood and incomplete investigation which act was ultra vires and infringed on her rights not to be discriminated against and also her right to fair administrative Action.

7. It was also to be noted that the "Agricultural officers report," Which the respondents intended to rely on had stated categorically that ***"verification of the owner of the land was not done, as the person who allegedly burnt down the stocks had planted the same on the same piece of land."*** (Refer to land

**Registrar).** Under the aforesaid circumstance, it was clear that there was no basis of preferring any criminal charge against her in court and thus urged this court to stop the respondents from misusing the criminal justice system to harass and intimidate her.

8. The Ex parte Applicant thus urged the court to call and examine the basis upon which the criminal case against her was instituted and prayed that the court be pleased to quash the same.

**(ii) The 3<sup>rd</sup> Respondents Response.**

9. The 3<sup>rd</sup> respondent opposed this application vide his replying affidavit dated 20<sup>th</sup> May 2025, where he deponed that he was he registered owner of land parcel known as **L.R. MARSABIT/JERIME/1372** located with Marsabit Central ward, and that on 28.03.2024 the Ex parte Applicant, while in company her family members and hired goons, had descended on his parcel of land and forcefully/violently chased him away therefrom and subsequently on 30.03.2024, the same group proceeded to burn down his crops planted therein, completely destroying them in the said process.

10. As a result, he had made several complaints to the police, concerning each incident that took place, but no action would be taken as the Ex parte Applicant was a

police officer, who at some point was stationed at Marsabit Central police station, before eventually being transferred. As a result of his persistence the OCS did request the Agriculture department to send an officer to evaluate the damage occasion and eventually, the said department did present to the investigating officer their report dated 04.04.2024, where the damaged crops were assessed at **Ksh.34,000/=**.

11. Thereafter, the Ex parte applicant was summoned severally to the police station to record her statement but contemptuously declined to do so. Upon conclusion of the investigations the police file was forwarded to the ODPP, who independently reviewed the same and approved that the Ex parte Applicant be charged with the offence of forcible detainer and destruction of crops.

12. Even after getting approval to charge, the police were slow to act and he had to engage an advocate, who in turn lodged a complaint with Independent Policing oversight Authority (IPOA), and it is through their intervention, that the Ex parte Applicant finally recorded her statement and eventually she was charged in court for committing the aforsetated offences. When the case came up for plea, the Ex parte Applicant willfully neglected to attend court and warrants of arrest were issued and later lifted when she attended court.

13. The 3<sup>rd</sup> respondent further urged the court to note that the civil suit (ELC), which he had filed was not dismissed on merit, but for want of prosecution and thus could not be used by the Applicant as a basis for deflecting her criminal actions, which had since been established through investigations and she therefore had to face the full force of law instead of playing victim.
14. He reiterated that the investigations had been undertaken in a procedurally fair manner and thus urged the court to find that the Ex parte Applicant was abusing the court process to shield herself from lawful prosecution. The application filed was thus mad without merit, was frivolous and he urged the court to dismiss the same.

**(iii) The Ex parte Applicants further Supporting Affidavit.**

15. The Exparte Applicant in response to the replying affidavit, did file her further supporting Affidavit dated 19<sup>th</sup> June 2025, where she denied entering into the respondent parcel of land and/or violently chasing him away therefrom. It was clear from the pleading filed that since their parcels of land were adjoining each other, the dispute was a boundary problem, which had to sorted by rectification of boundaries as outlined in

**Section 18 of the Land registration Act, 2012** and not through criminal proceedings as maliciously instituted by the respondents.

16. Therefore, it was premature for the 3<sup>rd</sup> respondent to make a false report to the police that she had trespassed into his land and destroyed his crops, when the boundaries of the suit parcels had not been established. The 3<sup>rd</sup> respondents action therefore had been driven by malice and was geared towards misusing the criminal justice system to her loss and detriment. The Ex parte Applicant thus urged the court to find that her Application had merit and be pleased to allow the same.

