

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISC APPLICATION NO. E019 OF 2025

JAMES WERE 1ST APPLICANT

CHRISTOPHER THUITA 2ND APPLICANT

-VERSUS-

THE INDEPENDENT POLICING OVERSIGHT AUTHORITY (IPOA)
..... 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

THE HONOURABLE CHIEF

MAGISTRATE’S COURT AT MAKADARA..... 4TH RESPONDENT

RULING

1. Vide Chamber Summons dated 10th February 2026 filed under Article 157 of the Constitution 2010, Order 53 of the Civil Procedure Rules, Section 8 & 9 Law Reform Act, and Section 6 & 29 (1) Independent Policing Oversight Authority Act, Cap 86, the *ex-parte* Applicants seek the following orders:

(1) Spent

(2) THAT leave be granted to the ex-parte Applicants to apply for Certiorari Order to remove and quash the directive by the Independent Policing Oversight Authority for the arrest of the ex-parte Applicants and commencement of criminal proceedings.

(3) THAT leave be granted to the ex-parte Applicants to apply for a prohibition order to issue to prohibit the 2nd Respondent from commencing criminal proceedings against the ex-parte Applicants.

(4) THAT leave granted do operate as stay of arrest and commencement of criminal proceedings against the ex-parte Applicants pending the hearing and determination of this Application and the substantive motion.

(5) THAT costs of the Application be provided for.

2. The Application is supported by the statement of facts and verifying affidavit sworn by James Were, the 1st ex-parte Applicant on his own behalf and on behalf of the 2nd applicant and premised on the grounds on the face of the Chamber Summons.
3. The ex-parte Applicants' case is that they are police officers employed by the National Police Service and have diligently performed their duties. That on or about 17th June 2022, the ex-parte Applicants while on official duty (patrol) around Kamukunji Road, they received a distress call from members of the public concerning a robbery incident. That they proceeded to the crime scene and encountered the deceased Dominic Mogere Machoni who was being chased, armed with a gun and engaged the said deceased was firing at the applicants.

4. The *ex-parte* Applicants assert that they were defending themselves when they fatally shot at the deceased. They state that a report was made to the Police Station and an inquest was commenced at Makadara Law Courts in 2023, by the Director of Public Prosecutions. However, that after IPOA concluded its investigations into the matter, it supplied the Director of Public Prosecutions, in 2024 with a report that entailed a recommendation to prefer criminal charges of murder against the *ex-parte* Applicants.
5. The *ex-parte* Applicants further aver that the 1st Respondent-IPOA, issued a directive to the 2nd Respondent to arrest and institute criminal proceedings against them despite the fact that the inquest was still pending in court.
6. The *ex-parte* Applicants contend that the 1st Respondent is acting un-procedurally and ultra vires by issuing directions to the 2nd Respondent who is the only authority lawfully vested with such a mandate under the law.

Response by the 1st respondent

7. In response to the Application, only the 1st respondent filed a replying a Replying Affidavit sworn by Paul Njihia, an Assistant Director, Investigations of the 1st Respondent, dated 3rd February 2026. He deposes that they are mandated as an Authority to provide civilian oversight over the work of the National Police Service and its members and that under

Section 4 of the IPOA Act, they are an independent authority and cannot be interfered with in the performance of their functions.

8. Mr. Njihia in outlining IPOA's functions deposes that they received a complaint regarding the death of the deceased on 17th June 2022 who had been allegedly shot by police officers from the National Police Service at Shauri Moyo Police Station on the same date. He avers that the complaint was registered under **Complaint No. IPOA/CMU/001709-2020** and forwarded for investigations with a view of establishing the circumstances of death.
9. Further deposition is that IPOA recorded statements from prospective prosecution witnesses together with those of the two *ex-parte* Applicants in the course of their investigations and gathered documentary evidence alongside where they made a finding at the end of the investigations that the *ex-parte* Applicants were responsible for the murder of the deceased. It is also contended that they forwarded their findings and recommendations to the 2nd Respondent DPP for perusal and advice, in compliance with **Section 29 (1) (a) of the IPOA Act** and that the DPP then made the decision pursuant to **Articles 157 (6) (a) and (10) of the Constitution** to charge the *ex-parte* Applicants as recommended in the report. That from the said decision, the 2nd Respondent further recommended that the proceedings in **Makadara Inquest No. E025 of 2023** be halted, which led to the 1st Respondent writing to the Regional Police Commander, Nairobi Region

requesting them to facilitate the arrest and arraignment in court of the *ex-parte* Applicants.

