

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
MISC. APPLICATION NO. 225 OF 2024

VENAN MA -MABIALALA
APPLICANT

VERSUS

THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS
..... RESPONDENT
DMITRI STRESHINSKI T/A VENDOM GOLD
.....INTERESTED PARTY

JUDGMENT

- 1.** The Applicant is aggrieved by the fact that on 24th February 2025 he was arrested and arraigned in court on 25th February 2025 and he strongly believes that the decision to charge him is faulty given that the complainant does not implicate him in his statement.
- 2.** According to the Applicant, the dispute is civil in nature and indeed there is a Civil suit that is pending determination.He is of the view that the Respondent is exposing him to double jeopardy given that there was also an anti-corruption case before.
- 3.** This has precipitated the filling of the Application dated 4th October 2024 wherein he seeks the following orders: -

- 1) That this Honourable Court be pleased to issue an Order of CERTIORARI to quash the decision of the Respondent to

charge the Exparte Applicant as per the charge sheet dated 25th February, 2024 with the charge of obtaining Money by false pretense Contrary to section 303 of the penal code.

2) That this honourable Court be pleased to issue an Order of PROHIBITION to prohibit the and prevent the Respondent or other persons/ state actors acting at its behest from hearing the Applicants case as per the charge sheet dated 25th February, 2024 or otherwise in connection with the charge herein.

3) That cost of this Application be provided for.

The Exparte Applicant's Written Submissions;

4. The Interested Party submitted that he has always been in constant communication with the co-director of the Applicant herein, thus begging the question, why he "The Applicant" had to be charged when he had nothing to do with the monies in question.
5. The factual sequence giving rise to the said criminal proceedings are that, Group Elykia Limited a Company in which the ex-pate Applicant is a director with another director in the name of Jean Paul Tshkangu Musangu entered into a sale agreement with the Interested Party on 6th November, 2021.
6. In the said agreement, Group Elykia limited was to supply the Interested Party with wood for a period of 1 year from 30th November, 2021 of which Jean Pail Tshkangu Musangu as set out by the 2nd Defendant in Civil Case Number 515 of 2023 Vendome Gold Dmcc Versus Group Elykia Limited And 2 Others signed the agreement.

7. Upon signing of the said agreement, the Interested Party claims that he later learnt through the media that, Jean Pail Tshkangu Musangu had been arrested by the Asset recovery agency on account of acquiring money through proceeds of crime.
8. The Interested Party herein claims through his written statement both in Civil case Number, E 515 of 2023 Vendom Gold Dmcc Verus Group Elykia Limited & 2 Others, that he did engage lawyers within the Republic of Kenya and other state agencies to find the veracity of the statements in the media. He indeed confirmed that, after the money had been sent into the account of Group Elykia Limited, the same had been transferred into the personal account of Jean Pail Tshkangu Musangu a Co-director of the Exparte Applicant.
9. As per the Interested Party's account, he stated that evidence showed that one Jean Pail Tshkangu Musangu the co-director of the Exparte Applicant herein had used the said funds for his own personal use and nowhere does he mention the Exparte Applicant.
10. The Interested Party further stated in his statement's that, he has always been in constant communication with the said Jean Pail Tshkangu Musangu the other co-director of the Exparte Applicant with the aim of having him return the said amounts owed, totaling to USD 5,133,050.
11. He submits that after failing to get hold of the real culprit, one Jean Pail Tshkangu Musangu, the Interested Party with the help of the Respondent herein chose to level frivolous charges of Obtaining Money through false pretense contrary to section 303 of the penal code against the Exparte Applicant. This according to the applicant

amounts to abusing the Court process and seemingly on a mission to settle scores on an innocent party, the Applicant.

