Multichoice Kenya Limited & 4 others v Inspector General of Police & 11 others (Civil Appeal E604 & E676 of 2023 (Consolidated)) [2025] KECA 72 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KECA 72 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E604 & E676 OF 2023 (CONSOLIDATED)

PO KIAGE, A ALI-ARONI & LA ACHODE, JJA

JANUARY 24, 2025

BETWEEN

MULTICHOICE KENYA LIMITED ..... APPELLANT

AND

INSPECTOR GENERAL OF POLICE ..... 1ST RESPONDENT

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

CEMENTERS LIMITED ..... 3RD RESPONDENT

STANLEY KEBATHI ..... 4TH RESPONDENT

STANLEY KEBATHI T/A ARCHPLANS ..... 5TH RESPONDENT

KARIUKI MUCHEMI ..... 6TH RESPONDENT

INTERCONSULT ENGINEERS LIMITED ..... 7TH RESPONDENT

WILSON MUNYU KARABA ..... 8TH RESPONDENT

CONAPEX CONSULTING ENGINEERS LIMITED ..... 9TH RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL E676 OF 2023

BETWEEN

STANLEY KEBATHI ..... 1ST APPELLANT

STANELY KEBATHI T/A SK ARCHPLANS ..... 2ND APPELLANT

KARIUKI MUCHEMI ..... 3RD APPELLANT

INTERCONSULT ENGINEERS LIMITED ..... 4TH APPELLANT

AND

INSPECTOR GENERAL OF POLICE ..... 1ST RESPONDENT

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

MILIMANI CHIEF MAGISTRATE'S COURT ..... 3RD RESPONDENT

CEMENTERS LIMITED ..... 4TH RESPONDENT

MULTICHOICE KENYA LTD ..... 5TH RESPONDENT

WILSON MUNYU KARABA ..... 6TH RESPONDENT

CONAPEX ENGINEERS LTD ..... 7TH RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Milimani, Nairobi Judicial Review Division (Ngaah, J.) dated 4th July, 2023 in JR Misc. Application No. E033 of 2022)

JUDGMENT

1. The consolidated appeal emanates from the judgment of the High Court of Kenya at Milimani (Ngaah, J.) dated 4th July 2023 in JR Misc. Application No. E033 of 2022. The ex-parte applicants; Stanley Kebathi (Kebathi), Stanley Kebathi T/A SK Archplans (Archplans), Kariuki Muchemi (Muchemi), and Interconsult Engineers Limited (IEL), tendered a motion before the learned Judge seeking the following orders;

> " 1. That an order of certiorari do and is hereby issued bringing to this court and quashing the 1st respondent's decision to investigate the ex parte applicants in relation to the professional services rendered in the construction and related works of erecting an office block on land reference no. 2734/421 Oloitoktok road Nairobi.
>
> 2. That an order of certiorari do and is hereby issued to bringing to this court and quashing the 2nd respondents decision to charge and prosecute the ex parte applicants as contained in the amended charge sheet dated 8th March 2022 in Milimani Chief Magistrate's Court Criminal Case No. E007 of 2022 Republic versus Kariuki Muchemi and 6 others.
>
> 3. That an order of certiorari do and is hereby issued bringing to this court and quashing the 3rd respondent's decision to admit the amended charge dated 8th March 2022.
>
> 4. That an order of certiorari do and is hereby issued bringing to this court and quashing all the proceedings in Milimani Chief Magistrate's Court Criminal Case No. E007 of 2022 Republic versus Kariuki Muchemi and 6 Others in their entirety.
>
> 5. That an order of prohibition do and is hereby issued forbidding the 1st, 2nd and 3rd respondents from conducting any further proceedings whatsoever in Milimani Chief Magistrate's Court Criminal Case No. E007 of 2022 Republic versus Kariuki Muchemi and 6 Others.

6. That an order of prohibition do and is hereby issued forbidding the 1st respondent, its employees, servants and/or agents from harassing, summoning, arresting and/or intimidating the ex parte applicants for the professional services rendered in the construction and related works of erecting an office block on land reference number 2734/421 Oloitoktok road Nairobi.

7. That an order of prohibition do and is hereby issued forbidding the 2nd respondent from instituting any further or future charges against the ex parte applicants based on the same complaint or facts the subject of the criminal charges in Milimani Chief Magistrate's Court Criminal Case No. E007 of 2022 Republic versus Kariuki Muchemi and 6 Others.

8. That costs be provided for."

2. The application was based on grounds on the face of the motion, the statutory statement and the verifying affidavits of Stanley Kebathi (Kebathi) and Kariuki Muchemi (Muchemi), all dated 22nd March 2022.