10. It is the 1st respondent's contention that the 2nd Respondent is mandated to decide against whom to commence criminal proceedings under the Constitution, that the 1st Respondent has fulfilled its objectives under the Act and that the immediate arrest and processing of the officers for arraignment in court should be permitted to proceed in accordance with the principles of administration of criminal justice. It is further contended that the *ex-parte* Applicants have not demonstrated the manner in which the Respondents have acted in excess of their powers or infringed, violated or contravened any laws in carrying out their objectives and that their claim of loss of livelihood cannot be a means to unlawfully seek the court's intervention to evade criminal responsibility.
11. It is also the 1st respondent's contention that the *ex-parte* Applicants will be afforded an opportunity to present and explain their case in court during the murder hearing, regarding the lawfulness of the use of force on the deceased on the night in question.

Oral submissions

12. The Chamber Summons was canvassed orally on 26th February 2026. All the respondents, except the 4th respondent appeared and were given the opportunity to submit, including those respondents who had not filed written responses.

13. Mr. Ogowe Counsel for the *ex-parte* Applicants submitted that IPOA the 1st Respondent exceeded its mandate by directing the 2nd Respondent to arrest and charge the Applicants by way of a letter which informed the arrest on 9th February 2026. That the said directive aborted the inquest which was at the hearing stage to pave way for murder charges, a directive which was *ultra vires* their mandate. Counsel for the applicants submitted that they had demonstrated a *prima facie* case and relied on the case of ***R. vs. County Council of Kwale and Another Ex-Parte Kondo and Others*** which set out the threshold for a *prima facie* case.
14. Counsel argued that there was no inordinate delay in bringing the Application before the Court, that they have an arguable case and prayed for stay of the prosecution proceedings against the *ex-parte* Applicants who are public servants and police officers in active employment with the risk of losing their livelihood if stay is not granted.
15. Ms. Mutie counsel for the 1st Respondent –IPOA- submitted opposing the application for leave and stay of prosecution arguing that the Application does not meet the threshold for granting leave and relied on the case of ***Republic vs. NLC & Another Ex-Parte Pinnacle Developers Ltd.*** She submitted that the Application has no likelihood of success as no *prima facie* case has been established. That the application is frivolous, brought in bad faith and misconceived.

16. She further submitted that the allegation that the prosecution is based on the letter of 6th February 2026 seeking to arrest the *ex-parte* Applicants was untruthful since it was addressed to George A. Sedah, the Regional Commander who was merely requested to assist in having the *ex-parte* Applicants arrested. Counsel submitted that they had demonstrated the mandate of IPOA which is to investigate cases and offences relating to the discipline of members of the National Police Service, which they did in this case and made a recommendation of their findings to the Office of the Director of Public Prosecutions. She contended that the decision to charge was reached by the DPP who directed the halting of the Inquest proceedings to pave way for murder charges. She justified the halting of the inquest proceedings by relying on the case of *Kemei vs. DPP & Another CRA 2/2022* where the court is said to have held at paragraph 53 that inquest proceedings were investigative in nature. Further reliance was placed on the case of *Legal Advice Centre & Others (2025)eKLR* where the court is said to have held that IPOA is exclusively mandated to investigate police incidents. She submitted that since IPOA had already investigated the case, the Inquest proceedings have no value.

17. Ms. Mutie further submitted that the Application for leave should be dismissed and stay should be denied since that should only be granted by the court where constitutional rights are being violated or threatened to be violated which was not the case in the present matter. She cited the case of

Mwendwa vs. DPP & Isah (2024)e KLR to support the position that the fear of arrest, interdiction and loss of livelihood cannot be grounds of stay since arrest and being charged is a legal process.

18. On their part, the 2nd Respondent - the DPP through Ms. Kihara submitted opposing the application for the reason that the mandatory threshold for leave had not been met and that there was no demonstration of illegality, irrationality and procedural impropriety. She argued that the DPP was not directed to prefer charges but acted within its mandate just as IPOA did. She contended that the decision to withdraw the Inquest case and proceed with prosecution is a lawful exercise of its mandate under **Article 157 of the Constitution** and that there is no procedural unfairness on their part.
19. Ms. Kihara submitted that an inquest is a preliminary fact-finding mechanism so that once a decision is reached, it serves no lawful purpose. That in this case, there is no legal or constitutional requirement that an inquest be conducted before prosecution and that no legitimate expectation has been established to that effect. Further submission was that the leave sought and stay orders are not warranted as they will only stall and delay the prosecution of the *ex-parte* Applicants. She urged this Court to dismiss the Application.
20. In a rejoinder, Mr. Ogowe submitted that Under **Section 6 of the IPOA Act**, they were clear on their mandate but were only concerned with the process of terminating the inquest following the letter dated 6th January

2026 when the matter was just about to commence hearing. He argued that if stay is not granted, their application will be rendered nugatory and justice will not be served.