- 12.** He submits that the real culprit one Jean Pail Tshkangu Musangu who is no longer in the jurisdiction of the Republic of Kenya. The pursuit of his co-director the Applicant who had nothing to do with the sale agreement herein nor the use and or misuse of the funds alleged herein was improper.
- 13.** He submits that in addition to having a Criminal suit against the Exparte Applicant herein, the Interested Party has also launched a Civil Suit at the Milimani Law Court against The Exparte Applicant In Milimani Civil Suit Number E 515 Of 2023 Vendome Gold Dmcc Versus Group Elykia Limited & 2 Others.He submits that this amounts to an abuse of the Court process.
- 14.** Reliance is placed in the case of Julius Meme Versus Republic And Another, (2004) Eklr, where it was held that an abuse of the Court process was defined to mean, "An abuse of the Court process would, in general, arise where the Court is being used for improper purposes, as a means of vexation and oppression, for the ulterior purposes, that is to say, Court process being misused. The proceedings, in such a case, should be shown to be frivolous, vexatious, or harassing or groundless and not based on law.
- 15.** Article 157 of the Constitution of Kenya, 2010, grants the Office, of the Respondent herein, Director of Public Prosecutions, power to institute Criminal proceedings against any person before any Court other than a Court martial in respect of any offence alleged to have been committed.

- 16.** In addition, he submits the office of the Director of Public prosecutions requires does not require any one's consent to commence Criminal proceedings under Article 157 (10) and Section 6 of Director of Public prosecutions Act.
- 17.** He submits that in Criminal case Number Kibera Criminal Case Number E 464 OF 2024, the Complainant, stated that he did enter the sale agreement with Jean Pail Tshkangu Musangu.
- 18.** He further submits that since then he has been making follow up with the said Jean Pail Tshkangu Musangu through WhatsApp messages exchanged between him and Jean Pail Tshkangu Musangu who had accepted to refund the said sums of money.
- 19.** He submits that per the statement by the Complainant, the accusation kept pointing at one Jean Paul Tshikangu Musangu yet the Respondent has chosen to abuse the powers bestowed onto them by the law and frustrate the Exparte Applicant.
- 20.** He further submits that the complainant avers in his own words that, he reached out to Jean Pail Tshkangu Musangu to return the money for non-performance of the Contract/ Agreement, however he says that Jean Pail Tshkangu Musangu does not give a definite answer.
- 21.** He also states that the said Jean Pail Tshkangu Musangu admitted severally that after the moneys were wired into the account of the company, he did take the same and bought vehicles and other goods and presents for his family.
- 22.** He submits that in his whole account, the complainant has not connected the Applicant with any wrongdoing. The only crime the

Exparte Applicant did was to perform his duty as a director shareholder releasing the money deposited on the company's account since it's the other director that had gotten the business and business was his.

- 23.** In addition, he submits that he did his duty of signing based on trust and the principles of fiduciary duty in business transactions as he knew his partner had engaged in straight forward business.
- 24.** It is his case that despite this glaring evidence and no wrongdoing on the part of the Exparte Applicant. The Respondent has still went ahead and preferred charges against the Exparte Applicant.
- 25.** Another front he retorts and submits that the Complainant did not produce any documents to show that indeed he trades in timber. The complainant did not demonstrate what the money was meant for. He submits that if the funds were part of a larger scheme of money laundering between the Complainant and Jean Pail Tshkangu Musangu then the police failed to investigate that and chose to unfairly conduct selective investigations against him. According to him there is nothing linking him with the alleged offense.
- 26.** Reliance is placed in **Thuita Mwangi and 2 Others vs Ethics and Anti-Corruption Commission & 3 others 2013 eKLR**, the Honourable Justice Majanja held as follows, on whether the Court can intervene on the powers and functions of the Office of The Director of Public Prosecutions; The discretionary powers vested in the DPP is not an open cheque and such discretion must be exercised within the four corners of the constitution. It must be exercised reasonably, within the law and to promote the policies and objects of