3. It was deposed that proceedings in Milimani Chief Magistrate's Court Criminal Case No. E007 of 2022; Republic versus Kariuki Muchemi and 6 Others were instituted pursuant to a complaint lodged with the Police by Cementers Limited (Cementers). The complaint, arrest and prosecution of the ex-parte applicants arose following the breach of a construction agreement between Multichoice and Cementers for the construction of an office block on Land Reference No. 2734/421 Oloitoktok Road, Nairobi (suit property). The involvement of the ex-parte applicants was that Kebathi, through his firm, Archplans, was engaged by Multichoice as the Principal Architect and Lead Consultant; Muchemi through his company, IEL, prepared reports on the integrity of the construction being undertaken by Cementers and gave the said report to Multichoice.

4. The report by IEL identified faults in some of the construction works which were attributable to Cementers and which acted as one of the triggers of the dispute between Cementers and Multichoice leading to the eventual termination of the construction contract. Following the termination of the contract, Cementers instituted Milimani Commercial Case No. 307 of 2018 where it sought and was granted ex-parte orders to raid the ex-parte applicants' offices, search, access and confiscate electronic data therein. During inter-party hearing of the said suit, Nzioka, J. stopped further raids and referred the dispute, as far as it related to Multichoice and Cementers to Arbitration. The case, however, remains alive as between Cementers, and 13 other defendants, including Kebathi and Muchemi. It was averred that Kebathi and Muchemi, together with their firms, are set to give evidence in that Arbitration on behalf of Multichoice. Further, the intention of Cementers in instituting the criminal proceedings was to avoid payment of damages which are quantified at Ksh. 895,000,000, an issue that can be sufficiently addressed in the pending arbitration and in Milimani Commercial Case No. 307 of 2018. The ex-parte applicants contended that the documentary evidence that was to be relied on by the 1st and 2nd respondents in the prosecution of the criminal case was obtained unprocedurally. Moreover, the charges that were drawn in the amended charge sheet did not disclose any offences.

5. In the verifying affidavit sworn by Kebathi, it was averred that some time in the year 2011, he came to know through a Mr. Suleiman Magare, a quantity surveyor and a friend, that Multichoice intended to construct an office block and was putting together a group of professionals to undertake the project. His firm, Archplans, participated in the competition for the best design proposal and emerged the best. Vide a letter dated 10th October 2011, Kebathi was appointed Principal Architect for the project. By an agreement dated 9th November 2011, he was engaged by Multichoice to carry out architectural

services with respect to the suit property. Pursuant to the agreement, Kebathi was given powers of lead consultant to appoint other consultants to provide structural quantity surveying, mechanical and electrical services. Together with a team of other professionals, they did the preliminary work and prepared the tender documents for the project. Eventually, Multichoice appointed Cementers as the contractor responsible for carrying out the development of the suit property.

6. On 18th March 2015, Multichoice and Cementers entered into a Contract for Building Works detailing the works to be executed on the suit property. The site was handed over to Cementers on 13th February 2015 and the works commenced on 3rd March 2015. As Project Architect and Lead Consultant, Kebathi used to visit the site regularly, and during one such visit, he noted cracks in the building and sagging of some floors. The cracks and sagging floors raised concerns about the integrity of the development, and it was decided that the services of an independent structural engineer be secured so that he could carry out a structural audit of the building and determine if the perceived defects were structural and if they affected the structural integrity of the structure. Multichoice commissioned Muchemi through his company, IEL, as independent consultants to conduct a structural audit of the building. Muchemi through his company produced independent periodic reports while liaising with the Project Engineer, Conapex Consulting Engineers (Conapex), whose reports were forwarded to Multichoice. By a letter dated 1st September 2016, Kebathi advised Conapex to take immediate measures to cause the necessary columns to be erected to remedy the situation.

7. Subsequently, Kebathi was instructed by Multichoice to terminate the services of the Project Engineer, Conapex, which they did vide a dated 27th October 2016. After several meetings between Cementers and Multichoice, and other professionals, the construction contract between Cementers and Multichoice was terminated on 21st June 2017. However, Cementers disputed the termination and declared it a wrongful termination. By a letter dated 29th November 2017, issued under clause 45 of the Contract for Building Works, Multichoice declared a dispute with respect to construction of the suit property. On 6th June 2018, at about 5.00pm, Kebathi's offices were raided by people who claimed to be agents of the 1st respondent, and all physical files and computers relating to the project were carried away from their office. They later learnt that Cementers had obtained an ex-parte court order in Milimani Commercial Case No. 307 of 2018 authorising the raid. Kebathi further deposed that on 19th July 2019, he recorded a statement with the Directorate of Criminal Investigation Offices detailing all the matters within his knowledge about the contract. He was later charged with conspiracy to defraud contrary to section 317 of the Penal Code in Milimani Chief Magistrate's Court Criminal Case No. E007 of 2022.

