

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

JUDICIAL REVIEW MISC APPLICATION NO. E397 OF 2025

**IN THE MATTER OF ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2, 10, 19
(2), 20 (2), 28, 29 AND 35 (1) (a) AND (b) OF THE CONSTITUTION OF
KENYA, 2010**

AND

THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT

AND

**IN THE MATTER FOR AN APPLICATION FOR JUDICIAL REVIEW
ORDERS OF PROHIBITION AND CERTIORARI**

AND

**IN THE MATTER OF VIOLATION OF THE RIGHT TO HUMAN
DIGNITY**

-BETWEEN-

REPUBLIC
APPLICANT

-VERSUS-

THE DIRECTOR OF PUBLIC PROSECUTIONS **1ST RESPONDENT**
CHIEF MAGISTRATE COURT AT MILIMANI **2ND RESPONDENT**
THE ATTORNEY GENERAL **3RD RESPONDENT**
KENZO DEALERS LIMITED **INTERESTED PARTY**

-AND-

JUDITH NGINA MWILU **EX-PARTE APPLICANT**

JUDGMENT

1. This Judgment determines the applicant's substantive Notice of Motion dated 9th December, 2025 filed pursuant to leave granted in JR Misc. E152 of 2025 by this Honourable Court on 19th November, 2025. The *ex-parte* Applicant seeks the following ORDERS: -

1) AN ORDER OF PROHIBITION directed to the:

(a) 1st Respondent stopping and/or restraining its officers from prosecuting and/or continuing with the prosecution of the Applicant in Milimani Chief Magistrates Court Criminal Case Number E077 of 2022 R vs. Judith Ngina Mwilu.

(b) The 2nd Respondent restraining and/or stopping it proceeding with the hearing of Milimani Chief Magistrates Court Criminal Case Number E077 of 2022 R vs. Judith Ngina Mwilu.

2) AN ORDER FOR CERTIORARI to remove into this Honourable Court to quash:

(a) The charges presented by the 1st Respondent in Milimani Chief Magistrates Court Criminal Case Number E077 of 2022 R vs Judith Ngina Mwilu.

(b) The proceedings and decisions made by the 2nd Respondent in Milimani Chief Magistrates Court Criminal Case Number E077 of 2022 R vs Judith Ngina Mwilu.

3) THAT costs of the application be provided for.

2. The Application is premised on the facts contained in the Statutory Statement, the Verifying Affidavit of Judith Ngina Mwilu and the grounds enlisted on the face of the Notice of Motion. The *ex-parte* Applicant claims that she is being unfairly prosecuted based on forged evidence, despite the matter being civil in nature and that multiple constitutional rights have been violated by the Respondents. The *ex-parte* Applicant contends that the Respondents have

ignored constitutional safeguards, abused prosecutorial powers under **Article 157 (11) of the Constitution** and violated her rights to equality, fair hearing, and fair administrative action under **Article 47 of the Constitution**. She seeks this court's intervention to halt the prosecution and protect her constitutional rights.

3. The ex parte applicant pleads that her and the Interested Party herein signed a joint venture agreement on 17 May 2021 but those disagreements arose between them which led to a civil case - *MILIMANI MCCC/E12932/2021*, where the Interested Party obtained an interlocutory judgment against her. That the Directors of the Interested Party then lodged complaints, resulting in *Criminal Case No. E077 of 2022* against her.
4. She asserts that the 1st Respondent has ignored written requests from her and the protests of Mandala & Company Advocates over the impugned agreement and the entire proceedings contrary to the principles envisaged in **Article 47 of the Constitution**.
5. She also decries being placed on her defence in the criminal proceedings, by the 2nd Respondent Magistrate, which proceedings were scheduled for 20th November, 2025 thereby violating her rights pursuant to **Article 50 (1)** and legitimate expectation pursuant to **Article 47 of the Constitution** and that the Respondents ought not to be allowed to proceed with her further prosecution, asserting that the criminal case against her is in violation of her constitutional rights to equal protection of the law, human dignity, fair administrative action and fair hearing, which violations are likely to continue unless this Honourable Court intervenes.