the law which are set out in section 4 of the office of the Director of Public Prosecutions Act. These objects are as follows, the diversity of the people of Kenya, impartiality and gender equity, the rules of natural justice, promotion of public confidence in the integrity of the office, the need to discharge the functions of the office on behalf of the people of Kenya, the need the cause of justice, prevent abuse of legal process and public interest, protection of the sovereignty of the people, secure the observance of democratic values and principles and promotion of constitutionalism. The court may intervene where it is shown that the impugned Criminal proceedings are instituted for other means other than the honest enforcement of the law, or are otherwise an abuse of the Court process. As Kuloba J, observed in Vincent kibiego Saina vs attorney general, High Court Misc Civil Application Number 839 of 1999 (Unreported) at pages 20, 21, if a Criminal prosecution is seen as amounting to an abuse of the Court Process the Court will interfere and stop it. This power to prevent such prosecutions is of great constitutional importance. It has never been doubted. It is jealously preserved. It is readily used, and if there are circumstances of abuse of the process of the Court, the Court will unresistingly step in.

- 27.** Section 313 of the penal code, the relevant section under which the Exparte Applicant has been charged in Kibera Criminal Case Number 464 of 2024 Republic versus Ma Mabialala Venana, provides as follows any person who by false any false pretense, and with intent to defraud obtains from any other person anything capable of being stolen, or includes any other person to deliver to any person anything

capable of being stolen, is guilty of a misdemeanor, and liable to imprisonment up to 3 years.

- 28.** He submits that the Respondents decision to charge the Exparte Applicant with criminal proceedings herein amounts to an abuse of the Court process and the Criminal justice system.
- 29.** Given that the Respondent was aware that the Exparte Applicant had never been in touch with the Interested Party and had equally not been implicated anywhere with the alleged offence, instituting Criminal charges against the Exparte Applicant speaks of malice, ulterior motive, and oppressiveness that is espoused in the decision of the DPP to charge the Exparte Applicant. He submits that this amounts to an abuse of the Applicant's rights and fundamental freedoms.
- 30.** He submits that the Criminal proceedings arising from Kibera Criminal Case Number E 464 of 2024 are tainted with malice, bad faith and it is meant to oppress the Exparte Applicant.

The Respondent's Case;

- 31.** In responding to the Application, the Respondent argues that the Applicant has not demonstrated how the decision to charge him is unlawful, unreasonable, and procedurally unfair.
- 32.** Under Article 157 of the Constitution the 1st Respondent has the power to institute Criminal proceedings where a criminal offence has been committed.

- 33.** Section 24 of the National Police Service Act mandates the police to investigate any complaint brought to their attention to determine whether a criminal offence has been committed.
- 34.** According to the Respondent it is in the Public interest that complaints made to the police are investigated and the perpetrators of crimes are charged and prosecuted.
- 35.** It argues that the Application herein has been filed in bad faith, and the same is misconceived, premature, is an abuse of the court process and the same is clearly meant to derail and defeat the cause of justice.
- 36.** The accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court where the Applicant is assured of fair trial and protection of the law and which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support of the charges.

The Respondent's submissions;

- 37.** The DPP is an independent body established under Article 157 of the Constitution of Kenya, 2010. Article 157(10) and (11) respectively provide that:
 - i. The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

- ii. In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the Public interest of the administration of justice and the need to prevent and avoid abuse of the legal process.

38. In the case of **Diamond Hasham Lalji & Another v A.G. & 4 others [2018] eKLR**, the Court of Appeal stated: -

“[34] It is also indubitable that the constitutional prosecutorial power of DPP is reviewable by the High Court as Article 165(2) (d)(ii) of the Constitution ordains. However, the doctrine of separation of powers should be respected and the courts should not unjustifiably interfere with the exercise of discretion by DPP unless it is exercised unlawfully by, inter alia, failing to exercise his/her own independent discretion; by acting under the control and direction of another person; failing to take into account public interest or interest of the administration of justice in all their manifestations; abusing the legal process; and by acting in breach of fundamental rights and freedoms of an individual.

