



**Erdemann Property Limited & another v Director of Public Prosecutions
& 2 others; KCB Bank Kenya Limited (Interested Party) (Judicial Review
E090 of 2026) [2026] KEHC 5583 (KLR) (Judicial Review) (27 April 2026) (Ruling)**

Neutral citation: [2026] KEHC 5583 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW E090 OF 2026**

TW OUYA, J

APRIL 27, 2026

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR
JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

-AND-

**IN THE MATTER OF: AN APPLICATION UNDER ARTICLES 10, 20, 21, 22, 23,
47, 48, 50 AND 165(3) (B) & (D) & 6 OF THE CONSTITUTION OF KENYA, 2010**

-AS READ WITH-

**SECTIONS 2 (II), 7 (1) (A), 7 (2) (A) (IV), 7 (2) (C), (D), (E), (F), (H), (J), (K), (M), (N),
(O), AND 9(1) OF THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015**

-AND-

**SECTION 10 (2) & (3), HIGH COURT (ORGANISATION & ADMINISTRATION) ACT
AND ALL OTHER ENABLING PROVISIONS AND PROCEDURES OF THE LAW**

BETWEEN

ERDEMANN PROPERTY LIMITED 1ST APPLICANT

ZEYUN YANG 2ND APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATION 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

AND

KCB BANK KENYA LIMITED INTERESTED PARTY



RULING

1. The Application for determination before the Court is a Chamber Summons dated 25th March 2026 filed under Certificate of Urgency and pursuant to Article 27 (1), 40, 47, 162 (2) (b) & (3), 165 (6) & (7) & 169 (2) of *the Constitution* of Kenya, Sections 3 (1) (b), 7 (1) (b), 7 (2) (a) (i) & (ii), 7 (2) (d), 7 (2) (f), 7(2) (i) (ii), 7(2)(j), 7(2) (n) and 9 (2) of the *Fair Administrative Action Act* No. 17 of 2015, Section 8 of the *Law Reform Act*, Order 53 Rule 1 (1) & (2) of the Civil Procedure Rules, 2010 and all enabling provisions of the Law.
2. The Applicants are seeking the following ex-parte orders:
 - i. spent
 - ii. That this Honourable Court be and is hereby pleased to grant Leave to the Applicants to apply to this Honourable Court for a Judicial Review order of certiorari to call-up, remove, deliver up to this Honourable Court and quash the decision, declaration and/or the directive of the Respondents purporting to order for the investigation, arrest, detention and/or prosecution of the Applicants as well as the directors of the 1st Applicant in relation to the Charge dated 16th September, 2019.
 - iii. That this Honourable Court be and is hereby pleased to grant Leave to the Applicants to apply to this Honourable Court for a Judicial Review order of prohibition to restrain the Respondents or anyone claiming under or pursuant to their authority from in any howsoever proceeding with investigation, arrest, detention and/or prosecution of the Applicants as well as the directors of the 1st Applicant in relation to the Charge dated 16th September, 2019.
 - iv. That the grant of such leave under prayer (2) & (3) above do operate as STAY against the decision to investigate, arrest, detain and/or prosecute the Applicants as well as the directors of the 1st Applicant in relation to the Charge dated 16th September 2019, pending the hearing and determination of the judicial review proceedings herein.
 - v. That this Honourable Court do grant any other or further relief that it may deem fit to grant, including timelines for expeditious determination of the substantive Motion herewith.
 - vi. That Costs be provided for on a full indemnity basis.
3. The Application is supported by the grounds on the face of it, the facts outlined in the accompanying Statutory Statement, and the Verifying Affidavit sworn by Zeyun Yang, the 2nd Applicant herein and a director of the 1st Applicant, all of eve date evenly.
4. The Applicants have outlined 28 grounds in their application in which they contend that the impending criminal proceedings arise from a purely civil dispute concerning a loan facility advanced by the Interested Party KCB Bank to the 1st Applicant and secured by a legal Charge on 16th September 2019.
5. The background of the dispute is that in 2021, the 1st Applicant's sales department inadvertently sold some of the charged units which upon discovery, they (1st Applicant) acknowledged the mistake in good faith and offered alternative security to the Bank where they proposed that the Bank retains the charged property valued at Kshs. 3.5 billion or substitute it with another property including one valued over Kshs. 500 million. However, the Interested Party declined the alternative security and proceeded