The 1st Respondent's response

6. In response to the Application, the 1st Respondent filed **Grounds of Opposition dated 23rd January 2026** raising seven grounds of opposition which in

summary are that the *ex-parte* Applicant has not shown any illegality or impropriety in the decision to prosecute her; on the allegations of forgery, witness credibility and evidentiary issues, the 1st Respondent argues that those are matters for the trial court, not judicial review; that civil disputes do not bar criminal proceedings and that the *ex-parte* Applicant has remedies within the criminal justice system.

7. It is also contended that the trial court's decision to place the Applicant on defence is a judicial act subject to appeal, not review and that the *ex-parte* applicant's application is an attempt to prematurely terminate lawful proceedings, thereby warranting a dismissal of the motion.
8. The 1st respondent also filed **the Replying Affidavit** sworn by **No. 54850 CPL Patrick Kuloba**, an officer in the Directorate of Criminal Investigations on 27th January 2026. He deposes that the *ex-parte* Applicant's prosecution followed thorough police investigations, after a complaint was lodged by Eugene Kabasha Hodari and Christine Mukanduhije, directors of Kenzo Dealer Limited, regarding fraudulent claims made by the *ex-parte* Applicant concerning purported government contracts.
9. CPL Kuloba deposes that the investigations confirmed fraudulent misrepresentations and financial transfers from the complainants to the *ex-parte* Applicant. Further, that documentary evidence, witness statements and official verifications established a deliberate scheme of deceit, supporting charges of obtaining money by false pretences under the Penal Code.
10. The 1st Respondent asserts that the decision to prosecute was lawful, reasonable and in good faith, with no malice or ulterior motive. He avers those issues of evidence authenticity and witness credibility are for the trial court, not judicial review and that civil disputes do not bar criminal proceedings. It is his contention that the Application is premature, lacking in merit and an abuse of

court process, with public interest requiring the criminal case to proceed to conclusion.

The interested party's response

11. The Interested Party filed an affidavit in response to the Application dated 27th January 2026 sworn by Eugene Kabasha Hodari, a Director of the Interested Party in which he deposes that Kenzo Dealers Limited was registered on 11th February 2021, with directors including the deponent Eugene Kabasha Hodari, Christine Mukanduhije and Clementine Kandra, all Rwandese nationals.
12. He avers that a Joint Venture Agreement was executed involving the *ex-parte* Applicant's company Cam-Links Limited and Kenzo Dealers Limited, with a financing arrangement of Kshs. 5,000,000/= for public works. That the *ex-parte* Applicant Judith Mwilu allegedly engaged Kenzo Dealers Limited personally for a government-linked sand supply tender scheme, presenting the deal as urgent and guaranteed with assurances of prompt payment.
13. Mr. Hodari deposes that the *ex-parte* Applicant obtained funds from Kenzo Dealers Limited based on representations of a government contract connected to State House for the supply of construction sand with profit-sharing terms detailed. That the *ex-parte* Applicant represented that the contract was substantial, claiming that the only obstacle to its immediate execution was her lack of working capital and so she requested funds from them, promising that the government payment was assured.
14. He deposes that the *ex-parte* applicant further told them that the turnaround period would not exceed two weeks and they would recover their capital with a substantial profit. So based on these representations, they executed a Joint Venture Agreement dated 17th May 2021 and received approximately Kshs. 5,000,000= through ABSA and I&M Bank accounts and also M-Pesa mobile

money accounts between 17 to 26 May 2021, which she acknowledged would be used solely for the execution of the alleged government tender.