The DPP is entitled to make errors within his constitutional jurisdiction and the decision will not be reviewed solely on the ground that it was based on misapprehension of facts and the law. (Matululu and Anor v. DPP [2003] 4 LRC 712). Further, authority show that courts are generally reluctant to interfere with prosecutorial decisions made within jurisdiction.”

39. In **Republic v Grace Wangari Bunyi (Sued as the Administrator of the Estate of the Late Obadiah Kuira**

Bunyi) & 7 others Exparte Moses Kirruti & 28 others [2018] eKLR,it was held,

“It is important to note that the discretion given to the Director of Public Prosecutions to undertake investigation and prosecute criminal offences is not to be taken for granted or lightly interfered with and must be properly exercised. In the same respect, the court ought not to usurp the constitutional and statutory mandate of the Director of Public Prosecutions. The mere fact that their high chance of success as regards the intended or ongoing criminal proceedings does not count, it is not a ground for halting those proceedings by way of Judicial Review since Judicial Review proceedings are not concerned merits of the case but to address defects in decision-making process by a decision-making body. However, the court may only intervene were the said discretion is exercised unlawfully and in bad faith, for instance where it is being abused or being used for the achievement of some collateral purpose which are not geared towards the vindication of the commission of a criminal offence and the justice system such as with a view to forcing a party to submit to a concession of a civil dispute, the court will not hesitate to bring such proceedings to a court.”

40. In Eunice Khalwali Miima v Director Public of Prosecutions & 2 others [2017] eKLR the Court held:

“The circumstances under which the Court will grant a stay of a criminal process in these kinds of proceedings is now well settled. The Court ought not 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. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings by way of Judicial Review since Judicial Review proceedings are not concerned with the merits but with the decision-making process. That an Applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is open to the Applicant in those proceedings. However, if the Applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.”

- 41.** The Applicant has given a version of his account which can make a good defense at the trial stage which the trial court shall interrogate in determining the reliability of the evidence tendered and the sustainability of the charges proffered.
- 42.** In **Kenneth Kanyarati & 2 others v Inspector General of Police Director of Criminal Investigations Department & 2 others [2015] eKLR** it was stated:

“It is evident consequently that investigation of crime has a constitutional underpinning with proper statutory structures. It is to ensure that persons are not simply dragged to court and charged with offences only to turn out that there was no basis for the prosecution in the first place. The mere fact therefore of

an investigation being undertaken by the 1st Respondent would not itself be unconstitutional and a party must prove much more than the investigation process alone. As was stated by Ngugi J in Peter Ngaki Njagi Vs. Officer Commanding Station (OCS)

Kasarani Police Station, and others NBI HCCC No. 169 of 2012 [2013] eKLR 2. “(12)an investigation into alleged commission of an offence does not amount to violation of a constitutional right. Indeed, neither does arrest and prosecution, for those are all part of the criminal justice system which is sanctioned by the Constitution.”

- 43.** Under Article 50 of the Constitution, the Applicant has the right to be presumed innocent unless the contrary is proved, the right to adduce evidence and challenge the prosecution's evidence, and the right to challenge the decision of the trial court through the Appellate mechanisms. The Kenya Criminal Justice system has inbuilt Constitutional safeguards that ensure that the criminal process is not subjected to any form of abuse.
- 44. In Kipoki Oreu Tasur vs. Inspector General of Police & 5 Others (2014) eKLR** stated that:

“The criminal justice system is a critical pillar of our society. It is underpinned by the Constitution, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation

of the fundamental rights of individuals facing trial is demonstrated...”

- 45.** In **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** the Court held that:

“... the police have a duty to investigate 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”

- 46.** The Court of Appeal in **Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others [2018] eKLR** referred to the Supreme Court of India in *State of Maharashtra & Others v. Arun Gulab & Others, Criminal Appeal No. 590 of 2007*, where the Court stated:

“The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an inquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court

do not confer an arbitrary jurisdiction to the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled-for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings.

