

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

J.R NO. E002 OF 2024

**IN THE MATTER OF AN APPLICATION BY SAMWEL
CHELUGET FOR ORDERS OF CERTIORARI AND
PROHIBITION**

AND

**IN THE MATTER OF ORDER 53 RULE 1 OF THE
CIVIL PROCEDURE RULES 2010**

AND

**IN THE MATTER OF SECTION 7 OF THE FAIR
ADMINISTRATIVE ACTIONS ACT**

AND

**IN THE MATTER OF ARTICLES 23, 25, 47, 50, 159,
165 (6) OF THE CONSTITUTION OF KENYA**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

HON. M.O RABERA,

P.M BOMET LAW COURTS.....1ST RESPONDENT

DIRECTOR OF

**PUBLIC PROSECUTIONS.....2ND
RESPONDENT**

**SAMWEL CHELUGET..... EX PARTE
APPLICANT**

JOTHAM NGENO.....INTERESTED PARTY

JUDGEMENT

1. For determination is the Application dated 5th July 2024 seeking the following orders: -

- i. Spent
- ii. That this court be pleased to issue an order of CERTIORARI to call to this honourable court and quash the charge sheet in Criminal Case No. E313 of 2023 (R V Samwel Kimutai Cheluget & Jotham Ngeno).
- iii. That this court be pleased to issue an order of CERTIORARI to call to this honourable court and quash the proceedings and ruling delivered by the

1st Respondent on 27th May 2023 in Criminal Case No. E313 of 2023 (R V Samwel Kimutai Cheluget & Jotham Ngeno) placing the exparte Applicant on his defence.

- iv. That this court be pleased to issue an order of PROHIBITION, prohibiting the 1st and 2nd Respondents from further carrying on with the trial and proceedings of Criminal Case No. E313 of 2023 (R v Samwel Kimutai Cheluget & Jotham Ngeno).
- v. That the costs of this Application be provided for.

2. The Application is premised on the grounds set out on its face and on the Supporting affidavit of Samwel Cheluget the Ex-Parte Applicant sworn on even date. It was deponed that the Ex- Parte Applicant together with the Interested Party were

arraigned before Bomet Magistrate's court presided by Hon. Kibelion on 23rd March 2023 vide a charge sheet dated 10th March 2023 for plea taking on the following charges: -

- (i) Forgery contrary to Section 351 of the Penal Code
- (ii) Conspiracy to commit a felony contrary to Section 393 of the Penal Code.
- (iii) Making a false document contrary to Section 347 (a) of the Penal Code.
- (iv) Uttering a false document contrary to Section 353 of the Penal Code.

3. He stated that upon their arraignment, his counsel raised a Preliminary objection regarding the defectiveness of the Charge sheet specifically Sections 351 & 347 (a) under which they were being charged did not create offences known in law. That as a result of the Preliminary objection, plea taking was deferred pending a ruling on the

Preliminary Objection. Consequently, a ruling was delivered on 27th April 2023 directing the DPP to effect the necessary amendments to the Charge Sheet.

4. He further deposed that through an Amended charge sheet, together with the Interested Party, they took plea on 6th September 2023 and the only noticeable amendments in the charge sheet was the substitution of the complainant but the impugned charges remained the same. That at the time of closing the Prosecution's case, the charge sheet remained defective.

5. He contends that vide a ruling dated 27th May 2024, the trial court disregarded the anomalies in the charge sheet and ruled that a *prima facie* case had been established against himself and the Interested Party. Further, that the trial court disregarded binding precedents placed before it on the effect of defective charge sheet and further

fettered its discretion to *suo moto* dismiss the charge sheet.

6. The Ex-parte Applicant further averred that the DPP acted illegally, irrationally, maliciously and with ill will in preferring criminal charges against himself as the complaint lodged was based on a Land Title document that had been declared by the High Court as a forgery. He urged the court to stay proceedings in the lower court case as he stands to suffer great prejudice as his rights to a fair trial have been put on jeopardy as he is required to put up a defence to charges that do not exist in law.