15. He further deposes that the *ex-parte* Applicant despite receiving the funds, failed to produce any government tender documents and gave various excuses for delays and inaction. That for these reasons, Kenzo Dealers through its advocates Wachira & Mumbi Advocates, lodged a formal complaint with the Directorate of Criminal Investigations (DCI), detailing the fraudulent scheme involving failure to repay Kshs. 5,000,000/= advanced for a non-existent government tender. That the DCI upon conducting investigations found no evidence of the alleged government tender and confirmed funds were retained by Mwilu the *ex-parte* Applicant. It is averred that the findings of the investigations led to criminal charges under Section 313 of the Penal Code being proffered against the *ex-parte* Applicant for obtaining money by false pretences.

16. The Deponent denies allegations that the Joint Venture Agreement and other documents are forged, stating that no official investigator found any forgery during the criminal case. He also avers that the *ex-parte* Applicant's forgery claim is described as a defensive tactic, and the trial court thoroughly examined and admitted the documents as evidence. It is argued that questioning document authenticity and witness credibility are matters for the trial court and not judicial review.

17. He contends in deposition that the judicial review proceedings are being misused to re-litigate evidence already handled in the criminal trial, which is impermissible. That the civil and criminal cases can run concurrently, with criminal proceedings addressing fraud and public justice beyond private contractual disputes in a civil suit.

18. He deposes that the *ex-parte* Applicant's characterization of the matter as solely civil is a deliberate attempt to evade criminal responsibility. Further, on prosecutorial discretion and constitutional mandate of the Respondents, it is deposed that the Director of Public Prosecution acted independently and lawfully in prosecuting the *ex-parte* Applicant with clear evidence. He contends that disagreement with prosecution evidence or court rulings is not grounds for judicial review intervention under Article 47 of the Constitution.
19. Further, that the *ex-parte* Applicant has shown a pattern of delaying justice, and the judicial review is an abuse of court process intended to obstruct the criminal trial. The deponent also deposes that fraud offenses affect public confidence in financial dealings, and prosecutions should not be prematurely terminated by collateral proceedings. It is his case that halting the criminal prosecution would undermine the mandate of the Director of Public Prosecutions and the rule of law.
20. This Court is urged to dismiss the judicial review application and allow execution of valid legal orders

The exparte applicant's submissions

21. By Court directions issued on 28th January 2026, the parties were to canvass the Application by oral submissions. On 16th February 2026, when the matter came up for hearing, Counsel for the *ex-parte* Applicant, Mr. Abidha submitted that the *ex-parte* Applicant and the Interested Party had a contract for deposit of funds and supply of goods in which the parties partly discharged their obligations but a disagreement arose, leading to the intervention of the police who subsequently charged the *ex-parte* Applicant vide *Milimani Cr. Case E077/2022* with the offence of obtaining by false pretence. That there is also a Ruling in Civil Division where the Interested Party has sued the *ex-parte*

Applicant and her company and that it was the agreement between the parties that gave rise to criminal charges against directors.

22. Counsel argued that the annexed agreement at pages 14-15 is altered but the one on page 18 was not. He asserted that the 1st Respondent, the Director of Public Prosecutions annexed the forged agreement as evidence yet Mr. Mandala, the advocate who drew the agreement, denies ever altering it. It is Counsel's submissions that the 1st Respondent is preferring charges based on fabricated documents specifically that the M-Pesa extract on page 19 relating to the transfer of Kshs 100,000/= is a forgery and that the M-Pesa statement at page 20 shows only Kshs. 50/=.
23. It is also submitted that the ex-parte Applicant is being charged with an offence of transferring money to herself in her Absa Bank Account, a transaction which is purportedly made by Eugene Odari on 20/5/2021, rendering the prosecution untruthful.
24. Citing **Article 157 of the Constitution** and **Section 4 of Office of Director of Public Prosecutions Act**, Counsel for the applicant submits that the principles to be applied by ODPP are well laid by the Supreme Court in *Jirongor Soi Developer & Others [2018] eKLR paragraphs 81-85* that where the ODPP overreaches in prosecution, the court can intervene and that the ODPP must not act in a way that is unreasonable or use the court for ulterior motive. Counsel urged that the Prosecution is overzealous, as addressed in the Supreme Court case of *Praxedes Wamoni Saisi at paragraphs 64-66*. He reiterated that the Court can intervene where the prosecution is not lawful and is mounted in violation of Article 157(1) of the Constitution as was held in *Dande & Others vs ODPP & Others*.
25. It is further submitted that the Respondents' responses admit that there could be forgeries which should be dealt with at the trial court through submissions