8. On his part, Muchemi confirmed in his verifying affidavit that in March 2016, Kebathi contacted him seeking a professional opinion on a project that his firm was undertaking. Kebathi informed him that he and other project consultants were of the opinion that the structure under construction had a number of defects that required immediate attention. On 14th March 2016, he was invited to the project site where he was taken around the structure and shown the perceived defects. After a series of meetings, IEL was formally commissioned by Multichoice to carry out a structural audit of the building with the aim of determining if at all the perceived defects were at all structural and if they affected the structural integrity of the structure. IEL advised the lead consultant, Kebathi, that it would be prudent to appoint a specialist to conduct non-destructive tests (NDT's) and scan some of the areas of concern within the structure. This was to help understand and determine the cause of the visible cracks and map out the depth, size, and location of the cracks which would aid in mapping out the extent of cracks within the structure. The NDT's and scans were also supposed to map out the reinforcement that was laid in the sample building's structural elements. IEL proposed Mass Labs Limited to undertake the tests and that proposal was accepted by Multichoice. On conducting the NDT's, IEL and Mass Labs preliminarily

concluded that there was inadequate steel reinforcement in the structural elements tested, and the concrete needed to be tested further to determine the reason for the cracks.

9. After presenting their preliminary report, IEL was in October 2016 offered the position of Project Civil Structural Engineering Consultant, and instructed to carry out a full structural audit of the building. Subsequent to the conducting of the tests, IEL drafted and shared a Structural Integrity Report of the findings and advised on the necessity of conducting 'Destructive Testing' tests of the structure to confirm the concrete strength of the different structural elements that is, column basis, column beams, reinforced concrete, walls and slab. However, the contractor, Cementers, declined and stated that they had a concern that the exercise would weaken the building. The Project Lead Consultant and the Project Manager nonetheless went ahead and put in mechanisms for the destructive tests to be carried out. Subsequently, a Structural Integrity Report was put together capturing the findings of both the destructive and non-destructive results, and was submitted to the Project Engineer and Project Manager. Muchemi deposed that upon sharing their final structural audit report dated February 2017, their office was raided by persons alleging to be agents of the 1st respondent, claiming that they had a court order to seize their computers, phones and documents, associated with the suit property. After a week, they were asked to pick up the items which had been seized from Kilimani Police Station, which they did. Further, on 8th March 2022, Muchemi and IEL were charged in Milimani Chief Magistrate Criminal Case No. 007 of 2022. Muchemi denied committing any known criminal offence, contending that the criminal proceedings were adversely affecting his business and his reputation.

10. In response to the application No. 100586, Police Constable Ian Mukumbu Makumi swore an affidavit on behalf of the 1st respondent on 20th April 2022. He averred that they received a complaint from Cementers on 8th April 2019 to the effect that there was an alteration of a Structural Integrity Investigation Report that was done to disfavour it. Upon receipt of the complaint, investigations were carried out, including recording of statements from witnesses and analysis of relevant documentation. On completing the investigations, the file was forwarded to the Office of the Director of Public Prosecutions (ODPP), who recommended that the suspected individuals be charged.

11. Cementers opposed the application through a replying affidavit sworn on 6th April 2022, a supplementary affidavit dated 8th April 2022, and a further supplementary affidavit dated 24th June 2022, all sworn by Dipak Halal, a director of Cementers. In the affidavits, it was confirmed that Cementers entered into a contract for construction with Multichoice for the suit property but in the course of the construction, disagreements arose between them and Multichoice decided to terminate the contract, a termination which Cementers protested. Cementers acknowledged having obtained Anton Piller orders against Kebathi and Muchemi together with their companies, and lodging a criminal complaint against them with the Directorate of Criminal Investigations (DCI). It was deposed that the complaint by Cementers and the subsequent arrest of Kebathi and Muchemi stemmed from their participation in the alteration of professional documents in relation to the construction dispute between Cementers and Multichoice where they conspired to blame Cementers through falsely doctored professional reports. Cementers contended that the ex-parte applicants had not met the grounds for granting the judicial review orders of certiorari and prohibition, and had not shown that the actions of the respondents were riddled with irregularities. Cementers also contested the participation of Multichoice in the judicial review proceedings for the reason that it was not directly affected by the judicial review claim.

12. Multichoice supported the application vide an affidavit sworn on 8th June 2022, by its Managing Director, Nancy Matimu. It was claimed that the instigation of the criminal proceedings by Cementers was intended to damage the professional reputations of the ex-parte applicants and frustrate or unduly

influence the arbitral proceedings and the ongoing court cases. Multichoice also indicated that the building had since been condemned by the County Government of Nairobi and demolished.

13. During the trial, Wilson Munyu Karaba (Karaba) and Conapex Consulting Engineers Limited (Conapex), were joined to the proceedings as the 3rd and 4th interested parties. Through their replying affidavit dated 23rd June 2022, they too supported the application arguing that instituting both Milimani Chief Magistrate Criminal Case No. E007 of 2022 and Milimani Commercial Case No. 307 of 2018, amounted to forum-shopping and a witch-hunt by Cementers.