7. The 1st Respondent filed a Preliminary Objection (P.O) dated 1st November 2024 raised on the following grounds:-

- i. That the Application erroneously enjoined Hon. M.O Rabera as a party to proceedings contrary to Article 160 (5) of the Constitution of Kenya.

- ii. That the Application violates the provisions of Section 12 of the Government Proceedings Act which mandates that in legal proceedings, the Government must be represented by the Attorney General.
 - iii. That the Application is scandalous, frivolous, vexatious and otherwise an abuse of the process of the court.
8. The 2nd Respondent filed a replying affidavit sworn by Eric Waweru Kiarie, Assistant Deputy Prosecutor ODPP. He stated that the Ex-Parte Applicant and the Interested Party were charged with the aforementioned charges. That the Ex-Parte Applicant objected to plea taking and a ruling was delivered by the court directing that the Prosecution make nominal amendments to the charge sheet. That, consequently the changes were made and the trial commenced.

9. He averred that the Ex-Parte Applicant and the Interested Party willingly took part in the trial and cross examined all the Prosecution witnesses and upon the close of the Prosecution's case, the Ex-Parte Applicant and the Interested Party were placed on their defence.
10. He stated that the instant Application constitutes a back door Appeal. Further, the Ex-Parte Applicant and the Interested party have the opportunity to defend themselves thus their rights have not been infringed.
11. Lastly, he deposed that the Application has wrongly enjoined Hon. M. Rabera (P.M in person yet Section 12 of the Government Proceedings Act mandates all civil proceedings against the government and its officials must be done against the Attorney General.

12. The Ex-Parte Applicant filed Grounds of opposition dated 11th November 2024 in respect of the Preliminary Objection stating as follows;

(i) That the 1st Respondent was properly impleaded in accordance with Order 53 Rule 1 (2) of the Civil Procedure Rules in his official capacity as the Judicial Officer in conduct of the subject proceedings in the trial court.

(ii) That Judicial Review Proceedings are sui generis that are neither Civil nor Criminal in nature as described by the Court of Appeal in the locus classicus case of **Republic v Commissioner of Lands Ex Parte Hotel Kunste [1997] eKLR** and thus not subject to Section 12 of the Government Proceedings Act.

(iii) That the Supreme Court in Petition No. 24 Consolidated with Petition No. 27 of 2019, **The Senate v The Council of County Governors & 6 Others**, affirmed the holding and finding of

the High Court and Court of Appeal that Section 12 of the Government Proceedings Act is inconsistent with the Constitution 2010.

(iv) That in the alternative Order 1 Rule 9 of the Civil Procedure Rules 2010 provides that “No suit shall be defeated by reason of the misjoinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

(v) That further Order 1 Rule 10 (2) empowers the court at any stage of the proceedings, either upon or without the Application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined to be added.

(vi) That the Preliminary Objection is misconceived, incompetent and an abuse of the

court process and ought to be struck out with costs.

13. Both the Application and the Preliminary Objection were canvassed by way of written submissions as per the directions of the court. The Ex-Parte Applicant filed written submissions dated 9th October 2024 and filed on 12th November 2024 in respect of the Application and submissions dated 11th November 2024 and filed on 12th November 2024 in respect of the Preliminary Objection. The 2nd Respondent filed undated submissions on 5th November 2024.

14. The Ex-Parte Applicant raised the following issues for determination as regards the Judicial Review Application: -

15. Whether the amended charge sheet presented by the 2nd Respondent before the trial court on 6th September 2023 was defective rendering the entire trial a mistrial and an illegality.