or cross-examination and revision and that these are not in themselves limitations. It is contended that the prosecution admits standards but goes against those standards. That **Kenzo Limited** is the plaintiff in the criminal court in **Misc E12932/2021** against the ex-parte Applicant and **Cam links Ltd**, her company, while in the criminal case, the people who are alleged to have been defrauded are not the company claiming in the civil suit but one **Eugene Odari**. Further, that the complaint was made by **Kenzo Ltd** and not the persons who are in the charge sheet as complainants. Counsel cited **George Williams Omondi vs. Co-operative Bank Ltd**, and **Salomon vs Salomon** on liability of a company which is not liability of directors.

26. He urged the Court to find the Application merited in the constitutional framework and hold the decision of the ODPP to be irrational, illegal and unconstitutional. Additionally, that the criminal charge in Cr. E077/2022 be quashed.

The 1st respondent's submissions

27. The Interested Party filed an affidavit in response to the Application dated 27th January 2026 sworn by Eugene Kabasha Hodari, a Director of the Interested Party in which he deposes that Kenzo Dealers Limited was registered on 11th February 2021, with directors including the deponent Eugene Kabasha Hodari, Christine Mukanduhije and Clementine Kandra, all Rwandese nationals.

28. He avers that a Joint Venture Agreement was executed involving the *ex-parte* Applicant's company Cam-Links Limited and Kenzo Dealers Limited, with a financing arrangement of Kshs. 5,000,000/= for public works. That the *ex-parte* Applicant Judith Mwilu allegedly engaged Kenzo Dealers Limited personally for a government-linked sand supply tender scheme, presenting the deal as urgent and guaranteed with assurances of prompt payment.

29. Mr. Hodari deposes that the *ex-parte* Applicant obtained funds from Kenzo Dealers Limited based on representations of a government contract connected to State House for the supply of construction sand with profit-sharing terms detailed. That the *ex-parte* Applicant represented that the contract was substantial, claiming that the only obstacle to its immediate execution was her lack of working capital and so she requested funds from them, promising that the government payment was assured.
30. He deposes that the *ex-parte* applicant further told them that the turnaround period would not exceed two weeks and they would recover their capital with a substantial profit. So based on these representations, they executed a Joint Venture Agreement dated 17th May 2021 and received approximately Kshs. 5,000,000/= through ABSA and I&M Bank accounts and also M-Pesa mobile money accounts between 17 to 26 May 2021, which she acknowledged would be used solely for the execution of the alleged government tender.
31. He further deposes that the *ex-parte* Applicant despite receiving the funds, failed to produce any government tender documents and gave various excuses for delays and inaction. That for these reasons, Kenzo Dealers through its advocates Wachira & Mumbi Advocates, lodged a formal complaint with the Directorate of Criminal Investigations (DCI), detailing the fraudulent scheme involving failure to repay Kshs. 5,000,000/= advanced for a non-existent government tender. That the DCI upon conducting investigations found no evidence of the alleged government tender and confirmed funds were retained by Mwilu the *ex-parte* Applicant. It is averred that the findings of the investigations led to criminal charges under Section 313 of the Penal Code being proffered against the *ex-parte* Applicant for obtaining money by false pretenses.

