

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL, HUMAN RIGHTS & JUDICIAL REVIEW
DIVISION
APPLICATION NO. E001 OF 2025

REPUBLIC.....APPLICANT

-VERSUS-

SENIOR RESIDENT MAGISTRATES COURT,
MOMBASA.....1ST RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT
DIRECTOR OF CRIMINAL INVESTIGATIONS.....3RD RESPONDENT

ex parte;

RIAZ SHIRAZ HUSSEIN

JUDGMENT

1. The motion before court is dated 7 February 2025 and seeks judicial review reliefs of certiorari and prohibition. In particular, the applicant prays as follows:

“(a) That the Honourable Court be pleased to issue orders in the nature of Certiorari quashing the arrest and charging of the Applicant in Mombasa Magistrate’s Criminal Case Number E2128 of 2025 Republic vs Riaz Shiraz Hussein.

(b) That the Honourable Court be pleased to issue orders in the nature of prohibition bringing to an end the Mombasa Magistrate’s Criminal Case Number E2128 of 2025 Republic vs Riaz Shiraz Hussein.

(c) That the Honourable Court be pleased to issue orders in the nature of Prohibition stopping any further arrest, intimidation

harassment or in any way interfering with the Applicant's liberty with relation to this matter.

(d) That the Honourable Court be pleased to issue orders in the nature of Prohibition stopping any further arrest, intimidation harassment or in any way interfering with the Applicant's spouses, relatives or his businesses."

The applicant has also sought for an order on costs.

2. The application is based on a statutory statement 30 January 2025 and an affidavit sworn by Riaz Shiraz Hussein one even date, verifying the facts relied upon.
3. Riaz has sworn that he was arrested in September, 2024 by officers of the 3rd Respondent and, in a Miscellaneous Application No. E635 of 2024, the officers sought for more time to continue detaining him in order to conclude investigations.
4. The applicant opposed the 3rd respondent's application on the grounds that the transactions for which he had been arrested related to civil contracts entered into between the applicant and the complainant. According to the applicant, both he and the complainant had been long term business partners in the business of selling of motor vehicles.
5. In the course of their business relationship, the business partners differed when the complainant is said to have repossessed vehicles which he

supplied to the applicant. The applicant instituted court proceedings in the Meru Chief Magistrates' Court where he obtained injunctive orders against the complainant.

6. Notwithstanding the grant of injunctive orders, the complainant is said to have still seized the motor vehicles. Consequently, the applicant initiated contempt of court proceedings against the complainant. The court is said to have ordered the contemnor to surrender his passport to court and return the motor vehicles seized from the applicant.
7. It is then that the applicant instigated a criminal complaint against the respondent. The complainant reported to the police that the applicant had stolen his motor vehicles. Consequently, the applicant was arrested in Meru on 20 September 2024 and later transported to Mombasa on 21 September 2024.
8. Subsequently, the applicant was arraigned in Mombasa Chief Magistrate's Court on Monday 23 September, 2024. The police officers sought ten more days to detain the applicant pending conclusion of the investigations. The application was made in Mombasa Chief Magistrates Court Miscellaneous Application No. E635 of 2024.
9. The application for the applicant's continued detention was heard on merit in open Court at Mombasa. The court, according to the applicant, was persuaded that the issues between the complainant and the applicant were largely civil in nature and could be suitably resolved in a

commercial case as opposed to criminal proceedings. In any event, the parties were already involved in a civil suit that was underway. Nevertheless, the court admitted the applicant to a cash bail of Kshs. 50,000 pending the conclusion of the investigations.

10. Thereafter, the Office of the Director of Public Prosecutions at Mombasa wrote a letter confirming that the transactions between the applicant and the complainant were civil and could not warrant criminal sanctions. The 2nd respondent ordered for the release of vehicles that had been detained by police.

11. The applicant has sworn that although he paid the cash bail, the police Continued “*intimidating, threatening, harassing and instilling fear*” in the applicant and threatened to arrest him. For this reason, the applicant moved this Honourable Court in Miscellaneous Application No. E190 of 2024; Riaz Shiraz Hussein vs DCI Mombasa & 2 others. It is not clear from the affidavit what the applicant was seeking for but the application is said to have been allowed.

12. The police, in alleged utter contravention of the orders of court, arrested the applicant again during the Christmas festivities and arraigned him for plea taking on 27 December, 2024 where the applicant was ordered to pay execute a Kshs. 2,000,000/- bond or a cash bail of similar amount. It is the applicant’s case that the treatment accorded to him amounts to pure

witch-hunt where the police are being used to settle business disputes that are civil in nature.