14. The trial proceeded by way of written submissions and Ngaah, J. delivered his judgment dismissing the application as lacking in merit.

15. That decision aggrieved the appellants now before us and they lodged an appeal through Notices of Appeal dated 14th July 2023, 5th July 2023 and 10th July 2023. In the two memoranda of appeal, lodged on 2nd August 2023 on behalf of Multichoice and on 18th August 2023, on behalf of Kebathi et al, it is complained, in summary, that the learned Judge erred by;

    a. Finding that the appellants were guilty of non-disclosure of material facts, contrary to the evidence on record.

    b. Analysing the evidence before the criminal court in a biased one-sided fashion.

    c. Failing to resolve that Milimani Chief Magistrates Court Criminal Case No. E007 of 2022 had been instituted for improper purposes.

    d. Failing to find that Judicial Review orders can issue where there is a violation of constitutional rights.

    e. Failing to find that the appellants had adduced sufficient evidence to justify an order of certiorari and prohibition of the decision to investigate, charge and prosecute them.

    f. Holding that he was not obliged to consider the veracity of the charges against the appellants for conspiracy.

16. In the end, the appellants pray that the impugned judgment be set aside and an order of prohibition do issue prohibiting the continuation of proceedings in Milimani Chief Magistrates Court Criminal Case No. E007 of 2022, Republic vs. Kariuki Muchemi & 4 Others. They also pray for costs.

17. In preparation for the appeal, the respective parties filed written submissions together with their case digests which were orally highlighted before us by counsel.

18. At the hearing, learned counsel Mr. Eddie Omondi appeared for Multichoice, Mr. Mbuthi Gathenji appeared for Kebathi et al, Mr. O. J. Omondi, a Senior Director of Public Prosecutions, appeared for the Inspector General of Police and the Director of Public Prosecutions, Mr. Gitonga appeared for Cementers while Mr. Kirika appeared for Munyu and Conapex.

19. By consent of the parties, Civil Appeal No. E604 of 2023 and Civil Appeal No. E676 of 2023 were consolidated with the former designated the lead file.

20. In his submissions, Mr. Omondi for Multichoice outlined three issues for determination, namely;

    i. Whether the learned Judge as a judicial review court should have assessed the evidence before it.

    ii. Whether the learned Judge erred in law and in fact by considering evidence and facts in one-sided fashion.

iii. Whether Milimani Chief Magistrates Court Criminal Case No. E007 of 2022; Republic vs. Kariuki Muchemi & 4 others was instituted with an improper motive.

21. On the first issue, counsel contended that there has been an evolution towards the application of a 'merit-based approach' in judicial review proceedings as opposed to the 'process only inquiry', albeit cautiously. He submitted that *the Constitution* of Kenya, 2010 contains a comprehensive Bill of Rights, which includes the right to fair administrative action as espoused under Article 47. Article 23(3) in particular provides for orders of judicial review as one of the remedies for enforcement of the bill of rights. On reliance of the Court of Appeal decision in Suchan Investment Ltd Vs. Ministry of National Heritage & Culture & 3 Others [2016] eKLR, it was argued that Article 47 of the Constitution of Kenya 2010, as read with the *Fair Administrative Action Act*, reveal the implicit shift of judicial review to include aspects of merit review of administrative action. This Court's finding in Judicial Service Commission & Another Vs. Njora [2021] KECA 366 (KLR) was also cited. In that decision, Kiage JA was of the view that it would be unrealistic for a court to engage itself with a formalistic approach while excluding a merit review since it was only from the merits that a court can have a meaningful engagement with the question of reasonableness and fairness of a decision.

22. On the second issue, Mr. Omondi challenged the learned Judge's finding that Multichoice deliberately failed to disclose information that it deemed self-incriminating hence concealing the true nature of the dispute. He contended that the verifying affidavit of Stanley Kebathi provided a full, frank and chronological disclosure of the dispute, including annexures such as the structural integrity report. We were urged to evaluate the evidence adduced before the learned Judge and find that the appellants made a full and frank disclosure.

23. Concerning whether Milimani Chief Magistrates Court Criminal Case No. E007 of 2022; Republic vs. Kariuki Muchemi & 4 others was instituted with an improper motive, counsel submitted that the institution of the criminal proceedings was intended to aid Cementers in the civil and arbitration proceedings. Mr. Omondi faulted the learned Judge for ignoring the existence of other disputes between the parties herein which include, Nairobi Chief Magistrate Miscellaneous Criminal Application No. E606 of 2024, R Vs. GO TV Kenya and Multichoice Kenya; Nairobi Civil Appeal No. E676 of 2023, Stanley Kebathi & 2 others Vs. *Multichoice Kenya Limited & 6 Others; Nairobi High Court Civil Suit No. 307 of 2018*, Cementers Limited Vs. Multichoice Kenya Ltd & 13 others; Milimani Commercial Civil Suit No. 359 of 2018, MIH East Africa Limited Vs. Cementers Limited & 3 Others, and Arbitration between Multichoice Kenya and Cementers Kenya Limited.