- (i) Whether the 1st Respondent ignored/disregarded binding judicial precedents rendering his ruling an illegality.
- (ii) Whether the 2nd Respondent's decision to charge the Ex- Parte Applicant and the Interested Party was tainted with irrationality, illegality, procedural impropriety?
- (iii) Whether the continued trial and prosecution of the Ex- Parte Applicant amounts to violation of rights to a fair trial guaranteed under Articles 22 & 50 of the Constitution of Kenya 2010
- (iv) Whether the prayers sought by the Ex-Parte Applicant should be issued?
- (v) Whether the 1st Respondent has been sued in his Personal/Private capacity?
- (vi) Whether the Attorney General ought to have been sued as the Respondent in the place of the 1st Respondent

(vii) What are the consequences of misjoinder of a party in Judicial Review Proceedings.

16. The 2nd Respondent raised the following issues for determination: -

a. Is the remedy for judicial review applicable?

b. Prejudice suffered by aggrieved parties

17. I have considered the pleadings by the parties, the submissions as well as the authorities relied upon. I find the following issues for determination: -

i. Whether the 1st Respondent was properly sued and, if not whether the Attorney General ought to have been joined as the appropriate party, and the legal effect of any misjoinder.

ii. Whether the amended charge sheet presented on 6th September 2023 was defective and if such defect rendered the ensuing criminal trial illegal or a mistrial.

iii. Whether the decision to charge and prosecute the Ex-Parte Applicant was tainted by illegality, irrationality, or procedural impropriety, thereby warranting judicial review intervention.

18. I will first begin with the Preliminary Objection before I delve into the merits of the Judicial Review Application. The Preliminary Objection raises the question of joinder of the 1st Respondent.

19. The 1st Respondent contended that, being a judicial officer, he enjoys constitutional immunity under Article 160(5) of the Constitution and that the institution of the present proceedings against him contravenes section 12 of the Government Proceedings Act. It was argued that any proceedings arising from acts undertaken in the course of judicial duty ought properly to have been

instituted against the Attorney General and not the judicial officer personally.

20. There is no dispute that judicial officers enjoy constitutional protection in the exercise of their adjudicative functions. Article 160(5) of the Constitution expressly provides that a member of the judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function. The rationale underpinning that protection is to preserve decisional independence, shield judicial officers from personal intimidation through litigation, and safeguard the institutional integrity of the Judiciary.

21. It is a universal principle that judicial officers should not be exposed to personal liability merely because parties are dissatisfied with decisions rendered in the exercise of lawful jurisdiction. This position was succinctly discussed in **Bellevue**

Development Company Ltd v Gikonyo & 3 others [2020] KESC 43 (KLR) where the Supreme Court rendered itself as thus:-

“Article 160(5) of the Constitution entrenched the immunity of judicial officers who acted in good faith. The immunity granted by article 160(5) encapsulated protection from legal proceedings founded on acts committed or omissions made by judges in the lawful performance of their judicial functions.

The concept of judicial immunity was not without foundation. Judicial immunity was an important tenet in the delivery of justice and the maintenance of the rule of law. For the proper administration of justice, judges should freely express themselves in matters brought before

them. A judge, as well as other judicial officers, were required to have confidence in carrying out their judicial functions without the fear that they would be prosecuted or harassed for their acts or omissions.

The rationale for judicial immunity was the preservation of independent decision-making capabilities of judicial officers; immunity for judicial acts was thus necessary so that judicial officers could make the sometimes controversial decisions that were their judicial obligation and mandate to make, independent of personal considerations, including fear of personal liability. The concept of judicial immunity was also an important aspect of judicial independence under the doctrine of the

separation of powers. The protection offered to judicial officers in article 160(5) of the Constitution was inherent in the independence of the Judiciary as a state organ within the doctrine of separation of powers.

It would be repugnant to the cause of justice if judges acted in fear of legal actions being brought against them for decisions they made in the course of discharging their mandate. The immunity granted by article 160(5) of the Constitution was not necessarily for the benefit of the judicial officer concerned. It was for the public and in particular for litigants appearing before the courts.

Besides freedom of thought, expression and action, the other cardinal factor encapsulated in judicial immunity was

finality. It would be a travesty of justice if disgruntled litigants were permitted to sue judges who ruled against them thus prolonging litigation unnecessarily and personalizing matters that judges ought not to have had a personal interest in.”

