



**Republic v Kikuyu & 3 others; Wanjau (Interested Party); Mwaura & 5 others (Ex parte Applicants) (Miscellaneous Civil Application E023 of 2024) [2026] KEHC 6308 (KLR) (8 May 2026) (Ruling)**

Neutral citation: [2026] KEHC 6308 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
MISCELLANEOUS CIVIL APPLICATION E023 OF 2024**

**A MSHILA, J**

**MAY 8, 2026**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE CHIEF MAGISTRATES' COURT AT KIKUYU ..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 3<sup>RD</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**SAMUEL KING'ORI WANJAU ..... INTERESTED PARTY**

**AND**

**DR MOSES WAITIMU MWAURA ..... EX PARTE APPLICANT**

**TERESIA WANJIRU WAITIMU ..... EX PARTE APPLICANT**

**CAROLYNE MOSOTI ..... EX PARTE APPLICANT**

**LUCY WANJIRU MARURU MUGO ..... EX PARTE APPLICANT**

**MAGDALINE WANJIRU MUGO ..... EX PARTE APPLICANT**

**NEWTON THUMBI HUNGU ..... EX PARTE APPLICANT**



## RULING

1. The application for determination is the Notice of Motion dated 10<sup>th</sup> October, 2024 seeking for the following Judicial Review Orders of Certiorari and Prohibition;-
  - a. An order of Certiorari to remove into this Honourable Court for purposes of quashing the proceedings and judgment of the 1<sup>st</sup> Respondent Kikuyu Inquest No. E012 of 2022 In the Matter of Hellen Wanjiru Ngure (Deceased) dated, signed and delivered on the 4<sup>th</sup> of April, 2024.
  - b. An order of Certiorari to remove into this Honourable Court and quash the decision of the 2<sup>nd</sup> Respondent contained in its letter dated 19<sup>th</sup> July, 2024 making recommendations to charge the 1<sup>st</sup> ex-parte Applicant with the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code, and the 2<sup>nd</sup> and 6<sup>th</sup> ex-parte Applicants with negligence contrary to Section 243 (e) of the Penal Code.
  - c. An order of prohibition directed at the 2<sup>nd</sup> Respondent prohibiting them from charging the 1<sup>st</sup> ex-parte Applicant with the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code, and the 2<sup>nd</sup> and 6<sup>th</sup> ex-parte Applicants with negligence contrary to Section 243 (e) of the Penal Code and/or any other offence alternative thereto arising from the medical procedure conducted on the 23<sup>rd</sup> and 24<sup>th</sup> April, 2019 on one Hellen Wanjiru Ngure (Deceased).
2. The application is premised on the grounds on the face of the application, the supporting affidavit, the statutory statement dated 18<sup>th</sup> September, 2024 attached to the application for leave to institute judicial proceedings and the attendant verifying affidavits sworn by the 1<sup>st</sup> Ex-parte Applicant dated 18<sup>th</sup> September, 2024 stating as follows;-
  - a. That he is a registered and qualified surgeon with over 20 years experience in the medical profession and the proprietor of St. Teresa Maternity & Nursing Home.
  - b. On 23<sup>rd</sup> April, 2019, one Ms Hellen Wanjiru Ngure (Deceased) visited St. Teresa Maternity & Nursing Home when she was due for delivery and sought the 1<sup>st</sup> ex-parte Applicant's facility to conduct the delivery.
  - c. The Deceased was admitted and labour was induced on her instructions since the same was also induced during her two previous deliveries. She was attended by a team of health officers including the ex-parte Applicant.
  - d. The Deceased passed on in the process of delivery. The post-mortem report by the government pathologist, Dr. Dorothy Njera, indicated that the cause of death was irreversible shock due to disseminated intravascular coagulopathy with uterine atony, cervical tears and vaginal tears.
  - e. The Deceased's family alleged that the Deceased and her child died due to excessive bleeding caused by the negligence of the personnel at St. Teresa Maternity & Nursing Home.
  - f. The 3<sup>rd</sup> Respondent conducted investigations and submitted its findings to the 2<sup>nd</sup> Respondent who recommended that the 1<sup>st</sup> Ex-parte Applicant be prosecuted for the offence of reckless and negligence act causing harm contrary to section 243 (e) of the Penal Code.