24. Counsel cited the Supreme Court decision in Jirongo Vs. Soy Developers LTD & 9 others [2021] KESC 32 (KLR) for the argument that criminal proceedings cannot be used to gain an advantage in a civil suit; parties have to first pursue the civil suit then with a firm finding by the civil court on the alleged fraud, institute criminal proceedings. It was further submitted that the trial court was informed of the withdrawal of charges against Ms. Lucky Lavender Waindi, an employee of Multichoice, who was the only thread connecting the parties to the alleged crime and thus the Office of the Director of Public Prosecutions (ODPP) should not have gone ahead with the selective prosecution. In the end, counsel urged that the appeal be allowed with costs, and an order be issued prohibiting the continuance of Milimani Chief Magistrates Court Criminal Case No. E007 of 2022; Republic vs. Kariuki Muchemi & 4 others.

25. Submitting for Kebathi et al, Mr. Gathenji associated himself with the foregoing submissions made by Mr. Omondi. He additionally set out three issues for determination namely;

i. Whether the appellants are guilty of non-disclosure of material facts before the High Court.

ii. Whether Milimani Chief Magistrates Court Criminal Case No. E007 of 2022; Republic vs. Kariuki Muchemi & 4 others was instituted for improper purposes.

iii. Whether there is sufficient evidence to justify granting of orders of certiorari and prohibition against the decision to investigate, charge and prosecute the appellants.

26. On the first issue, counsel reiterated Mr. Omondi's assertion that what the learned Judge perceived to have been concealed was disclosed in the appellants' affidavits and documents and, there was no serious challenge to those affidavits by Cementers or the ODPP. We were once again urged to evaluate the evidence adduced and find that the appellants made full disclosure of material facts.

27. Turning to the second issue, Mr. Gathenji invited us to examine pleadings in Nairobi High Court Commercial Case No. 307 of 2018 and the claim, defence, and counterclaim before the arbitrator. To him, the documents revealed that the dispute between the appellants and Cementers, revolved around the Structural Integrity Report, which report is subject to scrutiny in the arbitration proceedings and the civil suit. Counsel argued that Cementer's complaint to the Police is a shield against being found civilly culpable in damages for defects in the proposed block. Moreover, the accused persons in the criminal case are the persons who are witnesses in the arbitration and the commercial dispute, and therefore, charging them with crimes under the Penal Code reduce their credibility. Mr. Gathenji asserted that the criminal justice system should not be used to achieve private ends especially where private interests can be achieved through other means. Counsel also cited the Supreme Court decision in Jirongo Vs. Soy Developers Ltd & 9 Others (supra) for the argument that criminal proceedings should not be used to gain an advantage in a civil suit. He urged that the civil case should be heard first since that is where a finding can be made whether a party should be charged in a criminal case.

28. Mr. Gathenji faulted the learned Judge for holding that there was no material before him to reach the conclusion that the prosecution of Kebathi et al amounted to an abuse of the court process. He urged that in determining whether there is an abuse of prosecutorial power, the court is enjoined to scrutinise material before it on a prima facie basis and form an opinion on whether an offence has been disclosed. We were invited to scrutinize the materials that formed the basis of the appellants' prosecution and to be persuaded by the High Court decision in Republic Vs. Director Of Public Prosecutions & Another Ex Parte Chamanlal Vrajlal Kamani & 2 Others [2015] eKLR. In that decision, the court held in part that,

> 'The High Court will interfere with a criminal trial in the subordinate court if it is determined that the prosecution is an abuse of the process of the court and/or because it is oppressive and vexatious."

29. Counsel submitted that Muchemi was charged with making a false document to wit the Structural Integrity Report contrary to section 347 of the Penal Code, and all other offences flowed from that report. He contended that the report was done by Muchemi on the basis of his knowledge in structural engineering and therefore that report was a private and professional opinion to Multichoice. Counsel posited that Cementers was invited to participate in the exercise but it declined the invite. Further, contrary to the learned Judge's suggestion that the report attempted to absolve one Eng. Karaba, both Cementers and Eng. Karaba were found liable. Mr. Gathenji invited us to make a finding that no lawful charge of making a false document can be based on the making of a professional opinion. Ultimately, counsel prayed that we allow the appeal with costs and issue an order prohibiting the continuation of the proceedings in Milimani Chief Magistrate Criminal Case No. E007 of 2020; Republic vs. Kariuki Muchemi. On probing counsel for parties on record, it emerged that the arbitration proceedings had since stalled following the recusal of the arbitrator. Learned counsel Mr. Kirika for Munyu and

Conapex indicated that he was supporting the appeal and he associated himself with the submissions of Mr. Gathenji.