### **C. Analysis & Determination**

17. This court has considered the Notice of motion Application, the affidavits filed in support and in opposition of the said motion, and given due consideration to the submissions filed by the parties' respective Counsel. The issues which arise for determination are;

***i. Whether the orders sought of CETRIORARI AND PROHIBITION should issue to quash the Criminal proceedings instituted via MARSABIT PRINCIPAL MAGISTRATE CRIMINAL CASE NO E135 OF 2024.***

**ii. Who should bear the costs of this suit?**

**(i) Whether the orders sought of Certiorari and Prohibition should Issue.**

18. According to ***Judicial Review Handbook***, 6th Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power.
19. The Court is also guided by the persuasive holding in the case of **Republic v Kenya National Highways Authority Ex Parte Applicant Benjo Super Stores Limited [2021] eKLR** where the court stated:
- “The objective of seeking judicial review orders is to cushion or protect litigants against suffering consequences out of decisions arrived at by public bodies, Institutions or public officers without due***

***regard to due process. procedural propriety, observance of the principles of natural justice by treating everybody equally and fairly, rational and prudent consideration and treatment of issues before them, due regard to the people they are serving and upholding the rule of law”***

20. Regarding the first issue raised (certiorari), In the case of **Municipal Council of Mombasa...Vs...Republic Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2007(2002) eKLR**, the Court of Appeal held that:-

***“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at. Did those who make the decision have the power i.e the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether there was or there was no sufficient evidence to support the***

***decision and that as we have said, is not the province of Judicial Review”.***

**21.** Further the circumstances under which orders of Judicial Review can be issued were elaborated by Justice Kasule in the celebrated Uganda case of **Pastoli ...Vs..Kabale District Local Government Canal & Others (2008) 2EA 300 at pages 300-304,** Where he stated that;

***“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.***

***Illegality, is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality-----.***

***Irrationality, is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.***

**Procedural Impropriety, is when there is failure to act fairly on the part of the decision-making Authority in the process of taking a decision. The unfairness maybe in non-observance of the rules of natural justice to act or to act with procedural fairness towards one to be affected by the decision-it may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislature instrument by which such authority exercises jurisdiction to make a decision. ( Al- Mehidswi Vs Secretary of state for Housing Department (1990) AC 876)**

22. The Court of Appeal in **Mirugi Kariuki vs Attorney General (1992) eKLR** also held that :-

***“The mere fact that the exercise of discretion by the decision-making authority affects the legal rights or interests of some person makes it judicial, and therefore subject to the procedure required by natural justice. Thus, that discretion must be exercised judicially, that is to say, fairly. The fact that the exercise of discretion is administrative does not make it any the less judicial for this purpose...It is not the absoluteness of the discretion nor the authority exercising it that matter but whether in its exercise, some of the person’s legal rights or interests have been affected. This makes the exercise of such discretion justiciable and therefore subject to judicial review.”***

23. Having considered the parameters discussed in the above cited precedent, and do find that in seeking Judicial Review orders, the applicant must demonstrate that any of the above discussed impropriety or breach of rules of natural justice exist to enable her succeed in her application.
24. It is not in doubt that the Ex parte Applicants father and the 3<sup>rd</sup> respondent are involved in a bruising land boundary dispute, involving land parcel no **MARSABIT/JERIME/126, 127 and MARSABIT/JERIME 1372**, the latter, which belongs to the 3<sup>rd</sup> respondent. The 3<sup>rd</sup> respondent escalated this dispute in 2018 by filing **MARSABIT SPM ELC NO 36 of 2018**, which was dismissed for want of prosecution and his Appeal being **MERU HCC ELC APPEAL NO E102 of 2021** too was dismissed on merit.
25. The 3<sup>rd</sup> respondent further averred that on 28.03.2024 and 29.03.2024, the Exparte Applicant forcefully did enter into his parcel of land, violently chased him away and proceed to cut down and burnt his crops. As a result, after a long-drawn investigation process and getting ODPP approval, the Ex parte Applicant was charged before court with the offence of forcible detainer and crop distruction. The

Ex parte Applicant on the other hand avers that she did not trespass into the 3<sup>rd</sup> respondents parcel of land and that the placed claimed by the said respondent was within their land.

26. The Ex parte Applicant further supported her contention by relying on the Agricultural officer report dated 04.04.24, which clearly states that. ***“verification of the owner of the land was not done, as the person who alleged burnt down the stocks had planted the same piece of land. (Refer to lands office).*”**

27. The question that then arises is whether given the above set of facts the 1<sup>st</sup> and 2<sup>nd</sup> respondent decision to charge the Ex parte Applicant was illegal, irrational and/or was tainted with procedural impropriety. **Under Article 245(2),(b) & (4) of the constitution**, the Inspector General of police has independent command of the police in performing his duties and delegates the investigative to the respective police officers on the ground as mandated through the National police service Act . It has not been shown that the police officer who investigated this matter acted out of his scope of duty and/or in an ultra vires manner or contrary to the provision of

a law or its principles. The principal of illegality is thus not proved.

