REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW MISC. APPLICATION NO. E.017 OF 2026

PATRICK MUTUNGA TITUS……....APPLICANT
VERSUS
INDEPENDENT POLICING OVERSIGHT AUTHORITY…….....1ST RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS…...2ND RESPONDENT
GODWIN MWASHUKE MJOMBA……..…...INTERESTED PARTY

RULING ON LEAVE TO APPLY

1. The chamber summons dated 6/2/2026 seeks leave of this Court to apply for judicial review Orders of certiorari to remove into this Court and quash the decision of the respondents herein IPOA and the DPP to charge the applicant with an offence of murder or any other charges against the applicant as may be registered and more specifically, the murder charge registered vide Makadara High Court in **HCCR E007 of 2026, Republic versus Patrick Mutunga Titus and Godwin Mwashuke Mjomba** for alleged fatal shooting of **Shukri Adan Ibrahim** on the 11th January, 2026.
2. The applicant also prays that pending the hearing and determination of these proceedings, there be stay of the taking of plea in the murder charge at Makadara High Court Scheduled for 17/2/2026 which is tomorrow.
3. The application was filed under certificate of urgency on 6th February 2026 and this Court directed the applicant to serve the Respondents and Interested

Party for interpartes hearing today, with further directions on the filing of responses.

4. All parties complied with the Court's directions and filed responses.
5. The application was heard this morning by way of oral submissions.
6. According to the applicant, and relying on his Sworn affidavit and the grounds in the statutory statement, there is no basis upon which he is being charged with the offence of murder since the arms movement register shows that all the ammunitions that he was given were intact and that the autopsy report shows that the deceased died of a single fatal shot in the head. That although he had a gun with him, lawfully issued to him, he never used it to shoot the deceased and therefore the prosecution and IPOA have no basis upon which to charge him with the offence of murder.
7. It is asserted that the case involves investigations which have been concluded and that in the absence of any evidence of his involvement in the shooting of the deceased, the decision to charge the applicant is abuse of powers of ODPP and legal process. The applicant relies on the Supreme Court case of **praxidis Namoni Saisi case.** See paragraph 82.
8. He contends that the decision to charge him is unreasonable as there is no legal evidence manifestly to prove the charge of murder against him.
9. Further reliance is placed on **Dande vs. I.G & Others, SCOK** – at paragraph 100 of the decision on when the court can be called upon to review the decision to charge.

10. According to the applicant, th Firearm Register shows that the applicant never discharged any ammunition to shoot anyone and that he returned or surrendered the firearm with all its 30 rounds of ammunition intact.
11. It is contended that the applicant does not have to go through a long process of trial when there is no evidence that he was in any way involved in the shooting of the deceased Shukri Adan Ibrahim.
12. A prayer for stay of the criminal proceedings was sought, to protect his rights and to enable him prosecute the substantive motion.
13. Opposing the application, the 1st respondent IPOA filed a replying affidavit sworn on 13th February, 2026 by Ibrahim Shunu a Principal Investigator with IPOA. The affidavit sets out the statutory and constitutional mandates of the 1st respondent to among others, investigate complaints against the members of the national police service in matters indiscipline or criminal offences and to investigate into deaths resulting from actions of the police and to gather any information necessary during such investigations and recover reports and or documents to ensure comprehensive independent investigations.
14. That on 12th January 2026 the IPOA received information of alleged unlawful shooting of a civilian by police officers and so it embarked on suo moto investigations by recording statements of prospective witnesses and gathered relevant documents relating to the shooting of the deceased.
15. That the 1st respondent also recorded statements from the applicant herein and the interested party on 15th January, 2026 before recommending that the

two be jointly charged with the murder of the deceased, which recommendation the DPP concurred with in accordance with Article 157(6) (a) of the Constitution. That therefore the course of justice should be left to take place since the murder charges have been registered at MAKADARA High Court vide HCC E007 of 2026 since this court is not a court to determine the innocence or otherwise of the applicant or the interested party but with the decision-making process.