22. However, the immunity accorded under Article 160(5) must be appreciated within the context and nature of the proceedings before the court. The present proceedings are judicial review proceedings instituted under Order 53 of the Civil Procedure Rules. Judicial review proceedings are sui generis in nature. They neither constitute ordinary civil proceedings nor criminal proceedings; rather, they are public law remedies through which the High Court exercises supervisory jurisdiction over subordinate courts, tribunals, public bodies and persons exercising public authority. The focus in judicial review is therefore

not the personal culpability of the decision maker, but the legality, propriety, rationality and procedural regularity of the impugned decision making process. Accordingly, and in view of the nature of the reliefs sought herein, the participation of the 1st Respondent is unnecessary and their name ought to be expunged from these proceedings.

23. Consequently, the Preliminary Objection succeeds and the same is hereby upheld.

24. Now focusing on the Application, I address the issues as hereunder:-

(i) Whether the amended charge sheet presented on 6th September 2023 was defective and if such defect rendered the ensuing criminal trial illegal or a mistrial.

25. Counsel for the Ex- Parte Applicant submitted that every Accused person has a right to a fair

trial which includes the right to not be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya or a crime under International Law. Counsel relied on the authority of **Sigilani v Republic [2004] 2 KLR** where the Court of Appeal held as follows: -

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.”

26. It was submitted that Section 351 of the Penal Code does not create the offence of forgery nor does it create an offence at all but prescribes

punishment for an offence created by another Section of the Penal Code. Counsel relied on **Daniel Lopeyok v Republic [2022] eKLR** where the court stated as follows: -

“the offence of forgery is created and declared by Section 349 of the Penal Code in the following terms; any person who forges any document or electronic record is guilty of an offence which unless otherwise stated is a felony and he is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years...

The Appellant was thus charged under the wrong Section of the Penal Code. This was not a mere technicality curable under Section 382 of the Criminal

Procedure Code, Cap 75. In our jurisdiction a criminal offence must be created by a specific section of a specific statute. The statute here is the Penal Code. The Section thereof alleged to have been breached did not create the offence charged.”

27. It was further submitted that on the count of making a false document contrary to Section 347 (a) of the Penal Code, the said offence does not exist. To this, counsel cited the case of **Wilson Maina Wanjohi v Republic [2018] eKLR** where the court held: -

“From the above provisions of the law it can be seen immediately that making a false document as defined in Section 347 of the Penal Code is one of the ingredients of the offence of forgery

created by Section 349 of the Penal Code and defined by Section 345 of the same Code. It is the actus reus of the offence.”

“... of itself, making a false document does not constitute a criminal offence, and section 347 of the aforesaid does not create an offence.”

28. The Ex Parte Applicant urged that the court halt the proceedings in the lower court for he was on the verge of being convicted for non-existent offences which would irredeemably violate his right to a fair hearing. Counsel cited the case of **Suleiman Shabhal v Independent Electoral & Boundaries Commission and 3 others [2014] eKLR** where the court emphasized the importance of adhering to procedural fairness by stating: -

“any action that impairs the accused’s ability to defend themselves, especially

where procedural improprieties are evident, constitutes a violation of constitutional right.”

29. The 2nd Respondent on the other hand submitted that the Ex-Parte Applicant and the Interested Party have been placed on their defence and still remain innocent in the eyes of the law and have a chance to clear their names thus no prejudice will be suffered by them.

30. It is important at the outset to observe that this court is sitting in judicial review. Its role is supervisory, not appellate or trial in nature. Judicial review is designed to address decisions or actions that are illegal, procedurally improper, irrational, or an abuse of power. It is not intended to serve as a forum for re hearing a matter or substituting the judgment of the trial court.

