

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS CIVIL APPLICATION NO. E038 OF 2026

HARILAL DHANJI VELJI PATEL & 3 OTHERS.....
APPLICANTS

VERSUS

DIRECTOR OF CRIMINAL PROSECUTIONS.....1ST
RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND **RESPONDENT**

AND

TAIPAN PROPERTY

MANAGEMENT LIMITED.....INTERESTED
PARTY

RULING

1. Before me is an *ex parte* chamber summons, dated 9th March 2026, seeking leave to apply for the Judicial Review orders of *certiorari* and prohibition, with respect to the summoning, arresting, charging and prosecuting the applicants. The *ex parte* applicants have also filed the statutory statement, and an affidavit to verify it, both dated 9th March 2026. They have also filed a supporting affidavit.
2. The background is set out in the grounds on the face of the application, as well as in the affidavits. The 4th *ex parte* applicant claims ownership of a piece of land in Athi River, Machakos County, which has been encroached upon by third parties, prompting the filing of a suit at the Machakos Environment and Land Court, where injunctive relief was granted. The *ex parte* applicants complain that the 1st respondent has been incorporated into a scheme to dispossess them of the land, and has embarked on a campaign of intimidation, through summonses, arrests, charges and prosecution. It is against that background that

the Judicial Review orders are sought, to quash the decision to summon, arrest, charge and prosecute them; and an order to prohibit the summons, arrest, charging and prosecution. They cite ulterior motives, bias and double standards, failure to consider relevant matters, the need to await the outcome of the land case before consideration for prosecution, and abuse of power and discretion.

3. They have attached relevant documentation to support their application. They include documents of title to land, allotment letters, assorted documents relating to land transactions, cash receipts in respect of payments of land rates and rents, court papers relating to the suit at Machakos, correspondence between the applicants and the 1st respondent, and the charge sheet in Milimani MCCRC No. E060 of 2026.
4. The *ex parte* chamber summons application was placed before the Judge, on 10th March 2026, and it was directed that the same be served, for mention, *inter partes*, on 17th March 2026.
5. Ahead of the *inter partes* mention on 17th March 2026. The respondents filed grounds of opposition, dated 16th March 2026. The constitutional mandate of the respondents, to conduct investigations and prosecution, was asserted. It was argued that the 2nd respondent exercises independent prosecutorial authority which the court should not interfere with, in the absence of illegality, abuse of power or violation of constitutional rights. It was further argued that the *ex parte* applicants had not demonstrated exceptional circumstances that would warrant grant of an order that grant of leave ought to operate as a stay of ongoing criminal proceedings, and, in any event, the prayer for leave was premature and unfounded, and designed to shield the applicants from a lawful criminal process. It was argued that the existence of parallel civil proceedings was not a bar to

criminal proceedings being initiated. It was further argued that no prejudice would be suffered, as the applicants would have an opportunity to challenge evidence and present a defence at the criminal trial.

6. The parties appeared before the Judge, on 17th March 2026, and were heard. Their representations turned more on whether stay was to be granted. The court was not addressed on the matter of leave. In the end, the court ruled, on 17th March 2026, that grant of stay could only be considered at the stage of assessing whether leave ought to be granted.
7. Before I evaluate the *ex parte* chamber summons on its merits, let me say something about the procedure, in Judicial Review causes, as laid out in the Law Reform Act, Cap 26, Laws of Kenya, and Order 53 of the Civil Procedure Rules.
8. The commencement of Judicial Review proceedings is preceded by the filing of an *ex parte* chamber summons, for leave to initiate the proceedings, according to Order 53 rule 1(1) of the Civil Procedure Rules. Upon grant of the leave, a substantive Motion is then filed. Of course, the principal pleading is the statutory statement, and the Motion is merely filed to enable prosecution of the case set out in the statutory statement. According to Order 53 rule 4(1), upon the grant of leave, the *ex parte* applicant, while filing the substantive Motion, is not required to file fresh pleadings and affidavits, but should rely on those filed at leave stage, under Order 53 rule 1(2)(a)(b). Why? Because the case, by the *ex parte* applicant, is in the statement and the affidavit verifying it, and not in the Motion.
9. The *ex parte* chamber summons is not for canvassing *inter partes*, because it is supposed to be *ex parte*. It is for consideration by the Judge without hearing the parties. That is why, under Order 53 rule 1(2), the application for leave is

made *ex parte*, to the Judge in chambers. It is not meant for hearing in open court, and, therefore, *inter partes*. But, under the proviso to Order 53 rule 1(4), the Judge may require an *inter partes* or open court hearing of the application for leave, before grant of leave, “*where the circumstances so require.*” It may equally require separate *inter partes* hearings for the leave and the stay.