32. The Deponent denies allegations that the Joint Venture Agreement and other documents are forged, stating that no official investigator found any forgery during the criminal case. He also avers that the *ex-parte* Applicant's forgery claim is described as a defensive tactic, and the trial court thoroughly examined and admitted the documents as evidence. It is argued that questioning document authenticity and witness credibility are matters for the trial court and not judicial review.
33. He contends in deposition that the judicial review proceedings are being misused to re-litigate evidence already handled in the criminal trial, which is impermissible. That the civil and criminal cases can run concurrently, with criminal proceedings addressing fraud and public justice beyond private contractual disputes in a civil suit.
34. He deposes that the *ex-parte* Applicant's characterization of the matter as solely civil is a deliberate attempt to evade criminal responsibility. Further, on prosecutorial discretion and constitutional mandate of the Respondents, it is deposed that the Director of Public Prosecution acted independently and lawfully in prosecuting the *ex-parte* Applicant with clear evidence. He contends that disagreement with prosecution evidence or court rulings is not grounds for judicial review intervention under Article 47 of the Constitution.
35. Further, that the *ex-parte* Applicant has shown a pattern of delaying justice, and the judicial review is an abuse of court process intended to obstruct the criminal trial. The deponent also deposes that fraud offenses affect public confidence in financial dealings, and prosecutions should not be prematurely terminated by collateral proceedings. It is his case that halting the criminal prosecution would undermine the mandate of the Director of Public Prosecutions and the rule of law.

36. This Court is urged to dismiss the judicial review application and allow execution of valid legal orders
37. Mr. Mulati counsel for the 1st Respondent submitted opposing the Application and relied on the Replying affidavit and Grounds of Opposition. He submitted that the prosecution acted, after thorough investigations following complaints by the directors of **Kenzo Ltd** found that there were transfers and deposits of about Kshs. 5 Million to the ex-parte Applicant who pretended that she would supply material on Government contracts.
38. On alleged fake agreements, it is submitted that the alleged forgery documents were not in existence in 2022 when the charges were preferred and that the advocate only came up with the document in 2023. That in any case, the trial court has already considered the documents and placed the Applicant on her defence in the criminal case.
39. It is further submitted that the *ex-parte* Applicant is represented by an advocate in the criminal case and on the parties in the civil suit, Counsel submits that the DPP has discretion to determine who to charge since the transactions involved directors personally, not the company. He urged the court to allow the criminal case to proceed to its logical conclusion.

The interested party's submissions

40. Mr. Nthei Counsel for the Interested Party submitted relying on the affidavit of Eugene Kabasha Hodari sworn on 27/1/2026 and stated that the ex-parte Applicant approached the Interested Party to raise money to enable her supply sand to the Government and make a profit of Kshs. 7 million. That the Interested Party and its directors raised Kshs. 5 million and waited for the profit & refund of their money which never came, necessitating the filing of a complaint with the police.

41. He submits that the DCI investigated the case and charged the *ex-parte* Applicant, that the DPP was within his powers to charge the *ex-parte* applicant, and that witnesses have testified and the *ex-parte* Applicant has been placed on her defence. It is his submission that the present Application is an appeal disguised as a Judicial Review Application upon the *ex-parte* being aggrieved by the decision to place her on her defence. That the issues of the alleged forgeries were handled at the trial court through cross-examination and many exhibits were produced at the trial court. That the *ex-parte* Applicant has only pointed out the agreement allegedly forged and he relies on ***Henry Aminga Nyabere vs DPP & 2 Others (2021) eKLR***.
42. On the Agreement's authenticity, it was submitted that the issue is the performance of the agreement. That the intention was achieved and money received by the *ex-parte* Applicant as testified by one witness who said that he withdrew the money and gave it in cash to the *ex-parte* Applicant who deposited in her account. It is submitted that the same situation happened to other directors and that where the activities were engineered by the directors, natural persons responsible for fraud., the *mens rea* and actus reus was by the directors.
43. Counsel submitted that the criminal justice system is the pillar of our society and the Rule of Law and that therefore, Criminal proceedings should not be interfered with by this Court just because the *ex-parte* Applicant was placed on her defence. He urged this Court to dismiss the application and allow the criminal process to take its course.