The provisions of Articles 226, and 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as “C.D.C.”) are a device to advance justice and not to frustrate it. The power of Judicial Review is discretionary; however, it must be exercised to prevent the miscarriage of justice and correct some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of power of the Court, but the more the power, the more due care and caution is to be exercised in invoking these powers.”

47. The Applicant has failed to meet the threshold for the grant of the orders he is seeking. The Application is meant to derail and further delay the institution of the intended criminal proceedings, a clear abuse of the legal process. The Applicant will aptly present his case and defend himself before the trial court. They urge the court to dismiss the Petition.

The Interested Parties case;

48. He opposes the Application. He argues that he entered into an agreement with the company where the Applicant is a director.

49. He argues that he made a payment to the company and both directors are liable.
50. He argues that the fact that there is a Civil suit pending cannot operate as a bar to the criminal case.
51. He argues that he was not a party to the criminal case that the Applicant is referring to.
52. It is further his case that the Applicant can defend himself in the criminal trial.

The Interested Parties' Submissions;

53. Reliance is placed in The Supreme Court in **Petition 17 of 2015: John Florence Maritime Services Limited & Anor vs Cabinet Secretary Transport & Infrastructure & 3 others** stated that:

"Despite the shift from common law to codification in the Constitution and the Fair Administrative Action Act, the purpose of the remedy of Judicial Review is concerned with review in not the merits of the decision in respect of which the Application for Judicial Review is made. but the decision—making process itself. This finding is further reinforced by the fact that though the court in determining a Judicial Review Application may look at certain aspects of merit and even set aside a decision, it may not substitute its own decision on merit but must remit the same to the body or office with the power to make that decision.

54. The court is concerned with the decision-making process and not the merits of the decision.
55. The Applicant has not demonstrated in any manner how the decision to charge by the Respondent contravened the principles of Fair Administrative Action.
56. The Applicant has not pointed out with any specificity the fault he seeks to address in the decision-making process of the Respondent.
57. In **Kajiado HCJR Misc Appl 1 of 2018: Republic v Grace Wangari Bunyi (Sued as the Administrator of the Estate of the Late Obadiah Kuiru Bunyi) & 7 others Ex parte Moses Kirruti & 28 others** the court held that:

“It is important to note that the discretion given to the Director of Public Prosecutions to undertake investigation and prosecute criminal offences is not to be taken for granted or lightly interfered with and must be properly exercised In the same respect, the court ought not to usurp the constitutional and statutory mandate of the Director of Public Prosecutions. The mere fact that their high chance of success as regards the intended or ongoing criminal proceedings does not count, it not a ground for halting those proceedings by way of Judicial Review since Judicial Review proceedings are not concerned merits of the case but to address defects in decision making process by a decision-making body.”

58. He submits that the Respondent made a reasonable decision to charge the Applicant based on the evidence that had been secured

during Investigations which shows that the Applicant and his business partner Jean-Paul Tshikangu Musangu executed a sale agreement with the Interested Party.

59. Upon execution of the agreement, the Interested Party wired USD. 5,133,050/ = to the bank account of the company wherein the Applicant and his business partner are shareholders as well as directors. The Criminal Procedure Code at Section 193A 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.

60. Therefore, a litigant is allowed to pursue a civil claim and seek compensation even as the state prosecutes a person for contravening the law.

61. In this regard, the **Court of Appeal in Civil Application E003 of 2022: Evans Kidero vs Ethics & Anti-Corruption Commission & 3** others it was stated that:

“In short, courts will not ordinarily grant a stay of civil proceedings simply by virtue of the existence of parallel criminal proceedings arising out of the same events or subject matter. This is the import of section 193A of the Criminal Procedure Code which expressly permits parallel criminal and civil proceedings. The above being the general proposition of the

law, to surmount the arguability threshold, an Applicant bears the burden of showing how the continuance of the civil action will lead to a "real danger of prejudice" against him in the concurrent criminal and civil proceedings."