13. In a further affidavit sworn by the applicant 26 March 2025, he has made reference to a replying affidavit sworn by Sergeant Allan Adalo on 25 February 2025. However, I have not been able to find this affidavit on the Case Tracking System (CTS) portal. All I gather from the portal as having been filed on behalf of the respondents are written submissions dated 8 July 2025 drawn by Ms. Anyumba, the learned counsel for the 2nd respondent.

14. Talking of submissions, it has been submitted on behalf of the applicant that the 2nd respondent has abused his powers in preferring charges against the applicant and in this regard, he has relied on **Maina & 4 others V Director of Public Prosecutions & 4 others (Constitutional Petition E106 & 160 of 2021(Consolidated)) [2022] KEHC 15 (KLR) (Constitutional and Human Rights) (27 January 2022)** where the court held that this Honourable Court can halt prosecution in certain instances.

15. It is the applicant's position that the office of the Director of Public Prosecutions, being a public office, must discharge its functions in a way that preserves public confidence in it. This requires impartiality, transparency and consistency in its decisions. The office, it is urged, cannot make decisions and resile from them at will without proper explanation backed by formidable evidence for the change of heart.

16. The applicant has submitted that the dispute between him and the complainant is for breach of contract; a fact that is said to have been admitted by the 2nd Respondent in his replying affidavit. In these circumstances, the applicant has relied on the *Maina & 4 others V Director of Public Prosecutions & 4 others (Constitutional Petition E106 & 160 of 2021(Consolidated))* case (supra), where the court is said to have held that it is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court. The court in that case is said to have further stated:

“This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations. We have no doubt in our minds that the belated involvement of the police in this purely civil dispute is an abuse of their power. The police should direct their energies and resources to prevention of crime which we all know is rampant in this country and is about to get out of control.”

17. For the same argument, the applicant has relied on **Kuria & 3 Others Vs. Attorney General (2002) 2 KLR 69** and urged that his is a proper case

for this this Honourable Court to quash the decision of the 2nd respondent to charge the applicant as the decision amounts to abuse of powers.

18. Ms. Anyumba, the learned counsel for the 2nd respondent has, in her submissions, urged that at the time the 2nd respondent wrote its letter which the applicant has heavily relied upon to question the charges against him, there was insufficient evidence and that is why the letter was clear that:

“...the decision to charge the suspect for the offence of stealing cannot be made at this point.”(Emphasis added).

19. Based on the subsequent evidence, the 2nd respondent determined that the ingredients of the offence of stealing by agent contrary to section 283 of the Penal Code had been established hence the prosecution of the applicant.

20. In any event, the investigation and subsequent prosecution of the applicant was sanctioned by this Honourable Court in Miscellaneous Criminal Application No. E190 of 2024.

21. While relying on section 193A of the Criminal Procedure Code, cap. 75, the 2nd respondent has urged that civil proceedings are not a bar to criminal proceedings, as a matter of course, and that the two jurisdictions can run side by side. In this submission, the 2nd respondent has relied on

my decision in **Alfred Lumiti Lusiba v Pethad Ranik Shantilal & 2 others [2016] eKLR** where I held, *inter alia*, that:

“The law is clear that the pendency of a civil suit is not a bar to criminal proceedings; it acknowledges the fact that the trial of the tortfeasor in a criminal prosecution need not be affected by the pending civil action against him. It is implied, therefore, that a civil suit cannot be stayed because of the prosecution of the tortfeasor for the obvious reason that the cause of action is neither rooted in the prosecution of the tortfeasor nor in his subsequent conviction.... the conclusion that one can draw from Section 193A of the Criminal Procedure Code together with the decisions of the learned judges in aforementioned cases is that both civil and criminal jurisdictions can run parallel to each other and that neither can stand in the way of the other unless either of them is being employed to perpetuate ulterior motives or generally to abuse of the process of the court in whatever manner.”

22. The 2nd respondent has also submitted that in reviewing the decision to charge the applicant, the 2nd respondent was exercising his powers as bestowed upon him under article 157 of the Constitution. According to the 2nd respondent, the prayers sought by the applicant against him merely

seek to curtail the 2nd respondent from exercising his statutory and constitutional mandate to prosecute a criminal offence defined in law, in particular, the Penal Code, cap. 63.

23. Again, under Section 35 of the National Police Service Act, it was the lawful duty of the 3rd Respondent to conduct criminal investigations and, in that regard, he was not under the command or direction of any person. It is submitted on behalf of the respondents that the applicant has not demonstrated that the respondents failed to act independently or acted capriciously, in bad faith or abused the process in any manner that warrants this Honourable Court's intervention.