30. In opposition to the appeals, Mr. O.J. Omondi for the 1st and 2nd respondent, insisted that the learned Judge properly evaluated the application and the entire evidence before him and reached the correct conclusion that, at the time when the appellants were seeking leave to apply for judicial review orders, they did not disclose material facts. To counsel, therefore, it was misleading for the appellants to argue that the learned Judge abdicated his duty to assess all the material that was presented. Counsel further concurred with the learned Judge's reliance on the decision in R Vs. Kensington Income Tax Commissioner, Ex Parte Princess Edmond De Polignac [1917] 1KB 495 where Viscount LJ held that in an application for leave for judicial review uberrimae fides is required and leave would not be granted, or maybe later set aside, if there has been deliberate misrepresentation or concealment of material facts in the applicant's affidavit or affidavits.

31. Mr. O. J. Omondi sought to distinguish the instant case from Jirongo Vs. Soy Developers Ltd & 9 Others (supra). He explained that in the Jirongo matter, the criminal case was filed several years after the civil case was filed. However, in this case, the dispute on liability in the civil case is the same one giving rise to the criminal case because of an allegation of conspiracy in making a false document to defraud. Counsel submitted that when the correspondence concerning the alleged offence were tabled before the CID, investigations were carried out objectively, and it was established that a crime of making a false document had been committed. That evidence was taken to the 2nd respondent, the ODPP, who confirmed that a criminal offence had been perpetrated.

32. Mr. O. J. Omondi disputed the claim that the criminal case had been instituted for improper motives, arguing that the law allows civil cases and criminal cases to run concurrently. It was submitted that Kebathi et al, did not raise any constitutional issues in the judicial review court, which would have necessitated the learned Judge to go beyond just looking at the procedure. In counsel's view, had any constitutional issue been raised, the learned Judge would have gone to the extent of looking at the merits of that issue. In this regard, the decision in Anarita Karimi Njeru Vs. Republic [1979] KLR 154 was cited for the proposition that where a person seeks redress from the High Court on a matter which refers to *the Constitution*, he should set out with a reasonable degree of precision that which he complaints about, the provisions said to be infringed, and the manner in which they were allegedly infringed.

33. Counsel posited that a judicial review court cannot substitute its own decision for that of the ODPP, and neither can it assume the place of the trial court and decide whether offences alleged to have been committed were indeed committed. On the contention that the learned Judge failed to resolve that the criminal case before the Milimani Magistrates Court had been instituted for improper purposes, counsel referred to section 193A of the Criminal Procedure Code, which provides that criminal proceedings and civil proceedings can proceed concurrently. The section provides;

> "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."

34. Mr. O. J. Omondi urged us to uphold the decision of the judicial review court and dismiss the appellant's appeal with costs.

35. We inquired from counsel what his opinion was when the Jirongo case was compared with the instant matter, especially in light of the Supreme Court's view that it is advisable for parties to first pursue

civil proceedings and if there is a firm finding by the civil court of alleged fraud, then one can institute criminal proceedings to prosecute the culprits. Mr. Omondi O. J. reiterated that the distinguishing factors included the timing; in the Jirongo case where the criminal case was instituted many years after the civil case was filed. Further, the issues in the criminal case were different from those in the civil case.

36. In further opposition to the appeal, Mr. Gitonga for Cementers charged that the leading case in this matter, which dispels and dislodges the Jirongo case, is the Supreme Court decision in Dande & 3 Others Vs. Inspector General, National Police Service & 5 Others [2023] KESC 40 (KLR). Counsel drew our attention to paragraph 104 of that decision where the apex Court, while addressing the place of section 193(a) of the CPC stated thus;

> The conclusion we draw from the above provision is that both civil and criminal jurisdictions can run parallel to each other and that neither can stand in the way of the other unless either of them is being employed to perpetuate ulterior motives or generally to abuse the process of the court in whatever manner."

37. Mr. Gitonga submitted that there was no ulterior motive or abuse of the process of court that had been demonstrated. While distinguishing the Jirongo case from the instant case, counsel stated that the criminal case in Jirongo had been filed after 24 years while in this matter, evidence of the criminal acts of the appellants were discovered from the execution of a lawful Anton Piller order. On whether the Judicial Review Court should have done a merit review rather than a process inquiry, counsel posited that the appellants had a choice to file a judicial review application under *the Constitution* or pursuant to Order 53 of the Civil Procedure Rules. Having chosen to lodge the application pursuant to Order 53, the Court was only limited to conducting a process inquiry not a merit-based inquiry. For this argument counsel relied on the Apex Court's decision in Dande & 3 Others Vs. Inspector General, National Police Service & 5 Others (supra). Mr. Gitonga continued that, even though the learned judge was obliged to only conducing a process inquiry of the application, he went ahead and looked at the merit of the evidence and was equally persuaded that the decision to charge was sound.