- 62.** The Applicant has not demonstrated to this court that he will suffer prejudice if the criminal matter proceeds concurrently with the civil matter.
- 63.** The police have a constitutional mandate to investigate any complaint made and in doing so they only need to establish a reasonable suspicion before preferring charges.
- 64.** The Interested Party relies on the decision of the **Court of Appeal in Mbuthia v Attorney General & 3 others (Civil Appeal 377 of 2017)** where the court stated that: -

"On our analysis of the evidence before the Constitutional Court, we cannot fault the following finding by the learned Judge: "Section 24 of the National Police Service Act sets out functions of the Kenya Police Service. In my view, the petitioner has not demonstrated that the investigations and prosecution in question constitute an abuse of process or police powers, nor has the petitioner proved malice or bad faith. The duty and mandate of the police was appreciated in Republic vs. Commissioner of Police and Another Exparte Michael Monari & Another where it was held that the police have a duty to investigate an com Iaintonceacom faint is made. The police only need to establish reasonable suspicion before referring charges. The rest is left to the trial court. As long as the prosecution and

those charged with the responsibility of making the decision to charge act in a reasonable manner, the High Court would be reluctant to intervene. I find absolutely nothing in this case to suggest the police acted unreasonably or maliciously.

65. The Court of Appeal in Civil Appeal No. 181 of 2013: Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others where the court quoted the Supreme Court of India and held that:

“The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction to the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled-for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings.

Analysis and determination:

Upon perusing the pleadings as filed and exchanged by the parties the court finds the following to be the issues for determination;

- 1) Whether or not the Applicant has made out a case for the grant of the orders sought.
- 2) Who shall be the costs.

The 1st issue:

- 66.** Section 35 of the National Police Service Act sets the duties out the Directorate of Criminal Investigations as below;

“To collect and provide criminal intelligence; undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber-crime among others; maintain law and order; detect and prevent crime; apprehend offenders; maintain criminal records; conduct forensic analysis; execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of the Constitution; co-ordinate country Interpol Affairs; investigate any matter that may be referred to it by the Independent Police Oversight Authority; and perform any other function conferred on it by any other written law.”

- 67.** In the case of **Republic vs Commissioner of Police and Another Exparte Michael Monari & Another (2012) eKLR** 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".

- 68.** The power to investigate crime is an important component of the criminal justice system. To stop the police from investigating crimes without justification would usher in anarchy.
- 69.** The Applicant has not demonstrated and the court does not see any malice in the manner in which the investigations were carried out, the decision to charge was arrived at and how the prosecution is being conducted.
- 70.** On another front, the court has looked at the Applicant's case and submissions keenly. In the case of **Robert Ngande Kathathi v Francis Kivuva Kitonde [2020] eKLR**, justice GV Odunga as then he was stated as doth: -

"It also relied on submissions of parties to which the no agreed documents were annexed. Submissions, with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions."

- 71.** In the case of **Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007** it was held that:

“Submissions simply concretise and focus on each side’s case with a view to win the court’s decision that way. Submissions are not evidence on which a case is decided.”

72. In Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993 expressed himself as follows:

“Indeed, and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court’s view, are a course by which counsel or able litigants focus the court’s attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So, submissions are not necessarily the case.”

73. In Ngang’a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, the Court held that:

“As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court’s focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not

evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable.”

- 74. In Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007 held that;**

“Submissions simply concretise and focus on each side’s case with a view to win the court’s decision that way. Submissions are not evidence on which a case is decided.”

- 75.** The Applicant loaded the bulk of his concerns into his submissions. This should have been advanced in his verifying affidavit. Evidence that is advanced through submissions by a party like what the Applicant did without any linkage to the evidence that was advanced through his Affidavit in support of the claim does not bolster the Applicant’s case.

- 76.** On another front, the Applicant asks the court to stop the criminal proceedings because there exists a civil suit.

- 77.** 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.”