24. The learned counsel for the respondents relied on the Supreme Court decision in **Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010))** where the Supreme Court provided guidelines to be considered when reviewing prosecutorial powers. To be precise, the Supreme Court held:

“The following guidelines were to be considered by courts when reviewing prosecutorial powers;

a. where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice; or

b. where it manifestly appeared that there was a legal bar against the institution or continuance of the proceeding, for example want of sanction; or

c. where the allegations in the first information report or the complaint taken at their face value and accepted in their entirety, did not constitute the offence alleged; or

d. where the allegations constituted an offence alleged but there was either no legal evidence adduced or evidence adduced clearly or manifestly failed to prove the charge.”

25. It is the respondents' position that the investigations on the complaint lodged by the complainant yielded sufficient evidence to warrant the arraignment and prosecution of the applicant. Relying on the decision in **Republic v Commissioner of Police & another ex parte Michael Monari & another [2012] eKLR**, it is urged that the trial court ought to be given opportunity to assess the evidence presented by the prosecution to decide whether indeed the applicant is guilty of the offence or offences with which he is charged.

26. Having considered the application and the submissions filed by counsel for the applicant and the respondent in support of their respective clients' cases, it is clear to me that the facts, the basis upon which the applicant has been charged are not in dispute. It is also not in dispute that there is a

civil case between the applicant and the complaint over the same issues that form the transaction upon which the prosecution against the applicant was mounted.

27. In considering the application, my attention has been drawn to the ruling delivered by this Honourable Court (Kagendo, J.) on 19 December 2024 in an application filed in the criminal Division of this Honourable Court at Mombasa, against the respondents. The ruling reveals that the pleadings and the evidence in the application, the subject of the ruling, are similar to the pleadings and evidence that forms the basis of the instant motion.

28. To begin with the court, at the commencement of its ruling, the court reproduced the prayers on the face of the application and the provisions of the law upon which the application was filed. It noted as follows:

“1. This Honourable Court is called to determine the Notice of Motion application dated 26th September, 2024 brought under the dint of Article 10,21(1),22(1),23,28,29,47(2),49(1),159(2), and 244(C) of the Constitution of Kenya, Section 123 of the Criminal Procedure Code And other enabling Provisions of the Law by the Applicant.

2. The Applicant sought the following orders: -

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4. That the Honourable Court be pleased to order that the Kshs. 50,000 deposited by the Applicant in Mombasa Chief Magistrate's Criminal Miscellaneous Application Number E616 of 2024 be used as anticipatory bail pending any investigations by the respondents.

5. That the Respondents and all police officers subordinate to them be restrained by an order of injunction from arbitrarily summoning, arresting, incarcerating and/or interfering with the Applicants freedom of movement in relation to the interactions to the trade disputes between the Applicant and the Interested Party herein.

6. That the costs of this Application be provided for.”

29. The court then proceeded to lay out the applicant's case which I purpose to reproduce here to the extent that the ruling demonstrates that the application before the court is on all fours with the applicant's case in the instant motion. The ruling reads as follows:

“7. The Application is supported by the applicant's affidavit wherein he avers that:-

8. The Applicant and the Interested Party have been long term business partners dealing in sale of motor vehicles.

9. The Applicant and the Interested Party differed in their business endeavors whereby the Interested Party whimsically took away the motor vehicles he had supplied to the Applicant.

10. The Applicant instituted a civil suit at the Chief Magistrate's Court at Meru whereby he obtained injunctive orders stopping the Interested Party from seizing the motor vehicles from the Applicant herein.

11. Besides the issuance of the injunction, the Interested Party never complied with the orders of Court but instead seized the motor vehicles in contempt of the orders of Court.

12. The defiance forced the Applicant to institute an Application for contempt against the Interested Party. Court went ahead to order that the contemnor (the Director of the Interested Party) surrenders his passport in court and the seized motor vehicles be returned to the Applicant forthwith in compliance with the orders of injunction issued.

13. Having sensed defeat, the Interested Party now resorted to the use of Police to intimidate and harass the Applicant.

14. The Interested Party now changed tune and informed the Police that the Applicant had stolen his motor vehicles causing

the police to arrest the Applicant at Meru on 20th September, 2024 and was later transported to Mombasa on 21st September, 2024.

15. The Applicant was eventually arraigned in Mombasa Magistrate court on Monday 23rd September, 2024 where the Police through an Application sought for additional ten days to detain the Applicant in order to carry out investigations.

16. The Police Application for the continued detention of the Applicant was heard on merit in open Court and court was persuaded that the problems between the Applicant and the Interested Party were largely civil in nature which would be suitably resolved in a commercial case as opposed to criminal proceedings. In any event, the parties were already involved in a civil suit that was already ongoing.

17. The Mombasa court nevertheless admitted the Applicant to a cash bail of Kshs. 50,000 pending the said investigations and any incidentals thereto.

18. Besides the payment of the said cash bail, the police and the interested party had continued to intimidate, harass and install fear in the Applicant issuing threats of arresting him.

