



**Kariuki v Director of Public Prosecutions & 3 others (Civil Appeal
E331 of 2024) [2026] KECA 203 (KLR) (6 February 2026) (Judgment)**

Neutral citation: [2026] KECA 203 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E331 OF 2024
W KARANJA, P NYAMWEYA & GV ODUNGA, JJA
FEBRUARY 6, 2026**

BETWEEN

GEORGE NJOROGE KARIUKI APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

**THE CHIEF MAGISTRATES COURT, CRIMINAL DIVISION 3RD
RESPONDENT**

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

*(Being an appeal from the judgement of the High Court of Kenya at Nairobi
(Chigiti J.) dated 15th March, 2024 in JR Misc. Application No. E086 of 2023)*

JUDGMENT

1. George Njoroge Kariuki, the appellant herein, implores us to overturn the judgment delivered by the High Court at Nairobi (Chigiti J.) on 15th March 2024 in JR. Misc. Application No. E086 of 2023, in which his application for an order of certiorari to quash the decision by the Director of Public Prosecutions and the Director of Criminal Investigations, the 1st and 2nd respondents herein, contained in a charge sheet dated 10th July 2024 to charge him in Milimani Chief Magistrate Court, Criminal Case No. E504 of 2023 - R vs Kevin Otunga & Collins Otieno and 30 others was dismissed. The appellant had also sought orders prohibiting the said respondents as well as the Chief Magistrate Court, Criminal Division and the Attorney General, the 3rd and 4th respondents herein, from proceeding with the prosecution, and from investigating, recommending the prosecution or proceeding with his prosecution and those of others charged with him in Milimani Chief Magistrate Court Criminal Case No. E504 of 2023.



2. The main ground for the application in the High Court was that the charges against the appellant and the others in Milimani Chief Magistrate Court Criminal Case No. E504 of 2023 arise from an eviction process that had been duly sanctioned by the Environment and Land Court (“ELC”) in Nairobi in ELC Misc. App. E050 of 2022 - George Njoroge Kariuki vs Sulemani Harunani & Karura Investments Ltd by a ruling delivered on 9th March 2023, in which it ordered that the appellant evict persons from his parcel of land known as L.R. Number 12422/119 and that the Officer Commanding Kasarani Police Division to provide security during the eviction exercise to ensure that law and order is maintained. The appellant gave an account of the proceedings in the ELC and Court of Appeal relating to the said order, and averred that the decision by the 1st and 2nd respondents to charge him was manifestly malicious and tainted with illegality and irrationality, for being in contradiction with the decision of the ELC which has not been set aside, and considering the fact that the appellant was acting on the strength of a court order in carrying out the eviction and based on documentation presented to court which the 2nd respondent now terms as forgeries.
3. The respondents opposed the application on the grounds that the orders sought by the appellant were misplaced and an abuse of the Court process and ought to have been pursued by way of a constitutional petition and not in a judicial review application; the Director of the Public Prosecutions (“DPP”) is a fair and impartial constitutional office holder empowered by Article 157 of *the Constitution* of Kenya, 2010 and had recommended prosecution because the evidential test, the threshold test and the public interest test had been met; the criminal charges were not brought with any ulterior motives nor was there any impropriety on the part of the 3rd respondent as it had a statutory duty to hear and determine matters brought before it with impartiality; the 3rd respondent was able to adjudicate over the matter fairly and the application if granted would usurp its adjudicatory mandate and would delay the criminal trial contrary to Article 50 (2) (e) of *the Constitution* of Kenya, 2010; the appellant did not demonstrate any illegality, irrationality and procedural impropriety on the part of the 3rd respondent or how the 3rd respondent acted without or in excess of powers conferred upon it by the law; and the appellant had failed to demonstrate that substantial injustice would otherwise result and he would not get a fair hearing at the trial Court.
4. Chigiti J., (hereinafter “the trial Judge”) after hearing the parties, found that the appellant had failed to prove that he is entitled to the orders sought and in particular, had not proven how the investigations and the criminal proceedings have been brought for ulterior motives or for achievement of some collateral, or how the trial court had acted illegally or without jurisdiction. Furthermore, that the fact that there exists a civil suit is not a bar to any criminal proceedings or investigations, and the victims had an interest in the outcome of the investigations and allowing the application would deny the complainants their right to fair hearing as guaranteed under Article 50 of *the Constitution*.
5. Aggrieved, the appellant filed an appeal in this Court and has raised nine
 - (9) grounds of appeal in his Memorandum of Appeal dated 17th April 2024 that challenge the findings by the trial Judge that the powers of the 1st and 2nd respondents were not used oppressively and disproportionately, that the investigations and criminal proceedings were not brought based on ulterior motives or for achievement of some collateral or based on illegality, irrationality and procedural impropriety; and that judicial review application will deny the complainants the right of fair hearing. We heard the appeal on this Court’s virtual platform on 4th March 2025, and learned counsel, Mr. Majimbo Georgiadis appeared together with learned counsel Mr. Ashford Mugwuku for the appellant; learned counsel Mr. O. J. Omondi appeared for the 1st and 2nd respondents, and learned counsel Mr. Munene Wanjohi who was holding brief for learned counsel Ms Leah Gathenya appeared for the 3rd and 4th respondents. The