21. Counsel for the applicant submitted that the applicants had only taken issue with the fact that the 2nd Respondent in exercising its mandate as DPP followed the directive in the impugned letter. He urged that there should be no abuse of the legal process. He submitted that this Court should allow leave in order to determine whether there was an abuse of the process or not and that no prejudice would be occasioned to the Respondents if leave and stay are granted.

Analysis and Determination

22. I have carefully considered the application for leave and stay and the main issue for my determination is whether the application for leave to apply is merited and if so, whether a stay of prosecution should issue pending hearing and determination of the intended substantive motion.
23. The parameters for granting leave to apply for Judicial Review Orders are that an Applicant must demonstrate an arguable *prima facie* case. Leave stage is intended to sieve or filter out frivolous cases; there must be timeliness in the lodging of the Application under **Order 53 of the Civil Procedure Rules**; the Applicant must demonstrate sufficient interest in the matter at hand and must seek remedies that can only be granted under

Judicial Review. This threshold was restated in the case of **Kenya National Examination Council & Others ex parte Kipkurui Michelle Jeruto & 34 Others [2015] eKLR** citing **Republic v Kenya National Examinations Council ex parte Gathenji & Others [1997] eKLR**

24.in **Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** the High Court-Waki J (as he then was) stated as follows:

“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 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. It is an exercise of the court's discretion but as always it has to be exercised judicially”.

25. In **Ongere & another v Mulabe & 3 others (Judicial Review Miscellaneous Application E026 of 2025) [2025] KEHC 2797 (KLR) (Judicial Review) (13 March 2025) (Ruling)**, this court had this to say on the yardstick for grant of leave to apply for judicial review orders:

“13. The age-old rationale for the requirement that leave be sought and obtained under Order 53 (1) of the Civil Procedure Rules is to exclude frivolous, vexatious or applications which prima facie appear to be an abuse of the process of the Court or those applications which are statute barred. However, 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.

14. The yardstick for the grant of leave was pronounced by the Court of Appeal in Mirugi Kariuki v Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8 as follows:

“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.”[emphasis added]

15. The purpose of seeking leave therefore is to determine whether there is prima facie case that would warrant the hearing of the judicial review application to determine whether the orders sought should be granted.”

26. I have considered the Chamber Summons Application dated 10th February 2026 and note that the *ex-parte* Applicants seek leave to apply for Judicial Review Orders based on the decision of the Respondents to withdraw the inquest, to seek their arrest, charging and prosecution for the murder of Dominic Mogere Machoni - the deceased.

27. I have considered what a *prima facie* case entails as explained by the Court of Appeal in **Nguruman Ltd v Nielsen & 2 others [2014] KECA 606 (KLR)** that:

“Prima facie” is a Latin phrase for “at first sight”, whose legal meaning and application has been the subject of varying interpretation by courts in many jurisdictions. Phrases like “a serious question to be tried”, “a question which is not vexatious or frivolous”, “an arguable case” have been adopted to describe the burden imposed on the applicant to demonstrate the existence of prima facie case. The leading English House of Lords case of the American Cyanamid Co. Ethicon Ltd [1975] AC 396 is a case in point. The meaning of “prima facie case”, in our view, should not be too much stretched to land in the loss of real purpose.

28. Similarly, in **Mrao Ltd. vs. First American Bank of Kenya Ltd & 2 others [2003] KLR 125** it was explained as follows:

“In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the

applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

29. Notably, a *prima facie* case must not necessarily be one that will succeed. It must only raise arguable issues in law. From the grounds raised by the *ex-parte* Applicants in the pleadings before this Court, the applicants challenge the withdrawal of the inquest proceedings before they are completed, in favour of a murder charge preferred against them. They claim that the DPP is acting on the directions of IPOA, contrary to Article 157 of the Constitution. They therefore allege that the criminal charges of murder are premature as the Inquest proceedings have not yielded results to pave way for murder.
30. , it is important to note that Judicial review is now a constitutional remedy and whether a party approaches the court by way of leave to apply under order 53 of the Civil procedure Rules or under the Fair Administrative Action Act and Rules, whichever way they approach the court, the court must always wear a constitutional lens in considering such applications for leave. Leave would not be necessary had the applicant filed an originating motion under the Fair Administrative Action Rules, 2024. Therefore, unless the application as intended is hopeless and frivolous or abuse of court process on the face of it, or where there is no jurisdiction, inordinate delay or the proceedings are statute barred, this court should not deny an

aggrieved party an opportunity by way of leave to apply, enabling them to ventilate their grievances. 50