19. The Applicant is now a man under siege living under immense fear with his security under threat.

20. The Police and the Interested Parties are now misusing the criminal justice to settle commercial disputes which are civil in nature that can be remedied through an award of damages as opposed to Criminal sanctions.

21. An honest analysis of the impasse herein, clearly reveal that the Police and the Interested Party are not entirely interested in justice but are simply want to maliciously harass the Applicant herein.

22. Unless the court allows this Application and issues urgent orders, the Police are likely to arrest the Applicant again on Friday, as it has been their culture and modus oparendi.

23. Whereas the Police are empowered to carry out investigations, the same ought to be carried out judiciously paying respect to the rule of law and any court orders.

24. Unless this Application is heard expeditiously, the Respondents may arrest the Applicant reducing this Application into an academic exercise in futility.

25. From the face of this Application, the Applicant herein has a prima facie case with high chances of success.

26. The Respondents herein shall suffer no prejudice if the orders sought herein are issued expeditiously.

27. The actions of the Respondents clearly indicate that they have no respect for the letter and spirit of the Constitution and the rule of law but pay homage to the law of the jungle. Clearly, they have expressed their defiance of the orders of Court.

28. The actions of the Respondents herein are absurd, unreasonable, oppressive and vindictive.

29. The actions of the 1st and 2nd Respondents are not only outrageous but also capricious and whimsical.

30. The actions of the Respondents clearly indicate that they have no respect for the spirit of Constitution and the rule of law. They have overthrown the Constitution and ushered in lawlessness and anarchy.

31. The acts of the Respondents are not only outrageous but also criminal, dickenish, capricious and whimsical.

32. This Honourable court is vested with jurisdiction and powers under the law to grant the orders sought ex debito justciae (sic).

33. It is only fair and just that the Application be allowed and prayers sought granted in their entirety.”

30. Faced with the same facts and pleadings, as in the instant case, the learned judge came to the following conclusion:

“1. It is also not disputed that there is a civil dispute in court and the applicant had been presented before The Chief Magistrate court Mombasa where he was granted bond. Despite those proceedings, the officers were threatening to arrest and detain him. It has not been alleged that he is likely to interfere with investigations in any way. Further, he deposes that he is ready to cooperate with the investigators. The subsequent threats are suggestive of high handedness and abuse of power hence a breach of the rights of the Applicant. Whenever there is such a threat, the court must step in.

2. On basis of the above, the court hereby grants anticipatory bail to the applicant on the following terms;

3. The Applicant is hereby admitted to anticipatory bond.

4. The Cash bail of Kshs. 50,000 which was deposited by the Applicant in Mombasa Chief Magistrate's Criminal

Miscellaneous Application Number E616 of 2024 be used as anticipatory bail pending any investigations by the respondents.

5. The Applicant is hereby ordered to avail himself in the presence of his advocate for interrogation by the officers of the respondents when and as requested and cooperate with the investigators. This should be at mutually agreed dates and between the hours of 9.00AM and 4.PM.

6. The police should finalize their investigations and make a determination whether to charge the applicant within a period of six months from today.

7. If such a decision is made, he should be issued with summons to attend the plea court.”

31. Thus, the arguments which the applicant raised in the application no. E190 of 2024 are the same arguments that he has proffered in the instant application. Of particular relevance to the instant application is the fact that despite the applicant having prayed that “...*the Respondents and all police officers subordinate to them be restrained by an order of injunction from arbitrarily summoning, arresting, incarcerating and/or interfering with the Applicants freedom of movement in relation to the interactions to the trade disputes between the Applicant and the Interested Party herein*”, the court ruled that the applicant could still be

prosecuted if based on the evidence that the respondents had obtained, such a prosecution was viable.

32. This is what I understand the learned judge to have meant when she ruled that:

“6. The police should finalize their investigations and make a determination whether to charge the applicant within a period of six months from today.

7. If such a decision is made, he should be issued with summons to attend the plea court.”

33. Without delving much into the question whether the applicant could be prosecuted against the background of his business relationship with the applicant and the 2nd respondent's initial impression of the dispute between the applicant and the complaint, I would opine that, since this Honourable Court has already ruled that it was possible to arraign the applicant, for whatever charges the 2nd respondent would come up after investigations, it is not open to the same court to come to a contrary opinion in the instant suit considering that it is faced with the same evidence, pleadings and arguments that informed the court's previous decision. Allowing the applicant's application in these circumstances would be tantamount to sitting on an appeal on the decision delivered by this Honourable Court on 19 December 2024. This, the court cannot do.

34. For this reason, I find and hold the applicant's application to be misconceived and an abuse of the process of this Honourable Court. It is hereby dismissed. I make no order as to costs.

Signed, dated and circulated on the CTS on 20 February 2026

Ngaah Jairus

JUDGE