78. The concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court.
79. The abuse of court would have arisen had the Applicant proven that the commencement of the criminal proceedings was meant to force him to submit to the civil claim. Had that been the case then the court would have concluded that the institution of the criminal process had been one that was intended for the purpose of achieving a collateral purpose other than a legally recognized aim.
80. The Applicant has not proven that the investigations and the decision to charge him were actuated by malice and/or bad faith.
81. On another front, court is cognizant of the fact that there is need to uphold victims' rights. This court is under a duty to protect, fulfil and promote the right to access to justice for all which includes the right of victims of crime as highlighted under the Victim Protection Act.
82. Section 9(2) (a) of the Victims Protection Act provides that victims assist the courts to obtain a clear picture of what happened (to them) and how they suffered as a result of the offenders conduct or omission from their first hand in experience.
83. Article 50 of the constitution provides for the right to fair hearing. Victims of crime are entitled to the right to fair hearing and they should precipitate in criminal proceedings. This was settled by the Supreme Court in the case of **Joseph Lendrix Waswa v Republic [2020] eKLR**.

84. The victim of an offense in this case lodged a complaint with the police who initiated investigations. The filing of response to the Application and submissions goes a long way to demonstrate that it has an interest in the outcome of not only of both this case and the criminal trial.
85. Allowing the Application will amount to denying the Interested Party his right to fair hearing. As a Judicial Review court, I have cautioned myself that I should not delved into the merits of the case.
86. The Applicant will have his day in court where he will have the liberty to mount his defence through the evidence that he seeks to advance in this case.
87. Judicial Review jurisdiction, was discussed in the Ugandan 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).”*

- 88.** The Application does not satisfy the principles as enunciated in the Pastoli case, supra. Ultimately it is my finding and I so hold that the Applicant has 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.

- 89.** The merits of the case, and particularly whether the criminal proceedings have a likelihood of success, or that the Applicant has a good defence is not a ground for halting criminal proceedings by way of judicial review, in light of the purpose and limits of Judicial Review explained above.
- 90.** Had the Applicant demonstrated that the impugned criminal proceedings constitute an illegality or abuse of process, this Court would not have hesitate to halt to the said proceedings.
- 91.** The cases of *Peter Ngunjiri Maina v DPP & 2 Others (2017) eKLR*, and *R v DPP & 2 Others Exparte Nomoni Saisi (2016) eKLR* identified various scenarios that would require interrogation to warrant a review of the unfettered discretion of the Director of Public Prosecutions as follows: (a) Where there is an abuse of discretion; (b) Where the decision-maker exercises discretion for an improper purpose; (c) Whether decision-maker is in breach of the duty to act fairly; (d) Whether decision-maker has failed to exercise statutory discretion reasonably; (e) Where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (f) Where the decision-maker fetters the discretion given; (g) Where the decision-maker fails to exercise discretion; and (h) Where the decision-maker is irrational and unreasonable.
- 92.** The Applicant has failed and I so hold to prove that the Respondent has abused his discretion or exercised his discretion for an improper purpose; or acted in a manner that amounted to a breach of the duty to act fairly; the Respondent has failed to exercise statutory discretion reasonably; or that the Respondent acted in a manner to frustrate the

purpose of the Act donating the power, have fettered the discretion given or failed to exercise discretion; or that the Respondent has acted irrational and unreasonable.

93. The Applicant has also sought orders of prohibition.
94. 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.”

95. It is my finding and I hold that the issuance of the prohibition order as sought by the Applicant will serve no useful purpose given that this court has already made a finding that the Applicant did not persuade the court to halt the criminal proceedings and I so hold.

Costs;

96. **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.”

97. The Applicant shall bear the costs of this suit.

Disposition:

98. The Application lacks merit.

Order:

The Notice of Motion dated 4th October 2024 is dismissed with costs.

**Dated, signed and delivered at Nairobi this 19th day of February
2026.**

.....

**J. CHIGITI (SC)
JUDGE**