31. In my humble view, the intended substantive motion is not frivolous or hopeless. On the time taken to bring the application, the applicants have approached the court timeously following the intended termination of the inquest proceedings and the directive to arrest them to face murder charges before conclusion of the inquest proceedings.
32. I find that the issues raised by the applicants are *prima facie* arguable. I grant the applicants leave to apply for judicial review orders sought in the chamber summons. **The main motion to be filed and served by close of business on 24th March, 2026** in a substantive fresh judicial review file as these proceedings are being conducted in a miscellaneous file. Once filed, the file shall be placed before the duty judge to issue directions on the hearing of the main motion. The applicant is directed to file only a notice of motion and the registry will ensure that this file for leave and all documents as filed and relied on by the applicants are transferred to the substantive motion file.
33. On the second limb of the Application, the applicants pray that the leave so granted do operate as stay of criminal prosecution against them until the substantive motion is heard and determined. **Order 53 of the Civil Procedure Rules** provides that:

(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:

Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.

34. In **Taib A. Taib v The Minister for Local Government & Others** Mombasa HCMISCA. No. 158 of 2006 Maraga, J (as he then was) expressed himself as follows:

“As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction... In judicial review applications the Court should always ensure that the ex parte applicant’s application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited... The purpose of a stay order

in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act... A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted.”

35. The decision whether or not to grant a stay pursuant to leave granted is thus an exercise of judicial discretion, and that discretion must be exercised judiciously. In **utt v Rent Restriction Tribunal [1979] KECA 22 (KLR)**, the Court of Appeal stated that:

“The court will grant a stay where special circumstances of the case so require, per Lopes LJ in the Attorney General v Emerson and Others 24 QBD (1889) 56 at p 59Proceeding on this narrow basis, that is to prevent the appeal, if successful, from being nugatory.”

36. In **Mirugi Kariuki v Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** the court held:

“The decision whether or not to grant a stay pursuant to leave is no doubt an exercise of judicial discretion and that discretion like any other judicial discretion must be exercised judiciously. The circumstances under which the Court may grant an order that the grant of leave do operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise is now settled. Where the decision sought to be quashed has been implemented leave ought not to operate as a stay, as was held in George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005. In Nicodemus Kebaso v Chairman of the Board of Governors Matongo Lutheran Theological College [2000] eKLR the court held that:

“Applying the principles of the three cases to the facts of this application it is clear that it has not been stated that the college is going to close down, it has not been stated that there is not going to be any more graduation ceremonies and neither has it been stated that the Plaintiff/Applicant cannot join any other graduation group in future after his affairs have been sorted out by this Court. Definitely third parties are involved, innocent parties too are involved and it is not fair and just that these other third parties and innocent parties be inconvenienced and be treated as sacrificial lambs, in a matter they are not involved. I am sure they would have liked to be together with the

Plaintiff/Applicant had it not been for the unfortunate situation that the Plaintiff/Applicant finds himself in.”

37. In the instant case, there are inquest proceedings which were being conducted before the Magistrate’s court, prior to the DPP intimating the intention to terminate them so as to proceed with criminal prosecution against the applicants. In my humble view, no prejudice will be suffered by any party if a temporary stay is granted to allow the applicants prosecute their substantive notice of motion. These proceedings for judicial review will be fast tracked to avoid any delay in any other processes commenced by the DPP.

38. Accordingly, I find that a stay is necessary to preserve the status quo.

39. In the end, I make the following orders: -

a. The ex-parte Applicants be and are hereby granted leave to apply for Judicial Review Orders as prayed in prayers (2) and (3) of the chamber summons dated 10th February, 2026.

b. That leave so granted shall operate as stay of arrest and commencement of criminal proceedings against the ex-parte Applicants pending the hearing and determination of the substantive motion which shall be filed and served by close of business on 24th March, 2026.

- c. The substantive Application will be instituted in a new Judicial review file as these proceedings were instituted in a miscellaneous file.*
- d. Each party shall bear their own costs of these proceedings.*
- e. This file is closed.*

40. Orders accordingly.

**Dated, Signed & Delivered virtually at Nairobi this 23rd Day of March,
2026**

**R.E. ABURILI
JUDGE**