16. That the applicant is wrongly invoking jurisdiction of the criminal trial court before this Court which invitation should be declined.

17. In the oral submissions by Mr. Langat Counsel for the 1st respondent, and relying on the Replying Affidavit sworn on 13/2/2026 by Ibrahim Shunu a Principal Investigation Officer of the IPOA it is submitted in reiteration of the depositions above, setting out the statutory mandate of the 1st respondent under **IPOA Act** and the investigations undertaken by the 1st respondent and recommendations submitted to ODPP who made a decision in accordance with Article 157 of the Constitution.

18. According to the 1st respondent, the central issue is not about innocence or guilt of the applicant or sufficiency of evidence before this court but whether the decision-making process was lawful. He relied on Court of Appeal decision in **Municipal Council of Mombasa vs Umoja Consultants** paragraph 8 and R **vs PPRB & 2 Others exparte Rongo University** at paragraph 30.

19. Further, that the applicant had not demonstrated the three grounds for judicial review namely, illegality, irrationality and procedural impropriety (3 Is) and abuse of power. He maintained that the issues raised herein can be raised in the trial court where the applicant enjoys the right to fair trial.
20. Accordingly, it is submitted that these judicial review proceedings undermine mandates of the Respondents granted by the constitution and the law and that since the threshold for Judicial Review intervention is not established, the application should be dismissed.
21. The 2nd respondent DPP filed a replying affidavit sworn on 12/2/2026 by Ann Mugambi, opposing the application. Brief written submissions were also filed to augment the oral submissions.
22. In the replying affidavit which was relied on in the oral submissions word for word, the 2nd respondent deposes that the two police officers being the applicant and the interested party were both on duty on the material day when the deceased was shot dead and that their respective accounts as to what transpired was contradictory, an indication that they were trying to cover up for each other, compared to statements from independent witnesses. That the statements by the applicant and interested party are not credible and that the two are the prime suspects in the murder incident.
23. That these proceedings are filed in bad faith, are misconceived and abuse of court process and meant to defeat the cause of justice.

24. The 2nd respondent defends the role of the 1st respondent as mandated by IPOA Act specifically under section 6. That no excess of power on the part of DPP has been demonstrated as DPP acted independently in the decision-making process in the public interest and not any other considerations.
25. That the matters raised herein can be addressed by the trial court which is best suited to deal with quality or sufficiency of evidence gathered and adduced in support of the charges. That there is no evidence of abuse of court process to warrant interference by this court.
26. The 2nd respondent denies any malice in mounting the charges against the applicant and that the 2nd respondent had not been shown to have lacked authority or acting in excess of jurisdiction or departed from the rules of natural justice or that it acted unlawfully.
27. The 2nd respondent urged this court to dismiss the application.
28. The above depositions were reiterated by Mr. Makori in his oral submissions asserting that the applicant was involved in the shooting, that he was at the scene of the shooting and witnessed what transpired. That the decision to charge the applicant was proper and informed by sufficiency of evidence on record, public interest and not any other considerations.
29. That no sufficient grounds have been advanced to warrant grant of the orders sought, arguing that the application is premature and an abuse of court process.

30. In a rejoinder, Mr. Migele for the applicant submitted relying on paragraph 75 of the **Praxidis Namoni Saisi case** on merit review. On the DPP's submissions of contradictory evidence, counsel submitted that the contradictory evidence is not annexed and that what the applicant had presented is uncontroverted.

31. He reiterated that Page 28 of Firearm Register item 13 shows that the applicant was issued with a firearm with 30 rounds of ammunitions and that on 15/1/2026, four days later it shows that the same firearm had all the 30 rounds of ammunition while the postmortem report annexed to the supplementary affidavit sworn on 13/2/2026 says the death was by one single shot hence there is no contrary evidence. He prayed for the orders sought.