31. In **Moses Mwicigi & 14 Others v Independent Electoral and Boundaries**

Commission & 5 Others [2016] eKLR, the Supreme Court underscored that legality of administrative action must be rooted in a clear statutory foundation. The court held thus: -

“In many cases, procedure was so closely intertwined with the substance of a case, that it befitted not the attribute of mere technicality. The conventional wisdom, indeed, was that procedure was the handmaiden of justice. Where a procedural motion bearded the very ingredients of just determination, and yet it was overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.”

32. The Applicant argues that Sections 351 and 347(a) of the Penal Code do not create offences known to law. While citing **Daniel Lopeyok v Republic [2022] eKLR** and **Wilson Maina**

Wanjohi v Republic [2018] eKLR, he argues that Section 351 prescribes punishment rather than creating the substantive offence of forgery, and Section 347(a) merely defines one of the elements of forgery rather than constituting an independent offence.

33. In **Yongo v Republic [1983] KLR 319**, the Court of Appeal stated that: -

“A charge is defective under section 137 of the Criminal Procedure Code where it does not disclose an offence known to law. A conviction founded on such a charge is illegal because the court has no jurisdiction to convict on a non-existent offence.”

34. Furthermore, Section 134 of the **Criminal Procedure Code** mandates that every charge “shall contain a statement of the specific offence with which the accused is charged, together with

such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

35. A charge sheet is the foundation upon which a criminal trial is built. It is the instrument that invokes the jurisdiction of the trial court and informs an accused person of the exact offence he is called upon to answer. Consequently, where the charge as framed does not disclose an offence known to law or is otherwise so fundamentally defective that it fails to meet the requirements of section 134 of the Criminal Procedure Code, the defect transcends procedural technicality and barring amendment, becomes a substantive illegality that vitiates the entire proceedings.

36. The constitutional underpinning of this principle is found in Article 50(2)(b) of the Constitution of Kenya, 2010, which guarantees every accused person the right “to be informed of

the charge, with sufficient detail to answer it.” Accordingly, where the charge is founded on a non-existent offence or is framed in a manner that obscures the nature of the accusation, the resultant prejudice cannot be cured under section 382 of the Criminal Procedure Code because the defect strikes at the fairness and legality of the trial itself.

37. In the present matter, the amendment undertaken on 6th September 2023 merely substituted the complainant while retaining counts founded on offences unknown to law. That amendment did not rectify the fundamental defect in the charge sheet; rather, it perpetuated and entrenched the illegality. The short coming was therefore not one of form but of substance and legality.

38. The inevitable consequence is that the proceedings conducted upon the impugned charge

sheet were void from the outset. Once the foundation of the prosecution collapsed, every superstructure erected upon it equally collapsed. The trial court could not derive lawful jurisdiction from a charge sheet predicated on non-existent offences, and no subsequent amendment could breathe legality into proceedings that were incurably defective from inception. The entire trial was therefore rendered a nullity in law.

(ii)

Whether the decision to charge and prosecute the Ex-Parte Applicant was tainted by illegality, irrationality, or procedural impropriety, thereby

**warranting judicial
review intervention.**

39. Counsel for the Ex-Parte Applicant submitted that the decision to charge the Applicant was based on a complaint made by the complainant (now deceased) premised on a certificate of Title which had been cancelled by the High Court and the said complainant convicted and sentenced for forgery and uttering a false document. It was submitted that by charging the Ex-Parte Applicant on documents cancelled by the High Court was irrational. He relied on the case of **Joram Mwenda Guantai v The Chief Magistrate, Nairobi [2007]** where the court stated: -

“The court must act as a guardian of justice, and where it is evident that the charges preferred are not based on any legal provision, it has a duty to stop such

prosecutions, lest it allows the accused to suffer unnecessary injustice.”

40. Judicial review proceedings instituted under Order 53 of the Civil Procedure Rules are concerned not with the merits of the impugned decision, but with the legality, rationality and procedural propriety of the process through which the decision was arrived at. While this court does not sit as an appellate court over the decisions of investigative or prosecutorial agencies, it nonetheless retains a constitutional duty to intervene where the criminal justice process is employed in a manner inconsistent with the law, the Constitution, or the dictates of fair administrative action. Accordingly, where it is demonstrated that the decision to prosecute is founded upon illegality, abuse of power, consideration of irrelevant matters, or the absence

of a lawful factual foundation, the court is entitled to intervene so as to safeguard the integrity of the criminal justice system.

