

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR. NO. E252 OF 2025

INSTA-PUMPS ENGINEERING LTD..... 1ST
APPLICANT
JOHN NGUNDO GOSHO 2ND
APPLICANT

VERSUS

OFFICE OF DIRECTOR OF PUBLIC PROSECUTION
..... RESPONDENT

JUDGMENT

1. The Application that is before this court for determination is the one dated the 14th August, 2025 wherein the Applicant is seeking the following orders: -
 - 1) That this Honourable Court be pleased to issue an order ***Certiorari*** to bring into this Honourable Court for purposes of being quashed the decision of the **DIRECTOR OF PUBLIC PROSECUTION** and **THE DIRECTORATE OF CRIMINAL INVESTIGATION** to charge and prosecute the 1st Applicant at the Chief Magistrates Court in Makadara or any other court on the Count of Obtaining Money by False Pretense;

- 2) That this Honourable Court be pleased to grant the ***Exparte*** Applicant leave to apply for an Order of Prohibition directed at the Respondents prohibiting any further proceedings against the ***Exparte*** Applicant in the Chief Magistrates court in Makadara or any other court and prohibiting the 1st and 2nd Respondents from instituting further charges or criminal proceedings against the ***Exparte*** Applicant in respect of obtaining money by false pretense;
- 3) That the cost of this Application be provided for.

The Applicant's Case;

2. It is the Applicant's case that he and the 2nd Applicant sold a house to the 3rd Respondent on condition that the bank that had a charge over the house would discharge the charge.
3. Parties entered into a sale agreement to guide the said transaction. Subsequently the bank refused to discharge the charge generating problems for the Applicants.
4. The Applicants offered to refund the consideration, which the 3rd Respondent turned down the offer and reported the matter to the police.
5. It is his case that the police upon considering the issues referred the matter for alternative dispute resolution. That failed culminating in the decision to charge the Applicant with the offence as set out in the charge sheet.

6. The Applicants are aggrieved, and they maintain and believe that the decision to charge is driven by malice and the same should be quashed.

The Applicants' Submissions;

7. The Applicants submit that this Court can intervene where criminal proceedings are used for ulterior motives or to settle scores in civil/commercial disagreements.
8. Reliance is placed in the case of **Kuria & 3 Others v Attorney General [2002] 2 KLR 69** where the Court held that:

“A criminal prosecution which is commenced in the absence of proper factual foundation or legal basis is suspect for ulterior motives and is an abuse of the court process.”

9. The court further stated that;

“It cannot be gainsaid that the court has the power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its processes does not degenerate into tools for personal score-setting or vilification on issues not pertaining to that which the system was even formed to perform.

A stay (by an order prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie on society's senses of fair play and decency and/or where the proceedings

are oppressive or vexatious, see Keyowski v R (1988) 62 CR (3d) 349.

Kuloba J in Floriculture International HC Misc. Civil App No 114 of 1997 warned, which warning I would concur with, that the machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the courts') independence and impartiality (as per s. 77(1) of the Kenya Constitution in relation to criminal proceedings and s. 77(9) for the civil process). The invocation of the law, by whichever party, in unsuitable circumstances or for wrong ends must be stopped as in these instances, the goals for their utilization is far from that which the courts indeed the entire legal system is constitutionally mandated to administer, See Kangwana v Attorney General HC Mis. App No 446 of 1995 per Khamoni J.

In the instant case the criminal prosecution is alleged to be tainted with ulterior motives, namely to bear pressure on the Applicants in order to settle the civil dispute. It is further alleged that the criminal prosecution is an abuse of the court process epitomized by what is termed as selective prosecution by the Attorney General.”