- g. Nevertheless, the 2<sup>nd</sup> Respondent preferred to institute a different charge against the 1<sup>st</sup> ex-parte Applicant. On 15<sup>th</sup> October 2021, criminal proceedings were initiated against the 1<sup>st</sup> ex-parte Applicant on the charge of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code in Kikuyu Magistrates; Courts MCCR/E953/2021- The Republic v Moses Waitimu Mwaura.
- h. The 1<sup>st</sup> ex-parte Applicant later realized that there was a letter dated 10<sup>th</sup> December, 2021 from one MR. JOSEPHIRUNGU, OGW, the then Senior Assistant Director of Public Prosecution addressed to one Mr. Renson Ingonga, the Senior Assistant Director of Public Prosecution (as he then was) stating that the case was one of professional negligence. According to the said letter, a charge of manslaughter did not suffice and that the same should be withdrawn under Articles 157 of *the Constitution*, Section 25 of the office of Director Public Prosecutions Act and Section 87 (a) of the Criminal Procedure Code and an inquest to be undertaken.
- i. Consequently, the criminal proceedings in Kikuyu Magistrates' Courts MCCR/E953/2021 were withdrawn and an inquest was instituted before the Kikuyu Chief magistrates' Courts, Kikuyu Inquest No. E012 of 2022 In the Matter of Hellen Wanjiru Ngunjiri (Deceased).
- j. The prosecution did not call all necessary witnesses including the 2<sup>nd</sup>-6<sup>th</sup> Ex-parte Applicants and other medical experts.
- k. The court delivered its judgment on the inquest on 4<sup>th</sup> April, 2024 where it held that based on the evidence adduced, an offence was committed by known persons who were adversely mentioned in the matter.
- l. The court failed to find any fault on the 1<sup>st</sup> Ex-parte Applicant and stated that he could only be held vicariously liable for the acts and omissions of his medical staff because he was the proprietor of the hospital.
- m. Following the said judgment, the 2<sup>nd</sup> Respondent wrote a letter dated 19<sup>th</sup> July, 2024 addressed to the County Criminal Investigations officer recommending that the 1<sup>st</sup> Ex-parte Applicant be charged with manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and that the 2<sup>nd</sup>-6<sup>th</sup> Ex-parte Applicants be charged with negligence contrary to Section 243 (e) of the Penal Code.
- n. The said 2<sup>nd</sup> Respondent's letters dated 10<sup>th</sup> December, 2021 and another one dated 21<sup>st</sup> February, 2022 were clear that a decision had been taken not to prosecute the matter and there was no reason for the prosecution to change tune and prefer to charge the 1<sup>st</sup> Ex-parte Applicant with the offence of manslaughter.
- o. The 2<sup>nd</sup> Respondent only relied on the judgment in the inquest which amounts to delegation of powers to charge to the 1<sup>st</sup> Respondent contrary to Article 157 of *the Constitution*.
- p. There was impropriety, irregularity and incorrectness in the manner the inquest was initiated as the 1<sup>st</sup> Respondent ought to have declined to exercise jurisdiction over a matter that the 2<sup>nd</sup> Respondent had already determined on whether to charge or not to charge the Ex-parte Applicants.
- q. The findings of the 1<sup>st</sup> Respondent had no factual basis since they were not backed by the evidence a medical expert.



3. The 4<sup>th</sup> Respondent filed grounds of opposition dated 10<sup>th</sup> June, 2025 in response to the said Notice of Motion application dated 10<sup>th</sup> October, 2024 based on the following:-
- a. The inquest proceedings and judgment in Kikuyu Inquest No.012 of 2022 In the Matter of Hellen Wanjiru Ngure (Deceased) were conducted in a lawful, regular and procedurally fair manner in accordance with sections 386 (1) and 387(1) of the Criminal Procedure Code.
  - b. Contrary to the allegations by the Ex-parte Applicants, the 1<sup>st</sup> Respondent cannot recommend or determine what charge to consider as that is the mandate of the 2<sup>nd</sup> Respondent.
  - c. The Ex-parte Applicants have not demonstrated that the failure to be called as a witness was in any way attributable to the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent did not prevent or otherwise obstructed the 2<sup>nd</sup> to 6<sup>th</sup> Ex-parte Applicants from being heard.
  - d. The Nursing Council of Kenya is a legally recognized body with powers to conduct disciplinary proceedings under sections 18A and 18B of the Nursing Act No.27 of 2011. Its decision is legally binding and hence its rulings can be used as evidence in a court of law in accordance with section 34 of the Evidence Act Cap 80 of the Laws of Kenya.
  - e. The magistrate's court was satisfied that the disciplinary proceedings conducted by the Nursing Council of Kenya were in accordance with the legal requirements under Sections 34 (b) and 34(c) of the Evidence Act. The Ex-parte Applicants did not appeal the said decision of the Council.
  - f. The office of the 2<sup>nd</sup> Respondent is independent and empowered to exercise its power of prosecution and institute criminal proceedings against a person before any court in respect of any offence under Article 157 (6) of the Constitution.
  - g. Granting the prayers sought in the application will be akin to the court directing the Respondents on how to execute their statutory and constitutional mandates where there is no reasonable cause to warrant the issuance of such directives.
  - h. The Ex-parte Applicants adduced a number of letters which are inadmissible for being not authored by or addressed to them. The production of letters authored by the DPP and not addressed to the Ex-parte Applicants is in violation of trust and confidentiality of official documents.
  - i. There is no evidence of prejudice, damages or violation of the Ex-parte Applicants' rights and freedoms as a resulting of the ongoing investigation to render the investigations an outright abuse of constitutional powers. Neither is there any evidence of arrest, charge or ongoing criminal case to substantiate the 1<sup>st</sup> Ex-parte Applicants allegations.
4. The parties were directed to canvass the application by way of filing and exchanging written submissions. The parties respective submissions are summarized as follows:-