The applicant's rejoinder

44. In a rejoinder, Mr. Abidha for the applicant submitted that there is confirmation that the relationship of the parties was contractual. That the *ex-*

parte Applicant acted on behalf of Cam Links and that capacity or locus standi is important. He submitted that a company can make a complaint and that the forgeries were done to change the obligations. It is contended that if a right is being violated and threatened, a party ought not to wait and that the High Court can intervene as was held by the Supreme Court in the *Praxedes Namoni Saisi* case.

45. Counsel submitted that the Replying affidavit by Mr. Nthei does not agree with his submissions as this is not an appeal, but merely challenging powers of the DPP under Article 157 (11) and violation of Article 47 of the Constitution. He argued that they had demonstrated that proceedings before the 2nd Respondent are contra statute and that there is violation of the rights of the *ex-parte* Applicant and that the Court cannot restrain itself where there is violation of rights.

Analysis and Determination

46. I have considered the application, the supporting material and the responses thereto together with the oral submissions by the participating parties' counsel. In my view, the main issue for determination whether the orders sought are merited.
47. The powers of the DPP are set out under **Article 157 of the Constitution** which establishes the Office of the Director of Public Prosecutions as an independent office. This constitutional provision is further given effect by the Office of the Director of Public Prosecutions Act (2013). The primary function of the ODPP is that it is responsible for all criminal prosecutions in the country.
48. It is also a well -known principle that the DPP acts independently and free from external control. In particular, **Article 157(10)** speaks to the

independence of the ODPP. However, the power to prosecute must be exercised within the confines of the law.

49. The High Court on the other hand has inherent jurisdiction under **Article 165** to intervene in exceptional situations and quash a prosecution or halt criminal proceedings initiated against a person. Mativo J in **Carlito Emelson vs. Republic Petition No. 186 of 2016** explained the circumstances where a court of law could intervene and stop or quash ongoing prosecution and criminal proceedings against a party. The learned judge held thus:

“15. The inherent jurisdiction of the court to stop or quash a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances. (see Attorney General's Reference (No 1 of 1990) [1992] Q.B. 630, CA; Attorney General's Reference (No 2 of 2001) [2004] 2 A.C. 72, HL. The essential focus of the doctrine is on preventing unfairness at the trial through which the accused is prejudiced in the presentation of his or her case or where there is clear breach of fundamental rights to a fair trial. Courts should first consider whether or not there is anything in the trial to prevent 'a fair trial' and if there is, then the court ought to stop the prosecution.

16. The high court can prohibit or quash prosecutions in cases where it would be impossible to give the accused a fair trial; or where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case. (See Bennett vs Horseferry Road Magistrates' Court and Another [1993] 3 All E.R. 138, 151, HL; see also R vs Methyr Tydfil Magistrates' Court and Day ex parte DPP [1989] Crim. L. R. 148.) This test has not been established in this case.

17. The power to stay or stop a prosecution should only be exercised if exceptional circumstances exist which would result in prejudice to the accused which cannot be remedied in other ways. To me, this is not a deserving case where the prosecution ought to be halted or declared void for the interests of justice.

18. A criminal prosecution can also be stopped if it was commenced in the absence of proper factual foundation. This has not been alleged or proved in this case. From the material before me, there was proper factual foundation to warrant undertaking the prosecution in question. (Republic vs Attorney General ex-parte Arap Ngeny HCC APP NO. 406 of 2001.” [emphasis added]

50. Similarly, *Kuria & 3 Others vs. Attorney General* [2002] 2 KLR 69, it was held that:

“The Court has 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 process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society’s senses of fair play and decency and/or where the proceedings are oppressive or vexatious...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 Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, by whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer... In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute.....