38. Counsel agreed with the learned Judge's finding that Kebathi et al intentionally failed to bring to light several correspondences between various parties that were material to the dispute. Such correspondence, as highlighted by the learned Judge, included an email dated 5th May 2017 from Felicine Oriri of Multichoice to Albert Van Rooyen of the same company advising against the sharing of the full report by IEL with Cementers. Another correspondence was an opinion from a firm of lawyers called Coulson Harney LLP, in which the lawyers noted that 'the IEL Report attributed the inability for the structural deficiencies to the structural Engineer who was engaged in the preparation of the structural drawings and designs.' Still on the authority of the Supreme Court's holding in the Dande case, Mr. Gitonga contended that the appellants had not provided any evidence to show that the ODPP did not meet the expectations required under Article 157(11) of *the Constitution*, nor that the action of prosecuting Kebathi et al was an abuse of the process of the court.

39. Turning to the civil dispute between Cementers and Multichoice, counsel explained that Multichoice gave a contract to Cementers to construct a building when they were at the same time constructing another building famously known as Miran. The same concrete that was being used to construct the building for Multichoice is the same that was used for the Miran building. He contended that unlike what is said to have happened to the Multichoice building, the Miran building did not sag and there was no issue with the concrete deficiency. Hence when the contract with Cementers was terminated, it refused to be blamed for the deficiency.

40. Mr. Gitonga contended that by the time the contract with Cementers was being terminated, it was owed money which it sought to recover. Later it also came across evidence of conspiracy between the

Multichoice and a consultant to doctor evidence with a view to blaming it for the deficiency in the concrete that was used in the building. Confronted with that situation, Cementers lodged a complaint with the police to investigate. The police conducted investigations independently and came to the conclusion that, indeed there was culpability.

41. Asked whether we should be swayed by the Jirongo or the Dande case since they were both authorities from the Supreme Court, Mr. Gitonga's answer was that the Supreme Court took time to distinguish the former in Dande.

42. In a brief reply, Mr. Eddie Omondi stated that when Cementers went to court to obtain the Anton Piller orders, Multichoice challenged those particular orders and they were stayed. The court made a ruling that no party was to use documents which had been sourced in an unauthorized manner. Counsel argued that as a result, the appellants continue to challenge the admissibility of the evidence which was sought under the Anton Piller orders.

43. In a further reply, Mr. Gathenji insisted that the Dande case does not obliterate the Jirongo case. Instead, they run parallel as they reinforce section 193(a) of the CPC.

44. We have given due consideration to the record of appeal, the submissions for and against the appeal together with the authorities cited by counsel, cognizant that as a first appellate Court, we have an obligation to re-consider and re-evaluate the evidence and come up with independent conclusions. see Selle Vs. Associated Motor Boat CO. LTD [1968] EA 123. We however, do pay due respect to the conclusions of the first instance court and will not lightly depart from them, but we will not hesitate to do so if we are satisfied that the learned Judge misapprehended the facts; or misdirected himself on the law; or that he took into account matters of which he should not have; or failed to take into account considerations which he should have; or that his decision was plainly wrong. We are deliberately slow to interfere in decisions falling within the discretion of the first instance judge.

45. We think the sole issue for our determination, which is dispositive of this entire appeal, is whether the appellants were entitled to the orders of certiorari and prohibition of the decision to investigate, charge and prosecute them.

46. The appellants contend that the learned Judge should have assessed the evidence before him, considering that, the Constitution and the *Fair Administrative Action Act* have an implicit shift of judicial review, including aspects of merit review of administrative Action. They dispute the learned Judge's finding that they failed to disclose information that they deemed self- incriminating to them, arguing that the verifying Affidavit of Stanley Kebathi provided a full, frank, and chronological disclosure of the dispute. Further that, Milimani Chief Magistrates Court Criminal Case No. E007 of 2022; Republic vs. Kariuki Muchemi & 4 others was instituted for an improper motive, to aid Cementers in the civil and arbitration proceedings and reduce their credibility. The Supreme Court decision in the Jirongo case is relied on for the argument that a civil suit should be heard first, since that is whether a finding can be made firmly whether a party should be charged in a criminal case.

47. The respondents however maintain that the learned Judge properly evaluated the evidence that was before him and reached the correct conclusion that the appellants failed to disclose material facts while seeking leave to apply for judicial review orders. Counsel distinguished the instant case from the Jirongo case, stating that in Jirongo the criminal case was filed several years later and the issues in the criminal case were different from those in the civil matter. In this case the dispute on liability in the civil case was the one giving rise to the criminal case. It is argued that the law allows civil cases and criminal cases to run concurrently pursuant to section 193A of the Criminal Procedure Code (CPC). Counsel contends that the appellants did not raise any constitutional issues that would have necessitated the learned Judge to go beyond a procedural inquiry of the application. It is urged that the leading case

in this matter is not the Jirongo case but the Supreme Court decision in the Dande case. In Dande, the court affirmed section 193(A) of the CPC. On the basis of Dande it is also submitted that since the judicial review application was made under Order 53 of the Civil Procedure Rules, and not the Constitution, the learned Judge could only do a process review and not a merit-based inquiry.