Analysis and determination

32. I have considered the application for leave and stay, the grounds, statutory statement and annextures together with the supplementary affidavit. I have also considered the responses filed by the respondents and the oral submissions made this morning by the respective parties' counsel.

33. The main issues for determination are whether the leave sought should be granted and secondly, whether leave if granted should operate as stay of the criminal charges already mounted or intended to be mounted by the prosecution on advice from the IPOA, against the applicant herein Patrick Mutunga Titus.

34. It is important to note that the interested party has not responded to these proceedings and that therefore, any decision reached by this court in these proceedings will in no way prejudice or benefit him as an individual.

35. Additionally, I observe that parties argued the application for leave as if they were arguing the substantive motion. The parameters are different.

36. The requirement for leave under Order 53 of the Civil Procedure Rules and sections 8 and 9 of the law reform Act was explained by a three judge bench comprising Bosire, Mbogholi-Msagha & Oguk, JJ **in Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** where the Court held that it is supposed to exclude frivolous vexatious or applications which prima facie appear to be abuse of the process of the Court or those applications which are statute barred.

37. Similarly, in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321, Nyamu J** (as he then was) held that leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralyzed for months because of pending court action which might turn out to be unmeritorious. **See also Republic vs. The P/S**

Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353.

38. In **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996** Waki, J (as he then was), on the other hand, stated as follows on the need for leave to apply:

> ***"The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived… Leave may only be granted therefore if on the material available the court is of the view, without going into <u>the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review.</u> It is an***

exercise of the court's discretion but as always it has to be exercised judicially".

39. This position was confirmed by the Court of Appeal in **Meixner & Another vs. Attorney General [2005] 2 KLR 189** where the Court held that the leave of the court is a prerequisite to making a substantive application for judicial review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves an exercise of judicial discretion.

40. The circumstances that guide the grant of leave to apply for judicial review remedies were enumerated in **Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** as follows:

"The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter on which the Court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power…the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter… It is not the absoluteness of the discretion nor the authority of 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. In the instant appeal, it is of no consequence that the Attorney General has absolute discretion under section 11(1) of the Act if in its exercise the appellant's legal rights or interests were affected. The applicant's complaint in the High Court was that this was so and for that reason he sought leave of the court to have it investigated. It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the matter of his complaint. If he fails to show, when he applies for leave, a prima facie case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers…In this appeal, the issue is whether the appellant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of the Act was brought into question. Without a rebuttal to these allegations, the appellant certainly disclosed a prima facie case. For that, he should have been granted leave to apply for the orders sought."

41. In **R vs. Communications Commission of Kenya & 2 Others Ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199,** the Court of Appeal opined that leave should be granted if, on the material available, the Court considers, without going into the matter in depth, that there is an arguable case for granting leave.

16. similarly in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK),** the Court stated:

> ***"Application for leave to apply for orders of judicial review are normally ex parte and such an application does restrict the Court to threshold issues namely whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the Court's discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review***

remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in court instead of denying him….Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megarry, J in the case of John vs. Rees [1970] Ch 345 at 402. In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration."

42. It is therefore clear that the grant of leave to commence judicial review proceedings is not a mere formality and that leave is not granted as a matter of course, where a party approaches the court under Order 53 of the Civil Procedure Rules and sections 8 and 9 of the Law Reform Act. The applicant for leave is under an obligation to show to the court that he/she has ***a prima facie arguable*** case for grant of leave. Whereas he or she is not required at that stage to go into the depth of the application, he/she has to show that he/she has not come to court after an inordinate delay and that the application is not frivolous, malicious and futile.

43. On whether leave to apply should operate as stay, Order 53 1(4) of the Civil Procedure Rules provides:

4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs,

operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.

44. Thus, the grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise Order 53 Rule 1 (3) and (4) leaves the issue of stay to the discretion of the Judge to deduce from the nature of the application.