10. Reliance is also placed in the case of **Republic v Chief Magistrate’s Court at Mombasa Exparte Ganijee & Another [2002] 2 KLR 703** where the Court stated that criminal proceedings should not be used as a “pawn in civil disputes.”
11. In **Republic v Attorney General & Another Exparte Kipngeno Arap Ngeny [2001] eKLR**, the Court held that the Court’s intervention is justified where prosecution is “oppressive, vexatious and an abuse of power.”
12. They submit that the 3rd Respondent is attempting to use the criminal justice system to compel specific performance or secure financial gain not provided in the Sale Agreement.
13. Continuous harassment, threats of arrest, and attempts to coerce payment—including demand for interest and additional sums—point to an extortion motive.
14. They submit that the 1st Respondent (DPP) initially declined to charge the 1st Applicant, referred the matter to ADR, and acknowledged its civil nature. Charges were only preferred after pressure from the 2nd and 3rd Respondents, demonstrating clear bad faith.
15. On another aspect, the Applicants submit that a valid sale agreement dated 12 November 2024 existed which clearly provided that the Completion was conditional upon issuance of a Discharge of Charge by Bank of Baroda. The Bank refused to issue the discharge unless the market value was paid.

16. The Applicants opted to refund the deposit, and have already made substantial repayments. The 3rd Respondent declined ADR and instead filed a complaint to the DCI.
17. They submit that no element of *mens rea*, fraud, or false pretenses has been shown. There was no false representation and no intention to defraud.
18. Section 312 of the Penal Code defines “obtaining by false pretense” as requiring three main ingredients; a false representation of existing fact, knowingly made and with intent to defraud.
19. The transaction herein involved a valid written agreement, exchange of correspondence between Advocates, disclosure of the charge and attempts at refund. Courts have consistently held that criminal law should not be invoked merely because one party is dissatisfied with a contract.
20. In **Exparte Floriculture International Limited High Court Misc.144 of 1997**, the following statements were made;

“Proceedings taken in bad faith or circumstances yielding an inference that they were up to no good. Criminal law is not to be used oppressively to punish acts which in truth might be technically a breach of the criminal law but which contain no real vice and which can only be best handled under a process other than the criminal process namely any of the different systems of civil remedies. The existence of other remedies which have either have already been unsuccessfully sought or

which may be open and are less drastic and stigmatic than the criminalization of an otherwise civil dispute is indicative of improper and ulterior purposes.

....it is an abuse of criminal process for a person to launch criminal proceedings against the other, in civil matters which are genuinely disputed on substantial grounds by that other person and the civil dispute cannot be reasonably ventilated and decided with a fair finality in the criminal process.”

- 21.** Article 47(1) of the Constitution guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. Section 4(3) of the Fair Administrative Action Act demands notice and an opportunity to be heard before an adverse decision is made.
- 22.** They invite the court to intervene since the director of public prosecution’s actions amount to unreasonable and unlawful use of their prosecutorial powers.

The 3rd Respondent Case;

- 23.** It is his case that the Exparte Applicants falsely pretended that they were in a position to sell to him a residential apartment known as Apartment Number 207 Morning Side Heights erected on Land Reference Number 8393/38, Nairobi through the Sale Agreement dated the 12. 11 .2024.
- 24.** It is its case that the Applicants failed to discharge the charge subsisting over the subject property and refused to hand over vacant

possession to him even after he had paid the purchase prompting him to report the matter to the police.

- 25.** The 1st Exparte Applicant was to be arraigned and charged in court on the 1 July, 2025 before the 1st Respondent deferred the said decision for thirty (30) days so as to give the parties room to explore Alternative Dispute Resolution (ADR) towards resolving matter at hand.
- 26.** It is his case that Article 47(2) of the Constitution, the 1st Respondent is only required to give proper reasons as to why it intends to carry out the administrative action of charging the Exparte Applicants within the purview of the evidentiary threshold and public interest as relates to this matter.
- 27.** Section 193A of the Criminal Procedure Code allows him to pursue concurrently both civil and criminal proceedings, and in the instant case, the decision by the 1st Respondent to charge was exercised responsibly and independently.
- 28.** Article 157 (11) of the Constitution was exercised giving due regard to public interest and fair administration of justice and the 1st Respondent did not abuse the legal process while preferring the charges against the Exparte Applicants.