DIVISION - The Ex-parte Applicants' Written Submissions

PARA 5.

The Ex-parte Applicants submitted that they seek to quash both the judgment delivered in Kikuyu Inquest No. E012 of 2022 In the Matter of Hellen Wanjiru Ngure (Deceased) and the recommendation by the Director of Public Prosecution dated 19<sup>th</sup> July, 2024 which indicates the desire to prefer criminal charges against the Ex-parte Applicants. Both the inquest and the subsequent recommendation are unlawful, irrational and



procedurally unfair. They relied on *Pastorli v Kabale District Local Government Council & Others* [2008] 2 EA 300.

PARA 6.

The ODPP had initially instituted manslaughter charges against the 1<sup>st</sup> Ex-parte Applicant in Kikuyu Magistrates' Court MCCR/E953/2021 *Republic vs Moses Waitimu Mwaura*. After a peer review, the DPP concluded via letters dated 10<sup>th</sup> December, 2021 and 21<sup>st</sup> February, 2022 that the evidence could not support a criminal charge. The DPP withdrew the charge and recommended that an inquest be conducted.

PARA 7.

The 1<sup>st</sup> Ex-parte Applicant, being a qualified obstetrician, responded promptly and professionally to the emergency. He performed a caesarean section and a hysterectomy on the patient in accordance with the standard obstetric care. The post-mortem confirmed the cause of death as disseminated intravascular coagulopathy, a rapid and often fatal complication. There was no evidence of delay or misconduct on the part of the 1<sup>st</sup> Ex-parte Applicant, nor any expert testimony indicating that the care given was below the acceptable standards.

PARA 8.

The ODPP deferred its constitutional duty under Article 157 (6) of *the Constitution* by leaving the decision to charge to the inquest magistrate. The function of the inquest magistrate is limited to determining whether an offence appears to have been committed in line with Section 387 of the Criminal Procedure Code.

PARA 9.

The ODPP's decision to charge the Ex-parte Applicants after an earlier decision not to do so is irrational, procedurally unfair and contrary to Article 157 of *the Constitution*. It amounts to an abuse of prosecutorial discretion, undermines the rule of law and opens the door for arbitrary and malicious prosecutions.

PARA 10.

The 2<sup>nd</sup> to 6<sup>th</sup> Ex-parte Applicants were not summoned to testify or heard during the inquest proceedings but the magistrate made adverse findings against them relying on the report from the Nursing Council Board of Kenya. This contravened the principle that no one should be condemned unheard, the audi alteram partem rule. They cited *Municipal Council Of Mombasa v Republic & Umoja Consultants Ltd Civil Appeal No.185 Of 2001 And Republic v Attorney General Ex-parte Samuel Kamau Macharia & 2 Others* [2013] EKL.R.

PARA 11.

PW5 in the inquest proceedings was not the author of the report she presented in court. The report was not subjected to cross-examination. The 2<sup>nd</sup> to 6<sup>th</sup> Ex-parte Applicants mentioned in the report were not notified, summoned nor given an opportunity to respond to its contents.

PARA 12.

Section 35 of the *Evidence Act* requires that where the maker of a document is not called as a witness, such document is only admissible under restricted circumstances. The maker of the document must be unavailable by reason of death, incapacity or other sufficient cause. The document must have been made in the ordinary course of official or professional duty and the court must be satisfied as to its authenticity and reliability. There were no reasons given for the unavailability of the authors of the Nursing Council of Kenya Report.