28. On the ground of irrationality and procedural impropriety, it is clear beyond a shadow of doubt that the boundary dispute between the two warring parties has not been resolved. This also confirmed by the Agricultural officer, who went to assess the crops damaged and stated as much in his report that, **“verification of the owner of the land was not done, as the person who alleged burnt down the stocks had planted the same piece of land. ( Refer to lands office).**

29. The question that then arises is that is it rational and appropriate to charge the Ex parte Applicant with the offence of forcible detainer, when the suit parcel boundaries has not been established and/or for damaging crops, which the Agricultural officer says she planted. It is obvious that to reach such a conclusion is irrational and procedurally inappropriate and cannot be allowed to stand. The boundary issue must be sorted out first on the basis of the procedure stated under **Section 18 of the Lands Registration Act, 2012.**

30. Further to also subject the Ex parte Applicant to stand trial, when from the onset, the prosecution is

aware they cannot establish if the portion of land in dispute belongs to the Ex parte Applicants father and/or the 3<sup>rd</sup> Respondent reeks of ill will and an infringement to the Ex parte constitutional right not to be discriminated against, right to fair administrative action and right to fair trial as espoused under **Articles 27, 47 and 50(2) of the constitution of Kenya 2010.**

31. Lastly, on the question of prohibition, the circumstances which the Court takes into consideration in deciding whether or not to halt a criminal process were set out by **Musinga, J** (as he then was) in **Paul Stuart Imison Another vs. The Attorney General & 2 Others Petition No. 57 of 2009**, in the following manner:

***“The instances in which a court can declare a prosecution to be improper were well considered in Macharia & Another -vs- Attorney General & Another (2001) KLR 448. A prosecution is improper if:***

***(a) It is for a purpose other than upholding the criminal law;***

***(b) It is meant to bring pressure to bear upon the applicant/accused to settle a civil dispute;***

***(c) It is an abuse of the criminal process of the court;***

**(d) It amounts to harassment and is contrary to public policy;**

**(e) It is in contravention of the applicant's constitutional right to freedom.**

30. According to **Bennett vs. Horseferry Magistrates' Court (1993) 3 All E.R. 138, 151, HL**, an abuse of process justifying the stay of a prosecution could arise in the following circumstances:

**a) where it would be impossible to give the accused a fair trial; or**

**b) Where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.**

31. Whereas the DPP derives his prosecutorial power both from the Constitution and the ***Office of the Director of Public Prosecutions Act*** and in exercise of that power does not require the consent of any person or authority to commence criminal proceedings, his powers must be exercised within certain laid down standards provided under the Constitution. See **Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565, & Koinange vs. Attorney General and Others [2007] 2 EA 256.**

32. There is also a duty cast upon the prosecutor to take into account and must exercise proper discretion on the evidence presented based sound legal principles. As was held by **Ojwang, J (as he then was) in Nairobi HCCC No. 1729 of 2001 - Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another:**

***“...policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously so obviously crafted to be self-serving. To deploy the State’s prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes.”***

32. In this case of **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** it was held that:

**“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before**

***instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.***

33. The 1<sup>st</sup> and 2<sup>nd</sup> respondent did not file any response to this Application, and are deemed to have conceded to the same. The factual evidence too does not prove ownership of the disputed portion of land and there exists independent evidence by the Agricultural officer, who states that the crops planted belonged to the Ex parte Applicant family. Given the peculiar circumstance herein, the Ex parte applicant has demonstrated that no reasonable and probable cause existed the basis upon which the 1<sup>st</sup> and 2<sup>nd</sup> respondents could mount a criminal prosecution and thus to sustain it would offend the court's sense of justice and propriety.

#### **D. DISPOSITION**

34. The upshot is that the notice of motion application, dated 30<sup>th</sup> January, 2025, has merit and the same is allowed in terms of prayer (1) thereof.

35. The costs of the suit are awarded to the Ex parte Applicant.

36. It is so ordered.

**Dated, signed, and delivered** in open court at **MARSABIT** this **20<sup>th</sup>** day of **JANUARY, 2026**.

**FRANCIS RAYOLA OLEL**  
**JUDGE**

Delivered on the virtual platform, Team this **20<sup>th</sup>** day of **JANUARY, 2026**.

**In the presence of: -**

**Mr. Ondari** .....Applicant

**Mr. Behialu** ..... Respondent

**Mr. Jarso** ..... Court Assistant