10. Service of the *ex parte* application was ordered on 10th May 2026, but I have not seen any indication, in that order, of the circumstances which necessitated the disposal of that application *inter partes*. The said *ex parte* application was, nevertheless, handled *inter partes*, for oral arguments were taken on 17th March 2026, based on the material filed *ex parte* by the *ex parte* applicants, and the grounds and replying affidavit by the respondents. A ruling was delivered on 17th March 2026, which did not determine the *ex parte* chamber summons, for the matter was only meant to come up for *inter partes* mention, not hearing. So, both issues, of grant of leave and whether the grant of leave ought to operate as a stay, are still outstanding, and are what I should be determining in this ruling.
11. As indicated above, the response by the respondents, in their grounds of opposition, and in the representations that they made to the Judge on 17th March 2026, related only to the making of an order that grant of leave should not operate as stay, and did not address the matter as to whether or not leave ought to be granted. That also came out on 14th April 2026, when the matter was mentioned before me, that the respondents were only opposed to grant of stay.
12. I have read and considered the statutory statement and the affidavit verifying it. I am satisfied that the same disclose a justiciable cause, to warrant grant of the leave sought.

13. The *ex parte* applicants invite me to order that the grant of leave, if at all, do operate as stay of their prosecution in Milimani MCCRC No. E060 of 2026. Should I grant that order?
14. The case by the *ex parte* applicant is that the property at the heart of the dispute, LR 337/850 Athi River, belongs to them, and that they have title documents to support that, the land having been allotted to them by the government in 1983. They point to a determination of the Environment and Land Court, in Machakos ELCC No. E073 of 2021, between them and another, where their proprietorship of LR 337/850 Athi River, was upheld. They also point to the pendency of Machakos ELCC No. E107 of 2025, between them, on one side, and the 1st respondent and the interested party, on the other. They allege that the criminal justice system is being used to deprive them of proprietorship of the said property.
15. The respondents, on the other side, present a case that the documents of ownership of the said property, held by the *ex parte* applicants, were forged, hence the criminal proceedings in Milimani MCCRC No. E060 of 2026. They assert that the proper and legal proprietor of the said property is the interested party, as that party holds the valid ownership documents. They point to a decree, in Machakos ELCC No. 23 of 2019, a case that pitted the interested party against another, which resolved that that property, LR 337/850 IR 71895, belonged to the interested party, and asked the other party to vacate.
16. I acknowledge that the issue of stay was argued before Aburili J, on 17th March 2026, when the matter came up for mention *inter partes*, for directions on disposal of the *ex parte* chamber summons. The matter did not come up for hearing on 17th March 2026. In the ruling that was delivered that day, Aburili J did not grant either leave or stay, or both,

but ruled that both ought to be considered at the determination of the *ex parte* chamber summons.

17. Contrary to the view taken by the respondents, on 14th April 2026, that stay had been denied on 17th March 2026, Aburili J did not conclusively deal with the matter of stay, for it was ruled, at paragraph 15:

“... I am not satisfied that a stay should issue at this stage before considering whether or not the leave sought is warranted in the first instance, since stay would be predicated on leave if granted by the court. In other words, the court has not yet determined presence of a prima facie arguable case for in-depth investigation at the substantive stage.”

18. The court went on, at paragraph 16, to say:

“... Furthermore, the applicants can still seek for stay in the pending chamber summons for leave and in the event that the court is satisfied that the intended application may be rendered nugatory grant stay.”

19. In view of the above, the matter of stay is still alive before me. The stay order is secondary or ancillary to the leave order, for the primary prayer, in the *ex parte* application is for leave, and the prayer for stay is secondary to and dependent on that for leave, for where leave is denied, the issue of granting stay would not arise. It would have been premature to have stay granted where no leave had been obtained in the first place.