PARA 13.

The ODPP had initially communicated via a letter dated 4<sup>th</sup> April, 2022 that no criminal charges were warranted against the Ex-parte Applicants and referred the matter to the Kenya Medical Practitioners and



Dentist Council (KMPDC). This created a legitimate expectation that the matter would be addressed through a professional regulatory manner and not the criminal justice system. However, after the inquest the ODPP reversed its decision and recommended criminal charges against the Ex-parte Applicants. This contravened the principles of lawfulness, reasonableness and fairness in decision making.

PARA 14.

The Ex-parte Applicants reiterated that the inquest and the decision recommending to charge them with criminal offences were tainted with illegality, unconstitutionality, irrationality and unreasonableness.

DIVISION - The 4<sup>th</sup> Respondent's Submissions

PARA 15.

The Honourable Attorney-General, the 4<sup>th</sup> Respondent herein, stated that the inquest proceedings and resultant findings were lawful, regular and procedurally fair having been conducted in strict compliance with Sections 386 and 387 of the Criminal Procedure Code (Cap 75). The purpose of the inquest proceedings is set out under Sections 386 (1) and 387 (1) of the Criminal Procedure Code which empower a magistrate to conduct inquiries into sudden or unexplained deaths to establish the cause of death, determine whether a crime was committed and identify any person responsible. The Court's finding that there existed sufficient grounds for criminal culpability and recommendation for prosecution was therefore within the lawful remit of a magistrate conducting an inquest.

PARA 16.

The 4<sup>th</sup> Respondent relied on *REPUBLIC v CHIEF MAGISTRATE'S COURT MILIMANI LAW COURTS & 2 OTHERS EX PARTE PATEL RAJJI LALJI* [2022] KEHC 1120 (KLR) where it was held that judicial review cannot be used to dictate to the DPP how to exercise discretion unless there is demonstrable bad faith, unreasonableness or abuse of power. The DPP acted within the independent constitutional authority derived from Article 157 (6) of *the Constitution*.

PARA 17.

The Nursing Council of Kenya is a statutory body established under the Nursing Act No. 27 of 2011 with the power to conduct disciplinary proceedings under Sections 18A and 18B of the said Act. The findings of the Council are admissible and legally binding under Section 34 of the *Evidence Act* (Cap80). The Magistrate's reliance on the outcome of the Council's disciplinary proceedings was therefore lawful and procedurally sound.

PARA 18.

The Applicants' supporting affidavit introduces inadmissible documents, including letters authored by the office of the Director of Public Prosecutions contrary to Sections 79 and 82 of the *Evidence Act*. The introduction of confidential and official correspondence to which the Applicants are neither authors nor addressees violates evidentiary principles and renders such exhibits inadmissible.

DIVISION - Issue For Determination

PARA 19.

This application raises only one issue for determination; whether the application meets the threshold for the grant of judicial review orders of Certiorari and Prohibition.

DIVISION - Analysis

PARA 20.

The Ex-parte Applicants seek judicial review orders of Certiorari to quash both the judgment delivered in Kikuyu Inquest No.E012 of 2022 In the Matter of Hellen Wanjiru Ngure (Deceased) and the subsequent



recommendation of the ODPP dated 19<sup>th</sup> July, 2024 which seeks to prefer criminal charges against the Ex-parte Applicants.

PARA 21.

Judicial review is entrenched as a constitutional principle pursuant to the provisions of Article 47 of *the Constitution*, which provides for the right to fair administrative action, and Section 7 of the *Fair Administrative Action Act* which provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision.

PARA 22.

The purpose of Judicial Review as set out by the Court of Appeal in the case of *Municipal Council Of Mombasa v Republic Umoja Consultants Ltd*, Nairobi Civil Appeal No.185 of 2007(2002) EKLR, and reads as follows:-

“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at Did those who make the decision have the power i.e the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review”.

PARA 23.

In the illustrious case of *Pastoli v Kabale District Local Government Canal & Others* (2008) 2EA 300 at pages 300-304, the court elaborated the circumstances under which orders of Judicial Review can be issued as follows;-

“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

Illegality, is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality----

Irrationality, is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

Procedural impropriety, is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice to act or to act with procedural fairness towards one to be affected by the decision – it may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislature instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehidswi... vs...Secretary of State for the Housing Department* (1990) AC 876”

PARA 24.