said counsel highlighted their respective written submissions dated 25th February 2025, 28th February 2025 and 12th November 2024.

6. In commencing the determination of this appeal, we are mindful of the duty of this Court as a first appellate court, which was reiterated and set out in the decision of *Selle and another vs Associated Motor Boat Co. Ltd & Others* (1968) EA 123. We will therefore reconsider the evidence adduced at the trial court, evaluate it, and draw our conclusions. In addition, we will only depart from the findings by the trial court if they were not based on evidence on record; where the said court is shown to have acted on the wrong principles of law as was held in *Jabane vs Olenja* [1986] KLR 661, or where its discretion was exercised injudiciously as was held in *Mbogo & Another vs Shah* [1968] EA 93.
7. The issue before us is whether the trial Judge exercised his discretion judiciously in dismissing the appellant's application. The grounds upon which we can interfere with the trial Court's exercise of discretion were set out in the case of *United India Insurance Co. Ltd, Kenindia Insurance Co. Ltd & Oriental Fire & General Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd* [1985] eKLR as follows:

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

8. The appellant's advocates submitted that there was a ground to interfere with the trial Judge's decision because the decision to charge the appellant was commenced in the absence of factual foundation or basis with ulterior motives and malice, since he was arrested and charged only because of the outcome of the ELC ruling which declared him the proprietor of the suit property, which was explained in letters written to the 1st and 2nd respondents, and was against the standard required in making a decision to charge by the DPP. Reliance was placed on the Supreme Court case of *Silas Jirongo vs Soy Developers Ltd and 9 others* (2021) KESC 32 (KLR) where the Court dealt with the issue of misuse of powers by the DPP to institute criminal proceedings based on malicious complaints aimed at forcing a compromise on the part of the accused person. According to counsel, it was therefore, malicious for the 1st and 2nd respondent to charge the appellant for fraud relating to the suit property which was declared his by a court of competent jurisdiction, and the criminal case was aimed at pressuring him to relinquish his title to the suit property.
9. Furthermore, that the appellant's contention was not that a civil suit bars a criminal suit, an issue which was never pleaded or raised by the parties, but that the criminal suit emanated from a court-sanctioned eviction based on the ELC's ruling in his favour as the legal owner. In any event, that allegations that the appellant had forged documents relating to the suit property were raised by the 2nd respondent and dismissed in the ELC case. Lastly, that the trial court failed to recognize that the appellant as the legal owner was the victim, wrongly assumed the complainant in the criminal case was the victim, and failed to appreciate the prejudice that would befall him if the application were disallowed. Continuing criminal proceedings could lead to conviction and imprisonment, tainting his name irreversibly, despite clear evidence of his legal ownership of the property and his actions being based on a valid court order and a report by the National Land Commission.