It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The fact that it has not been argued before however does not mean that the law stops dead at its tracks. An order of prohibition looks to the future and not to the past; it is concerned with the happenings of future events and little, if any, of past events...So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to

determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the Court from prohibiting further hearings

and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...However, it does not mean that a civil suit and a criminal case cannot co-exist at any one particular time. This is because the section envisages the re-prosecution of a criminal case substantially dealt with either in fact or law, a case in which issues have been laid to rest. There is no mention in the section that the simultaneous existence of a civil and criminal cases is constituting double jeopardy. The courts have, however stated that the power to issue an order of prohibition to stop a criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related facts, or to say that a person should never be prosecuted in criminal proceedings when he has a civil suit against him relating to matters in the criminal proceedings....”[emphasis added]

51. Flowing from the above, and considering the facts of this case, I note that the dispute between the parties herein stems from the joint venture agreement dated 17th May 2021 between the *ex-parte* Applicant and the Interested Party who is the complainant in the criminal case. It is undisputed that civil proceedings have also emanated from the said dispute.
52. Section 193A of the Civil Procedure Code provides for concurrent criminal and civil proceedings in the following terms:

193A. Concurrent criminal and civil proceedings

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.

53. The case of **Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others** (supra) posits that the existence of a civil suit does not necessarily vitiate the commencement of a criminal trial. The only consideration should be whether the decision to prosecute was marred with irregularity, illegality and impropriety or unreasonableness and whether it goes against the overall interests of justice and or in violation of the constitutional rights and provisions. In other words, the prosecution and subsequent criminal proceedings should never be utilized for settling personal scores or for collateral purposes, including aiding of a plaintiff to succeed in a civil suit against the accused.
54. To further buttress this proposition, the High Court's pronouncement in **Francis Kirima M'ikunyua & Others vs. Director of Public Prosecutions, Petition No. 461 of 2012**, is instructive where **Majanja, J.** highlighted the possibility and the grave danger of such proceedings where one party had advantage over another thereby vitiating a fair trial. He expressed himself as hereunder in a case where there were both criminal and civil proceedings arising from the same facts: -

“It is very clear that the criminal process and the resultant court proceedings are being used to settle what is otherwise civil dispute which has been the subject of several court cases and indeed decisions. It is clear to me that the contending parties wish to use the criminal process to score points against each side in order to assert the rights of ownership. The use of the criminal process in this manner is not uncommon within this jurisdiction to find that intractable land disputes mutate into criminal

matters. It is not difficult to see why. In criminal cases the State's coercive power is brought to bear upon the individual and where we have an inefficient system to settle civil claims, a person who can tie his opponent in the criminal justice system and ultimately secure a conviction will no doubt have an advantage over his opponent."

(See also **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another** [2002] 2 KLR 703)

55. Similarly, the Court of Appeal in **Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others** Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR stated that:

"While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court. This is case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations."

56. Evidently, the High Court has the requisite authority and equally a duty to stop or quash criminal proceedings where the same have been instituted for ulterior purposes other than the pursuit of justice, despite the fact that the ODPP is constitutionally and legally vested with independent prosecutorial powers.

57. In **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170**, the Court of Appeal held:

“It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”

58. In other words, the ODPP cannot be subjected to the control of any other person or authority including the Court in exercising its discretionary and independent powers unless it can be proven that the DPP is acting unlawfully. (See **Meixner & Another vs. Attorney General [2005] 2 KLR 189**)

59. It is the 1st Respondent's case that the decision to institute criminal proceedings against the *ex-parte* applicant was informed by investigations which arose from complaints lodged by Eugene Kabasha Hodari and Christine Mukanduhije, directors of Kenzo Dealer Limited, regarding fraudulent claims made by the *ex-parte* Applicant concerning purported government contracts. That this disagreement precipitated a civil suit in Milimani Chief Magistrate's Court which later brought to light all documentary evidence that pointed to a criminal offence under section 313 of the Penal Code.
60. I note that the civil suit was initiated in 2021 and the criminal charges were mounted in 2022. The applicant has all along been in court and participated in those proceedings. She even discloses that the interested party obtained interlocutory judgment against her in the civil suit. She has waited until the trial court places her on her defence in a case where the prosecution has closed its case that she approaches this court with a view to halting the criminal proceedings.
61. In my view, the *ex-parte* Applicant's contention that the prosecution was based on falsified documents cannot be an issue which was only discovered after she was placed on her defence and is therefore not sufficient to warrant a stoppage of the ongoing criminal proceedings. This is because, it was expected that during the trial, the Prosecution would and have already presented evidence which the *ex-parte* Applicant as an accused person has had an opportunity to challenge through cross examination and now that she is placed on her defence, as she had that evidence availed to her in advance, she can mount a defence and give her side of the story.
62. In other words, the issue of alleged forged documents or locus standi can be sufficiently addressed at the trial and the court will be able to assess that