- to exercise its statutory power of sale, advertising the charged property for auction. They assert that the dispute is already the subject of extensive litigation before various Civil Courts, including the Court of Appeal and the High Court as follows:
- a. HCCOMM Case No. E209 of 2022 where 1st Applicant sued the Interested Party to prohibit the exercise of the power of sale.
 - b. CoACAPPL. No. E042 of 2024 which is an appeal arising from HCCOMM Case No. E209 of 2022 pending before the Court of Appeal.
 - c. HCCC No. E007 of 2024 entail civil proceedings by 100 homeowners who purchased units on the charged property instituted against both the Interested Party and the 1st Applicant, to prohibit the sale of their homes.
6. It is deposed that the impending criminal charges arise entirely from the loan agreement and the mistaken sale of the charged units. The Applicants argue that there is absolutely no criminal element to the dispute, which is governed by clear civil and contractual remedies. Further, that despite these ongoing civil matters, the 1st Respondent who is the Prosecuting authority, allegedly at the Interested Party's behest, confirmed via a letter dated 16th March, 2026 of its intention to imminently arrest, detain, and/or prosecute the Applicants. It is contented that KCB, the Interested Party herein is weaponizing the Criminal Justice System to harass and coerce the Applicants into repaying the loan, rather than pursuing the civil remedies such as the auction which it already initiated.
 7. It is deposed that initiating criminal charges disregards and undermines the multiple civil suits in courts of competent jurisdiction including the Court of Appeal, that are already actively hearing and determining the exact same issues between these parties.
 8. The Applicants aver that the impending prosecution constitutes an abuse of process and violates their rights to fair administrative action, fair trial, protection of property, and human dignity. In addition, it is pleaded that it threatens to destroy the Applicants' reputations, livelihoods, and businesses and that it is not in the public interest to use criminal proceedings as a tool to enforce a civil claim.
 9. It is reiterated that the dispute between the parties is contractual and commercial in nature with no criminal element. That in this regard, the decision by the 1st Respondent to prosecute is an abuse of their discretionary powers under Article 157 of *the Constitution*, exercised in bad faith, oppressively, and for extraneous goals not recognized by *the Constitution* or the *Office of the Director of Public Prosecutions Act*.
 10. It is their case that if the actions of the Respondents are not stopped, the proceedings will destroy the Applicants' families, livelihoods, and careers through "witch-hunts" and malicious prosecution. Accordingly, they invoke the High Court's supervisory authority under Article 165 (2), (3) (d) (ii) & (6) of *the Constitution* to intervene and investigate the allegations impugning the prosecution, to quash the impending unlawful criminal proceedings and grant leave to pursue Judicial Review Orders and a stay of the criminal proceedings to prevent oppression and secure the ends of justice.
 11. When the matter came up before this Court on 7th April 2026, Mr. Gisemba Counsel for the Applicants informed the Court that they were seeking leave to commence Judicial Review proceedings in order to quash the 1st Respondent's decision to charge the Applicants in a criminal case while the dispute was purely civil.
 12. Having taken consideration of the materials on Record being the Application itself and the annexures, against the law, the only issue for my determination is: whether the Applicants have made out a case for granting the orders sought in the Application for leave to institute Judicial proceedings.



13. The legal basis for seeking leave of the court to institute Judicial Review Proceedings is anchored on Order 53 of the Civil Procedure Rules 2010. It states as follows:

order 53 - applications for judicial review

1. Applications for mandamus, prohibition and certiorari to be made only with leave [Order 53, rule 1]
 1. No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.
 2. An application for such leave shall be made ex parte to a judge in chambers, and shall be accompanied by —
 - a. a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought; and
 - b. affidavits verifying the facts and averment that there is no other cause pending, and that there have been no previous proceedings in any court between the applicant and the respondent, over the same subject matter and that the cause of action relates to the applicants named in the application.

[L.N. 22/2020, r. 25.]

3. The judge may, where leave denotes stay, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.

[L.N. 22/2020, r. 26.]

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.

14. In order to determine whether the Court can grant leave to commence Judicial Review proceedings, I am guided by the decision in *Meixner & Anor v AG* [2005] 2 KLR 189 where the court held that an application for leave has to demonstrate an arguable case for the grant of the judicial review orders sought.

15. It follows then that, the duty of the Court at this stage of an Application for Leave, is not to delve into the substantive merits of the Application but to merely consider whether the Applicant has a sufficient interest in the subject matter, and whether they have demonstrated a prima facie case. On the same breath, a prima facie case is not one that will likely succeed but one that raises arguable points of law base on the facts. In other words, it is not a frivolous case.



16. The purpose for seeking leave before instituting Judicial Review proceedings is now well-established. Chigiti J. aptly explained this in the case of *Multiline Services Limited vs. Nairobi City County Government* [2023] KEHC 23794 (KLR) thus:

Leave is meant to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless; 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; 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. This reason for leave was discussed in the case of *Republic v County Council of Kwale & another ex parte Kondo & 57 others, Mombasa HCMCA No. 384 of 1996.*”

17. Similar position was also espoused in *Republic vs. National Transport & Safety Authority & 10 others* [2014] eKLR)

18. With this in mind, I have carefully read the Statutory Statement and the grounds elucidated in the Application together with the attendant affidavits. Under Article 157 *the Constitution*, the ODPP bears discretionary and independent prosecutorial powers. However, Article 165 of *the Constitution* vests in the High Court supervisory jurisdiction to intervene where there may be instances of the Director of Public Prosecutions acting in bad faith or for extraneous and illegal purposes, or against public interest.

19. The Applicants herein seek the Court’s intervention to quash the criminal proceedings, arguing that using the threat of criminal proceedings and potential imprisonment to resolve a commercial contract dispute is contrary to public policy and an abuse of power. I find that the Applicant has established a prima facie case and accordingly find the Application merited.

20. In the premises, I allow the Application for Leave dated 25th March 2026 and hereby grant the following orders:

- a. Leave to file judicial review proceedings is granted.
- b. Leave shall operate as stay.
- c. The substantive Application/Motion shall be filed and served within 14 days of the date of the Ruling.
- d. The Respondents shall file and serve their responses to the substantive Application within 14 days of service.
- e. Further directions to be given by court in the new suit file

DATED SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF APRIL, 2026.

HON. T. W. OUYA

JUDGE

In the presence of:

Gisemba – Exparte Applicants

Kevin/Hamza – Court Assistants