10. In rejoinder, the 1st and 2nd respondent's counsel, while citing the decisions by the Supreme Court in *Silas Jirongo vs Soy Developers Ltd and 9 others* (supra) and *Dande & 3 others vs Inspector General, National Police Service and Others* (2023) KESC 40 eKLR, submitted that the fact that ongoing criminal proceedings are in all likelihood bound to fail, or that an applicant has a good defence to criminal charges is not a ground for halting the criminal proceedings if undertaken bona fide, and since that defence is open to the appellant to raise in the criminal proceedings itself. Further, the decision to charge was well founded in law and that though the trial Judge may not have taken the trajectory of cautiously examining the merits of the decision to charge, the evidence collected during the investigations justify the charges and was gathered even before the institutions of the civil cases. It was therefore not the case, as contended by the appellant, that the criminal proceedings was entirely an offshoot of an eviction process duly sanctioned by an order of the ELC, or that the decision to charge was based on ulterior motives or for the achievement of some collateral purpose.
11. Counsel also cited section 6 of the *Judicature Act* and the decision of the Supreme Court of Kenya in the case of *Michael Osundwa Sakwa vs the Chief Justice and the President of the Supreme Court of Kenya and 5 others* [2016] eKLR that the immunity accorded to the Judiciary by Article 160(5) of *the Constitution* only remains valid and insurmountable as long as its members are exercising their functions in good faith in the lawful performance of such judicial functions to submit that the 3rd respondent acted within the ambit of its jurisdiction and carried out its statutory duties in accordance with the law. Lastly, while referring to section 35 of the *National Police Service Act* and Article 157 of *the Constitution*, it was submitted that the power to prohibit criminal prosecution should be exercised with great care, and that in any event the provision of Article 50 (2) and (4) of *the Constitution* presumes the accused to be innocent until the contrary is proved, the appellant was accorded adequate time to prepare his defence, and he will have a right of appeal to the High Court and to this Court if need be.
12. We have considered the arguments put forth by the parties, and the singular issue before us is the import and legal effect of the orders of eviction granted by the ELC on the decision to prosecute the appellant for the charges preferred against him in Milimani Chief Magistrate Court, Criminal Case No. E504 of 2023 - R vs Kevin Otunga & Collins Otieno and 30 others. The outcome of this query, will determine the question whether the decision to prosecute the appellant was thereby illegal, irrational or malicious as claimed by the appellant. In this respect we note that the trial Judge, while citing various decisions on the duties of the police and trial court and section 193A of the Criminal Procedure Code, held that the appellant had failed to demonstrate how the National Prosecution Policy powers of the 1st and 2nd respondents had been used oppressively and disproportionately; the investigations and the criminal proceedings had not been brought for ulterior motives or for achievement of some collateral purpose; the fact that there exists a civil suit is not a bar to any criminal proceedings or investigations; and that the court was cognizant of the fact that there is need to uphold victims' rights and under a duty to promote access to justice which includes the rights of victims as highlighted under the *Victim Protection Act*.
13. These findings however do not appear to have been supported by an analysis of the evidence relied upon by the parties. We shall accordingly, in exercise of our duty as a first appellate court, proceed to undertake a fresh analysis of the respective parties' cases.
14. We commence our analysis by acknowledging the role of the courts in a judicial review application, which is to review the lawfulness or legality of a decision, enactment, action, or failure to act in relation to the exercise of a public function, and the court's jurisdiction in this regard is a supervisory one, rather than appellate. Therefore, even though the grounds for review may be similar to those of an appeal, and may involve both a process and merit review, ultimately the task of the court is to determine the legality or constitutionality of a decision, but not to re-take the decision itself. The remedies in judicial review are therefore fashioned with this end in mind.



15. Coming to the issue in this appeal, which is the legality of the criminal investigation and prosecution of the appellant, *the Constitution* has established institutions that deal with the criminal investigations and prosecution and set certain requirements in this regard. Article 243 establishes the National Police Service, and section 28 of the *National Police Service Act* further establishes the Directorate of Criminal Investigations (DCI) which shall be under the direction, command, and control of the Inspector-General. The Inspector General of the National Police is established under Article 245 which also vests the power to investigate crimes in the office, and by dint of Article 245 (4), no person may give a direction to the Inspector-General with respect to the investigation of offences or the enforcement of the law against any particular person or persons. It was in this regard held by the Supreme Court in *Dande & 3 others vs Inspector General, National Police Service and Others* (supra) that the Inspector General and the DCI have the mandate to perform multi-faceted functions as provided under articles 244 and 245 of *the Constitution*, and that Article 244(c) in particular requires the National Police Service to comply with constitutional standards of human rights and fundamental freedoms in the discharge of its mandate. Therefore, that courts should only interfere with the powers granted to the Inspector General and the DCI if the constitutional and statutory provisions are not adhered to or if the actions are illegal and unlawful.
16. As regards prosecution of criminal cases, Article 157 establishes the office of office of Director of Public Prosecution (DPP) and its functions and duties, which include the institution, undertaking, continuance and discontinuance of criminal proceedings before any court other than a court martial and in respect of any offence alleged to have been committed by any person. The key considerations in the exercise of the functions and duties of the ODPP were stated by the Supreme Court in *Dande & 3 others vs Inspector General, National Police Service and Others* (supra) as follows :
- “ 97. *The Constitution*, as can be seen above, provides an inbuilt limitation on the powers of the DPP under article 157(11) of *the Constitution* which provides that; ‘In exercising the powers conferred by this article, the Director of Public Prosecutions shall 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.’
98. Furthermore, article 157(10) of *the Constitution* anticipates the independence of the office of DPP in the performance of its constitutional obligation, providing that in the exercise of its powers or functions, it shall not be under the direction or control of any person. This is important as it protects the integrity of a criminal process.”
17. The appellant averred in this regard that despite being granted a court order to evict trespassers on the suit property, officers of the 2nd Respondent, led by one Inspector Guyo raided the said property on the day of the eviction exercise and proceeded to arrest the appellant and his team, and they were subsequently charged with offences relating to conspiracy to defraud, forgery and trespass in Milimani Chief Magistrates Court, Criminal Case Number E504 of 2023. The evidence that the appellant relied upon in this regard were the copies of the ruling delivered by the ELC (Wabwoto J.) on 9th March 2023 in ELC Misc. App. E050 of 2022 granting him orders to evict certain persons from the suit property, directions given pursuant to the rulings by both the ELC and this Court, a copy of the chargesheet, a copy of a letter dated 24th July 2023 by his advocates requesting the 1st respondent to review the said charges with a view withdrawing the chargesheet, and a copy of his complaint lodged with the 2nd respondent against Inspector Guyo for his misconduct.