20. The wording, of Order 53 rule 1(4) of the Civil Procedure Rules, brings that out, as it states:

“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 ...”

21. I have already ruled, in paragraph 12, above, that the leave sought ought to be granted. The next consideration should be whether that leave should operate as a stay of the criminal proceedings in Milimani MCCRC No. E060 of 2026.
22. I note that ownership of the property is at the heart of the matter. Both sides, that is the *ex parte* applicants and the interested party, claim to have, in their possession, ownership documents. Both the *ex parte* applicants and the interested party claim to have gone to court, in Machakos ELCC No. 23 of 2019 and Machakos ELCC No. E073 of 2021, and obtained orders against third parties, and their respective proprietorship of the property was upheld in those matters. There is an impending suit, in Machakos ELCC No. E107 of 2025, between the *ex parte* applicants, on one side, and the 1st respondent and the interested party, on the other, over the same parcel of land. Without prejudicing the substantive proceedings, I wish to point out that a dispute over ownership of land, as between 2 claimants, is usually best resolved in civil proceedings, and that could make a case for grant of stay of the criminal proceedings.
23. The respondents have asserted their constitutional mandate over investigations and prosecutions, and argued that the court ought not to interfere, save for cases where illegality, abuse of power and violation of rights are established. That is true. There are constitutional mandates in that regard. However, power or authority that flows from constitutional mandates is not limitless. The court has jurisdiction to look into how those mandates are discharged. Judicial review is one way of scrutinising that discharge of mandate, and the court has been invited to do so in this cause. These proceedings are not about the respondents lacking mandate to do what they are doing, but about looking into how they are doing it, and evaluating whether they are doing it legally or properly, and whether legal or

constitutional rights are being or likely to be violated in the process. The court can only determine whether to intervene or interfere upon the principal matter being heard to its fullest.

24. There is also the argument about civil proceedings ought not take priority over criminal matters, and the urging that the 2 sets of proceedings could run parallel. That is also true. But there is a real spectre of conflicting decisions or outcomes, arising from the parallel proceedings, which would be to the eternal embarrassment of the judicial process. Prudence and good order would dictate sequencing of the proceedings, to obviate that. That would not serve to prejudice any of the processes, but to avoid the real possibility of the civil outcome, in Machakos ELCC No. E107 of 2025, being inconsistent with the criminal outcome, in Milimani MCCRC No. E060 of 2026, over the same issue, of ownership of the property in dispute.

25. There is also the argument that the *ex parte* applicants would have their chance, at trial, to challenge the evidence that the prosecution shall present, and to present their own evidence in defence. That is also true. However, should it turn out that there are issues that go to the propriety or legality of the criminal proceedings, it could be a waste of effort to plough on with those proceedings, if they are challenged later, on appeal or revision, and vitiated on grounds of impropriety and illegality, exposing the State and the public to expense. It may be more prudent to stay the criminal proceedings, to allow for the inquiry into the alleged impropriety or abuse of office, and, if cleared, upon determination of the main application, to gone with the prosecution.

26. The discussion above touches, to a large measure, on the matters that ought to be canvassed at the main hearing. It was, however, unavoidable, given that the court has had to

conduct a trial on the prayers for leave and stay, at the leave stage. That exposes the difficulty of having to conduct 2 trials in Judicial Review proceedings, the first being to decide on whether to grant leave and stay, and the second, upon leave being granted, determining the substantive Motion.

27. The final orders are that the *ex parte* application, by way of chamber summons, dated 9th March 2026, is hereby allowed, in terms of prayers 2, 3 and 4. The *ex parte* applicant has 21 days to file the substantive Motion, in a separate Judicial Review cause. This matter shall be mentioned on 3rd June 2026, for compliance and further directions, on the substantive Motion. Orders accordingly.

**DELIVERED, VIA EMAIL, DATED AND SIGNED IN
CHAMBERS, AT MILIMANI, NAIROBI, ON THIS 8TH DAY OF
MAY 2026.**

**WM MUSYOKA
JUDGE**

Mr. Abdirahman, Court Assistant.

Advocates

Mr. Odoyo, instructed by Kipkenda & Company, Advocates for the *ex parte* applicants.

Ms. Kihara, instructed by the Attorney General, for the respondents.

Mr. Kioko, Advocate for the interested party.