The 3rd Respondent's Submissions;

- 29.** The 3rd Respondent's submits that the Exparte Application is devoid of merit.

30. The 1st Exparte Applicant was to be arraigned and charged in court on the 11th July, 2025 before the 1st Respondent deferred the said decision and granted the Exparte Applicants thirty (30) days to allow both parties to explore Alternative Dispute Resolution (ADR) mechanism towards resolving the criminal matter at hand.

31. Reliance is placed in the case of **Republic vs Kenya National Examination Council Exparte Gathenji & Others Civil Appeal NO. 266 of 1996**, where the Court of Appeal stated inter alia:

“An order of certiorari can only quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not adhered to or any other reasonable cause. It is trite law that the remedy of judicial review is not concerned with the merits of the case but the decision-making process. In order for an Applicant to succeed in an Application for judicial review, he must satisfy the court that a public officer has acted un-procedurally, that his decision was unreasonable and that the impugned decision was illegal.”

32. According to Article 47(2) of the Constitution, the 1st Respondent is only required to give proper reasons as to why it intends to carry out the administrative action of charging the Exparte Applicants within the purview of the evidentiary threshold and public interest as relates to this matter.

33. The decision to charge is based on evidence, and the present Application is just a delaying tactic to the inevitable prosecution.
34. He submits that the Exparte Applicants have not demonstrated how the 1stRespondent acted in contravention of Section 7(2) of the Fair Administrative Action Act, 2015.
35. The 1st Respondent's decision to charge the Exparte Applicants was impartial, independent and was arrived at after the 2ndRespondent presented material evidence supporting the charge of obtaining money by false pretenses as against the Exparte Applicants in line with Section 24 of the National Police Service Act.
36. As was held in the case of **Republic vs Minister for Home Affairs & Others Exparte Sitamze Nairobi HCCC NO. 1652 of 2004 (HCK) [2008] 2 EA 323** the Court can only interfere in the following situations:
- 1) Where there is an abuse of process;
 - 2) Where the decision maker exercises discretion for an improper purpose;
 - 3) Where the decision maker is in breach of the duty to act fairly;
 - 4) Where the decision maker has failed to exercise statutory discretion reasonably;
 - 5) Where the decision maker acts in a manner to frustrate the purpose of the Act donating the power;

- 6) Where the decision maker fetters the discretion given;
 - 7) Where the decision maker fails to exercise discretion;
 - 8) Where the decision maker is irrational and unreasonable;
37. The Exparte Applicants have unfortunately not demonstrated how the 1st Respondent acted in contravention of the above principles.
 38. The decision 1st Respondent's decision to charge being based on evidence, this Honorable Court cannot interfere with the said decision without evidence of vendetta and unjustified prosecution.
 39. Reliance is placed in the case of **Hon James Gesami vs Attorney General & Others Petition No. 376 of 2011**, it is clear beyond doubt that the 1st Respondent is at liberty to prefer charges against any person if there is sufficient evidence.
 40. He submits that this court does not to determine the merit of criminal culpability but whether the administrative action and / or decision against the Exparte Applicants, was procedurally unfair, biased, made in bad faith or ultra vires.
 41. The Exparte Applicants presented their case and recorded a statement, before the 1st Respondent made the decision to charge them having considered their version of events.
 42. Section 193A of the Criminal Procedure Code allows the 3rd Respondent to pursue concurrently both civil and criminal proceedings, and in the instant case, the decision of the 1st Respondent to charge was exercised responsibly and independently,

the 1st Respondent only being concerned with the criminal element of obtaining by false pretenses as demonstrated.