18. The evidence provided by the appellant in the trial court was solely in support of the fact that a ruling was given by ELC in his favour authorising the subject eviction. In this respect, section 193A of the Criminal Procedure Code and various decisions of the courts, including the Supreme Court in *Silas Jirongo vs Soy Developers Ltd and 9 others* (supra) and *Dande & 3 others vs Inspector General, National Police Service and Others* (supra) have held that civil and criminal jurisdictions can run parallel to each other, and a criminal prosecution will only be quashed if it is being employed to perpetuate ulterior motives or to abuse of the process of the court in whatever manner. The question we therefore need to answer in the present appeal is whether the appellant's prosecution was being used to perpetrate an ulterior motive. The appellant in this respect urges that the criminal proceedings are meant to coerce him to relinquish his title to the suit property.
19. We have perused the ruling relied upon by the appellant, and are not persuaded that there was such a motive for two reasons. Firstly, the proceedings in the ELC arose from a miscellaneous application seeking orders of eviction, and the conclusion by the trial Judge when allowing the appellant's application was as follows:

“In conclusion, it is the finding of this Court that the applicant has been able to demonstrate compliance to the provisions of Section 152A, 1528, 152E & 152G of the Land Laws (Amendment) Act 28 of 2016 in so far as it relates to the procedure for moving the court while seeking eviction orders against a party...”

No finding was made by the Judge in the ruling in ELC Misc. App. E050 of 2022 as regards the propriety of the appellant's title and ownership of the suit property, which was not in any event the subject matter of the application, and therefore the ruling cannot be evidence in support of the appellant's averments as regards ulterior motives on the part of the prosecution.
20. Secondly, from the said ruling it is evident that the title to the suit property was contested, and the Judge did make observations in the ruling as regards the reliability and credibility of the various title documents produced by the parties in relation to the suit property, and referred to investigations that were being carried out in relation to the said titles, as set out in a replying affidavit filed by one Inspector Guyo as well as by the National Land Commission. It is therefore evident from the ruling that there is more than one title held in relation to the suit property, and that there were investigations being carried out in relation to the said titles. Accordingly, the ruling in ELC Misc. App. E050 of 2022 is of itself evidence that there was a basis for the charges brought against the appellant and others in the criminal proceedings in Milimani Chief Magistrate Court, Criminal Case No. E504 of 2023 - R vs Kevin Otunga & Collins Otieno and 30 others, arising from the multiple titles to the suit property, and investigations that had been carried out in relation thereto. These circumstances are clearly different from those in *Silas Jirongo vs Soy Developers Ltd and 9 others* (supra), wherein there were no multiple titles to the same property.
21. Lastly, it is notable that the appellant still has the opportunity to state his case and defence including his entitlement to the suit property in the criminal proceedings.
22. We are, therefore, not persuaded that the criminal prosecution of the appellant was with ulterior motive or in abuse of the process of Court, and the trial Judge did not err in the conclusions reached to this effect. We accordingly find this appeal not to have merit, and it is hereby dismissed with no order as to costs, given the circumstances giving rise to the appeal.
23. Orders accordingly.



DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF FEBRUARY, 2026.

W. KARANJA

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