Based on the established law on judicial review proceedings, the key question is whether the Ex-parte Applicants are deserving of the orders sought in their application. The Ex-parte Applicants averred that the inquest proceedings were procedurally unfair and that the DPP’s recommendation offends the principles of fair administrative action. Essentially, the challenge on the inquest proceedings is premised on the merits of the



decision. The Ex-parte Applicants, for example, challenged the magistrate's reliance on the evidence of PW5 on behalf of the Nursing Council of Kenya, calling it untested and hence insufficient to establish culpability. The Ex-parte Applicants have failed to establish any illegality, irrationality and procedural impropriety in the impugned inquest proceedings.

PARA 25.

The Ex-parte Applicants also challenge the ODPP's decision to charge by alleging that the same was based predominantly on the flawed inquest proceedings. Previous letters dated 10<sup>th</sup> December, 2021 and 21<sup>st</sup> February, 2022 from the ODPP indicate that there was no basis for preferring any criminal charges against the Ex-parte Applicants. The substance and import of these letters did not bar or restrict the DPP's independent authority to charge under Article 157 of *the Constitution*. These letters only indicate DPP's internal administrative decision making mechanisms and procedures leading to the inquest and subsequent charge. The letters did not establish legally binding estoppel against the DPP to recommend for the inquest or the initiation of any criminal proceedings before or after the inquest.

PARA 26.

This Court concurs with the decision in *Kimani v Director Of Public Prosecutions & 3 Others* (Judicial Review Application E062 of 2023) [2024] KEHC 3269 (KLR) (judicial Review)(3 APRIL 2024) (Judgment) that the Court ought not to usurp the Constitutional mandate of the DPP to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. However, if an Applicant demonstrates that the criminal proceedings constitute an illegality or abuse of process, this Court will not hesitate in putting a halt to such proceedings, as that falls squarely within its mandate as a judicial review Court.

PARA 27.

The circumstances under which the court may review the unfettered discretion of the DPP were illustrated in the cases of *Peter Ngunjiri Maina v Dpp & 2 Others*(2017) eKLR, AND *R v DPP & 2 Others Ex Parte Nomoni Saisi*(2016) EKLK and are set out as follows:

SUBPARA (a)

Where there is an abuse of discretion;

SUBPARA (b)

Where the decision-maker exercises discretion for an improper purpose;

SUBPARA (c)

Whether the decision-maker is in breach of the duty to act fairly;

SUBPARA (d)

Whether the decision-maker has failed to exercise statutory discretion reasonably;

SUBPARA (e)

Where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;

SUBPARA (f)

Where the decision-maker fetters the discretion given;

SUBPARA (g)

Where the decision-maker fails to exercise discretion; and

SUBPARA (h)



Where the decision-maker is irrational and unreasonable.

PARA 28.

This Court is satisfied that the Ex-parte Applicants herein have failed to prove that the DPP has abused discretion or exercised his discretion for an improper purpose; or acted in a manner that amounted to a breach of the duty to act fairly; the DPP has failed to exercise statutory discretion reasonably; or that the DPP acted in a manner to frustrate the purpose of the Act donating the power, has fettered the discretion given or failed to exercise discretion; or that the DPP has acted irrationally and unreasonably.

PARA 29.

By alleging that the evidence before the inquest court was insufficient or inadmissible to determine culpability or form a basis for criminal charges, the Ex-parte Applicants seem to be treating these judicial review proceedings as an appeal against the impugned inquest proceedings. This is beyond the purpose and import of judicial review as illustrated in the above cited case law.

PARA 30.

This Court finds that the Ex-parte Applicants have failed to establish any illegality, irrationality, unfairness and procedural impropriety in both the inquest proceedings and the DPP's decision to charge. The upshot is that the application does not meet the threshold for the judicial review orders sought.

DIVISION - Findings And Determinations

PARA 31.

For the forgoing reasons this Court makes the following findings and determinations

SUBPARA (i)

This Court finds the application to be devoid of merit and the same is hereby dismissed.

SUBPARA (ii)

Each party to bear its/their own costs.

Orders Accordingly.

**DATED, SIGNED AND DELIVERED VIA TEAMS AT VOI THIS 8<sup>TH</sup> DAY of MAY, 2026**

**A.MSHILA**

**JUDGE**

In the presence of;

Sanja/Millicent - Court Assistants

Khabongo h/b for Munyundo - For the Ex-parte Applicants

Kabutha h/b for Gacharia - For the Respondents

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