- 43.** The Exparte Applicants have hence failed to demonstrate whether there were other extraneous factors that influenced the 1st Respondent's decision to such as the decision being ultra vires, illegality, irrationality or unreasonableness while preferring the charges.
- 44.** They have not demonstrated that the decision to charge them was motivated by malice or by any reason other than public interest as would entitle this Court to interfere.
- 45.** The 1st Respondent also guided by Article 157(11) of the Constitution exercised due regard to public interest and fair administration of justice and did not abuse the legal process while preferring the charges against the Exparte Applicants. He submits that the Applicants will have a chance to a fair trial as per Article 50 of the Constitution.
- 46.** The merit and demerits of the criminal case facing the Exparte Applicants should be left to the trial court since under Article 165 of the Constitution and Article 47 of the Constitution, the High Court's role in Judicial Review is supervisory and in administrative processes, as opposed to determining the merits or demerits of the intended criminal case and whether the Exparte Applicants are guilty or not of the criminal charges.

47. The jurisdiction to decide whether or not a charge discloses an offence lies with the trial court but not with this Honorable Court. That jurisdiction is donated by Section 89(5) of the Criminal Procedure Code, which states:

“Where the Magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the Magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order.”

48. He submits that the Application is frivolous, vexatious and an abuse of court process calculated to delay prosecution of the Exparte Applicants by the 1st Respondent and interfere with the investigative function of the 2nd Respondent.

49. In respect of costs this Court should be guided by the principles enunciated in **Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others, [2014] eKLR**, and exercise its discretion to award the same to ensure that the ends of justice are met and guided by the principle that costs ordinarily follow the event.

Analysis and determination:

Upon perusing the Application, and the response thereto and the rival submissions by the parties, the court finds the following to be the issues for determination;

- 1) Whether or not the Applicant has merit.
- 2) Who shall be the costs.

The 1st issue:

- 50.** In the case of **Republic vs Commissioner of Police and Another Exparte Michael Monari & Another (2012) eKLR** where it was held:

“The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”.

- 51.** The Investigating Officer was not sued nor given a chance to inform the court how he conducted his investigations. The Applicant has not demonstrated to the court that the decision to charge the 1st Applicant was driven or inspired by malice. The Applicants have not proven that the investigations were carried out illegally or that the decision to charge was arrived at in breach of the decision to charge guidelines.
- 52.** The Applicants have invited the court to stop the criminal proceedings because issues that led to the decision to charge are of a civil nature.
- 53.** Section 193A of the Criminal Procedure Code on this issue provides that, *“notwithstanding the provisions of any other written law, the*

fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings."

- 54.** The fact that the parties were referred to attempt alternative dispute resolution mechanisms in a bid to resolve the dispute cannot form the basis for the court to stop the criminal proceedings as sought by the Applicants through an order of certiorari.
- 55.** The fact that the sale agreement had a completion that was conditional upon issuance of a Discharge of Charge by Bank of Baroda and that The Bank refused to issue the discharge unless the market value was paid and that The Applicants opted to refund the deposit, and that the Applicants have already made substantial repayments cannot form the basis of the inference that the Respondents had ulterior motives to arm twist that Applicants.
- 56.** The argument that the Respondent had an ulterior motive since there was no element of *mens rea*, fraud, or false pretenses, false representation or no intention to defraud cannot come to the Applicant's aid. I say so because the judicial review Court does not have the power or the jurisdiction to determine the issue of whether or not there was *mens rea*. That rests in the hands of the criminal Court.
- 57.** The Judicial Review court looks at the process of the decision-making and whether there was procedure impropriety in the manner in which the decision of that arrived at. It is guided by the Fair Administrative

action Act as read alongside Article 47 and 50 of the Constitution which guarantee all to fair, effective and efficient administrative action and the right to fair hearing.

58. In the case of **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300**, 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: See **Council of Civil Service Union v Minister for the Civil Service [1985] AC 2**; and also, **Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR)**.*

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 provisions 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: **Re an Application by Bukoba Gymkhana Club [1963] EA 478** at page 479 paragraph “E”.*

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 may be in non-observance of the Rules of Natural Justice 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 legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876).”