41. In **Republic v DPP & 2 Others ex parte Praxidis Namoni Saisi [2016] eKLR**, Odunga J.

(as he then was) held: -

“The Court will interfere where it is demonstrated that the DPP, in preferring charges, acted without due regard to the law, or for a purpose other than upholding the rule of law.”

42. The Ex-Parte Applicant contended that the Respondents failed to ascertain the legal status of the impugned title prior to preferring charges. However, upon consideration of the material placed before me, I am not satisfied that there is sufficient evidence to enable this court to interrogate or determine the rationality of the decision to charge.

The material presented does not conclusively demonstrate that the Respondents acted without inquiry, in bad faith, or in disregard of relevant considerations.

43. Further, the question whether the disputed title remained valid or had been lawfully nullified constitutes a substantive evidentiary issue which falls within the province of the trial court. Judicial review proceedings are not concerned with the merits of the decision to prosecute but with the legality of the decision-making process. In the absence of clear and cogent material demonstrating irrationality, procedural impropriety, or abuse of power on the part of the Respondents, this court cannot fault the prosecutorial decision of the DPP merely on the basis of the allegations advanced by the Ex-Parte Applicant. Courts must be reluctant to interfere with the prosecutorial mandate donated under Article 157

of the Constitution unless it is shown that the decision to charge and the subsequent prosecution were inconsistent with the Constitution, the public interest, and the administration of justice.

44. In the result, I find merit in the Ex-Parte Applicant's Notice of Motion dated 5th July 2024. The court is satisfied that the amended charge sheet presented before the trial court on 6th September 2023 was fundamentally defective for failure to disclose offences known to law and that the defect went to the root of the proceedings. Consequently, the criminal proceedings founded upon the impugned charge sheet were rendered incurably defective and *void ab initio*.

45. It was intriguing to this court that the Prosecution had been directed by the trial court to amend the charge sheet and they neglected or ignored such directions; only to turn around in these judicial

review proceedings to urge that the Ex-parte Applicant had a right of appeal and therefore could run the full course the trial and then appeal if convicted.

46. A Prosecutor is charged with the responsibility of bringing charges but ingrained in that responsibility is the duty to safeguard and promote constitutional values and rights. It is in that sense that in legal parlance, a Prosecutor stands in the place of 'a minister of justice'.

47. It is my conclusion that the continued Prosecution of the Ex-Parte Applicant in the circumstances would amount to an abuse of the criminal justice process and a violation of the constitutional guarantees to fair administrative action and fair trial.

48. Accordingly I make the following orders:-

(i) The Preliminary Objection dated 1st November 2024 is hereby upheld.

(ii) An order of CERTIORARI is hereby issued removing into this court for purposes of being quashed and hereby quash the charge sheet in Bomet Chief Magistrate's Criminal Case No. E313 of 2023, Republic v Samwel Kimutai Cheluget & Jotham Ngeno.

(iii) An order of CERTIORARI is hereby issued removing into this court for purposes of being quashed and hereby quash the proceedings and ruling delivered on 27th May 2024 in Bomet Chief Magistrate's Criminal Case No. E313 of 2023, Republic v Samwel Kimutai Cheluget & Jotham Ngeno, by which the Ex-Parte Applicant and the Interested Party were placed on their defence.

(iv) Each party shall bear their costs.

Orders accordingly.

**Judgement delivered, dated and signed at
Chuka this 12th day of May, 2026.**

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R. LAGAT-KORIR

JUDGE

**Judgement delivered in the presence of Mr.
Sang for the Ex-parte Applicant; Mr. Ayeka
for the 2nd Respondent; Muriuki (Court
Assistant)**