45. The question is whether the applicant herein has established an arguable case for consideration or inquiry at the substantive stage. The applicant from the statement recorded with the 1st respondent annexed to his verifying affidavit, concedes that he was indeed at the scene where it appears the deceased was fatally injured by a gun shot. He does not deny being in possession of the gun which had been lawfully issued to him for the day patrol on 10th January 2026, as per the firearm movement register which he has annexed to his verifying affidavit. He also does not deny being in company of his colleague, the interested party herein Godwin Mwashuke Mjomba, who was equally armed as the two are undeniable police officers who were on duty on the date and at the place where the deceased was allegedly shot dead.

46. The firearms movement register for the issuance of the firearm to the applicant and interested party for 10/1/2026 at 1800hrs shows that his

firearm had 30 rounds of ammunition which were all accounted for after the incident and that he never shot at or discharged any of them and there is no contrary evidence. There is also evidence of a post, mortem report annexed to his supplementary affidavit showing that the deceased died of a single gunshot in the head.

47. The interested party on the other hand was issued with 25 rounds of ammunition, of a different calibre from those of the applicant. When the interested party's firearm was returned after the incident, it had 19 rounds of ammunition.

48. The applicant contends that the charge against him is unwarranted and subjecting him to prosecution for murder is unnecessary since there is on the face of it, exculpating material.

49. Without delving into the merits of the intended proceedings and the criminal charges, and having perused the documents filed and the submissions, I find that the applicant has an arguable case to warrant intervention by the court through judicial review. The claims in my view, are not frivolous or vexatious on the face thereof.

50. However, and for avoidance of doubt, the fact that the applicant has made a *prima facie arguable* case does not mean that his case before this court must succeed. Additionally, the fact that he may not have done the shooting does not mean that no other offence could have been committed. This court finds

that the applicant has only established a prima facie case as far as the charge of murder is concerned.

51. I observe that the applicant could still have elected to approach this Court by way of Originating motion under the Fair Administrative Action Act, which implements Article 47 of the Constitution that guarantees every person the right to fair administrative action and which provisions do not require leave to apply. The court would not have any opportunity to decide at the preliminary stage whether the application is frivolous or vexatious until the parties are heard on merit, noting that judicial review is now a constitutional remedy under Article 23 of the Constitutional, for violation of constitutional rights.

52. The applicant in my view has established that he has an arguable case to be considered at the substantive stage. This is not to say that an arguable case is one that must succeed.

53. More so, Article 50(1) of the Constitution guarantees every person the right to a fair hearing and in that regard, to (1) have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

54. Having found that the application is not frivolous or vexatious, I grant leave to the applicant to file judicial review application challenging the decision of the DPP as advised by IPOA to charge the applicant with the offence of murder for the fatal shooting of the deceased Shukri Adan Ibrahim.

55. The main motion shall be filed and served within 7 days of today in a substantive judicial review file as this file is a miscellaneous one. The applicant shall only file a notice of motion, as all other supporting material and documents as filed herein shall form part of the main file as stipulated in Order 53 Rule 4 of the Civil procedure Rules.

56. On whether leave so granted should operate as stay of prosecution and the impending plea taking, I observe that judicial review proceedings take a shorter time than the criminal cases once initiated. However, in this case, the applicant has demonstrated, prim facie, at this stage, that unless stay is granted, if his prosecution proceeds, then he will be prejudiced if this challenge is successful and the criminal prosecution murder has progressed.

57. I further find that no prejudice will be suffered by the State and the family of the deceased as the applicant can still be prosecuted for murder if this court finds that his intended application has no merit, noting that the matter herein shall be fast tracked.

58. In the premises, I hereby hold that the leave so granted shall operate as a stay of taking plea of the applicant herein in Makadara High Court CR Case No. E007 of 2026 and that his prosecution if at all for the charge of murder as intended, shall await the hearing and determination of these proceedings which shall be fast tracked.

59. I make no orders as to costs.

60. This file is closed.

Dated, Signed and Delivered at Nairobi virtually this 16th Day of February, 2026

R.E. ABURILI
JUDGE