59. In order to succeed in Judicial Review Applications, the Applicant has to prove and demonstrate that it has fulfilled the principles that were enunciated in the case of Pastoli (supra). The Applicants have not.
60. In Criminal cases the prosecution has to prove its case on a beyond reasonable doubt threshold. The criminal Court has to hear witnesses, go through documents and carry out an analysis of the facts and evidence in order to find out whether or not the accused person is guilty. The prosecution has to prove the existence of *mens Rea* and *actus rea*. That is not so in judicial review Applications like the instant one.
61. On another front, the court is cognizant of the fact that there is a need to uphold victims’ rights. Article 50 of the constitution provides for the right to fair hearing. This was settled by the Supreme Court in the case of **Joseph Lendrix Waswa v Republic [2020] eKLR**.
62. In the instant suit, the 3rd Respondent has demonstrated a very clear interest in the case as the victim by filing a response and submissions.

He has a right access to justice under Article 48 and the right to the benefit and the protection of the law under Article 27 of the Constitution. He exercised his right when he opted to lodge a complaint with the police in his quest for justice and he cannot be faulted. He has a discernable interest in the outcome of not only this case but also the criminal trial. Allowing the Application will amount to denying the 3rd Respondent his right to fair hearing.

- 63.** The 1st Applicant will have his day in the criminal court where he will have the liberty to mount his defence through the evidence that he seeks to advance in this Application.
- 64.** The Application does not satisfy the principles as enunciated in the Pastoli case supra.
- 65.** Ultimately it is my finding that the Applicants have not persuaded this court that it ought to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office.
- 66.** Had the Applicants demonstrated that the criminal proceedings constitute an illegality or abuse of the justice system then this Court would not have hesitated in halting such proceedings, as that fall squarely within its mandate as a judicial review Court. The Applicants have not demonstrated that.
- 67.** The Applicants have failed to prove that the director of public prosecutions has abused its discretionary power or that he has

exercised his discretion for an improper purpose or acted in a manner that amounted to a breach of the duty to act fairly or that he failed to exercise statutory discretion reasonably; or that the he acted in a manner to frustrate the purpose of the Act donating the power or failed to exercise discretion; or that the he has acted irrational and unreasonable.

68. The Applicants have also sought orders of prohibition.

69. In **Republic v Principal Kadhi, Mombasa Ex-parties Alibhai Adamali Dar & 2 others; Murtaza Turabali Patel (Interested Party)** [2021 eKLR, the Court rendered itself thus:

"The Order of "Prohibition" issues where there are assumptions of unlawful jurisdiction or excess of jurisdiction. It's an order from the High Court directed to an inferior tribunal or body as in this case the Kadhi's Court. Its functions is to prohibit and/or forbids encroachment into jurisdiction and further to prevent the implementation of orders issued when there is lack of jurisdiction."

"Although prohibition was originally used to prevent tribunals from meddling with cases over which they had no jurisdiction, it was equally effective and equally often used, to prohibit the execution of some decision already taken but ultra vires. So long as the tribunal or administrative authority still had power to exercise as a consequence of the wrongful decision, the exercise of that power could be restrained by prohibition. Certiorari and prohibition frequently go hand in hand, as

where certiorari is sought to quash the decision and prohibition to restrain its execution. But either remedy may be sought by itself."

70. Guided by the foregoing analysis, it is my finding and I hold that the Applicants have not made out a case for the grant of the order of prohibition and I so hold.

Costs;

71. In **Party of Independent Candidates of Kenya versus Mutula Kilonzo a 2 others HC EP No. 6 of 2013**, the court stated as follows on the issue of costs:

"It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial judge is given discretion but this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, is a rule which should not be departed from without the demonstration of good grounds for doing so."

72. The Applicants shall bear the costs of this suit.

Disposition:

73. The Application lacks merit.

Order:

The Notice of Motion dated 14th August, 2025 is dismissed with costs.

Dated, signed and delivered at Nairobi this 20th day of February 2026.

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J. CHIGITI (SC)

JUDGE