evidence and make a determination. That in itself does not warrant interference of the powers of the ODPP and the authority of the trial court to hear criminal cases.

63. Additionally, this Court has an overriding duty to promote justice and prevent injustice. If in my view, the material placed before me presented a situation where the ongoing prosecution and criminal proceedings were instituted in an illegal manner and allowing them to continue would amount to an abuse court process or infringement of the ex-parte Applicant's fundamental rights, then there would be an avenue for intervention. At present, however, the facts before this court do not suggest that the ongoing trial is an abuse of court process or that the ODPP commenced the prosecution of the applicant whimsically and against laid down processes or legitimate expectation. If that were to be the case, the applicant could not have waited from 2022 to November, 2025 to challenge her prosecution which was mounted after a civil suit was instituted against her in 2021.

64. The Supreme court of India in **State of Maharashtra vs Arun Gulab Gawali (2010) 9 SCC 701** citing many other decisions had this to say concerning challenge to criminal prosecution:

“15. In State of Karnataka Vs. L.Muniswamy & Ors. AIR 1977 SC 1489, this Court held as under:-

“In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of

harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects it would be impossible to appreciate the width and contours of that salient jurisdiction.” (Emphasis added).

16. The inherent power is to be exercised ex debito justitiae, to do real and substantial justice, for administration of which alone Courts exist. Wherever any attempt is made to abuse that authority so as to produce injustice, the Court has power to prevent the abuse. It is, however, not necessary that at this stage there should be a meticulous analysis of the case before the trial to find out whether the case ends in conviction or acquittal. (Vide Mrs. Dhanalakshmi Vs. R. Prasanna Kumar & Ors. AIR 1990 SC 494; Ganesh Narayan Hegde Vs. S. Bangarappa & Ors. (1995) 4 SCC 41; and M/s Zandu Pharmaceutical Works Ltd. & Ors. Vs. Md. Sharaful Haque & Ors. AIR 2005 SC 9).

65. The Court further stated:

“17. In State of Orissa & Anr. Vs. Saroj Kumar Sahoo (2005) 13 SCC 540, it has been held that probabilities of the prosecution version cannot be analyzed at this stage. Likewise, the allegations of mala fides of the informant are of secondary importance. The relevant passage reads thus: “It would not be proper for the High Court to analyse the case of the

complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and, on such premises, arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with.” (Emphasis added).

66. The Court further stated that:

“12. The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and in the rarest of rare cases and the Court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the 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 on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at uncalled for stage nor can it ‘soft-pedal the course of justice’ at a crucial stage of proceedings.....The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of the power of the court, but the more the power, the more due care and caution is to be exercised in invoking these powers. (See State of West Bengal & Others vs. Swapan Kumar Guha & Others, AIR, 1982, SC 949, Pepsi Foods Ltd & Another vs Special Judicial Magistrate & Others AIR 1998, SC 128 & G. ugarSuri & Ano Vs. State of U.P & Others, AIR 2000 Sc 754 and Ajay Mitra Vs. State of M.P. & Ors. AIR 2003 SC 1069)”

67. Applying the above principles to this case, I find the application by the exparte applicant herein to be devoid of any merit and the same is hereby dismissed.
68. I order that each party bear their own costs of these judicial review proceedings.
69. This file is closed.

Dated, Signed and Delivered virtually via MS Teams at Nairobi this 15th Day of April 2026

**R.E. ABURILI
JUDGE**