48. From the rival submissions by parties, it would seem to us that the Supreme Court has already pronounced itself on the issues herein that is, whether the judicial review court ought to have conducted a merit-based review and/or a process inquiry in the circumstances, the import of section 193(A) of the CPC and, whether the decision to investigate, charge and prosecute was an abuse of power by the 1st and 2nd respondents. What we, however, need to consider is which of the two cited cases, Jirongo or Dande, is applicable and to what extent. We note that in Dande, the Apex Court addressed the issues under consideration in the following questions for determination.

    i. Whether the scope of judicial review has evolved to include merit review of an administrative decision or other action complained of.

    ii. Whether the decision to investigate, arrest, and prosecute the appellants constituted an abuse of power by the 1st and 2nd respondents.

49. Concerning the scope of judicial review and whether it has evolved to include merit review, the Supreme Court, upon considering Articles 23(3), and 47 of *the Constitution*, section 7 of the Fair Administrative Actions Act as well as its previous decisions on the matter, made the following finding;

    85. It is clear from the above decisions that when a party approaches a court under the provisions of *the Constitution* then the court ought to carry out a merit review of the case. However, if a party files a suit under the provisions of order 53 of the Civil Procedure Rules and does not claim any violation of rights or even violation of *the Constitution*, then the court can only limit itself to the process and manner in which the decision complained of was reached or action taken and following our decision in SGS Kenya Ltd and not the merits of the decision per se."

50. A perusal of the record shows that the notice of motion dated 29th March 2022, by which the judicial review application was made, was lodged under Order 53 rule 3 of the Civil Procedure Rules. There is no mention of any Constitutional provision or violation of rights therein. It then follows that the learned Judge was right when he declined to assess the evidence, as he was invited to, in order to determine whether a crime was committed and, therefore, whether the Director of Public Prosecutions was right in his decision to charge and prosecute.

51. On whether the decision to investigate, arrest, and prosecute the appellants constituted an abuse of power, the appellants dispute committing any offence in law. They claim that the alleged altered report was a professional report done by an expert in the field. To the contrary, it was submitted for the respondents that independent investigations were conducted by the 1st respondent and the appellants, specifically Kebathi et al were found culpable. Thereafter, upon the 2nd respondent reviewing the file, it deemed it necessary to charge and prosecute them. In Dande, the Apex Court was categorical that a court can only interfere with the powers granted to the Inspector General of Police and the DCI under Articles 244 and 245 of the Constitution and under the provisions of the *National Police Service Act*, if the constitutional and statutory provisions are not adhered to, or if the actions are illegal and unlawful. In the instant case, the record does not bear out any evidence that the Inspector General of Police or the DCI did anything unlawful in undertaking their investigatory role.

52. We further observe that in Dande, while considering whether there had been an abuse of prosecutorial powers by the Director of Public Prosecutions, the Supreme Court referred to the guidelines it decreed in Jirongo on what the court should consider in reviewing prosecutorial powers and concluded thus;

"102. We have no hesitation in holding that the record reveals that the appellants did not provide any evidence to prove that the office of DPP did not meet the expectations required of it under article 157(11) of *the Constitution* or that the action to prosecute them amounted to abuse of the process of the court. It is also clear to us that, at the time of instituting the criminal proceedings, there was no legal bar preventing them from prosecuting the appellants. The charges the accused are facing constitute offences under the laws of Kenya and therefore, it is proper that they be subjected to the due process of the law. Their innocence is intact and there is no apparent risk that they will not face a fair trial where the duty lies on the DPP to prove their culpability." (Emphasis ours)

53. We note that the learned Judge had similar sentiments as the Apex Court that the Director of Public Prosecutions will have opportunity to present that case before the trial court where the appellants can cross-examine the witnesses and seek to raise reasonable doubt. To our mind, having not come across evidence demonstrating that the decision to prosecute Kebathi et al was an abuse of the process of court, we think they should have their day in court where they will confront the charges and evidence assembled against them.

54. As to the import of section 193(A) of the CPC, as interpreted by the Apex Court in both cases, it is apparent that the Court endeavoured to clarify its position in the latter Dande case as follows;

"104. The conclusion we draw from the above provision is that both civil and criminal jurisdictions can run parallel to each other and that neither can stand in the way of the other unless either of them is being employed to perpetuate ulterior motives or generally to abuse of the process of the court in whatever manner.

105. Despite our conclusion above, we are alive to the fact that in the Jirongo case we held as follows:

> "We respectfully agree and adopt this position in this case but must add that where it is obvious to a court, as it is to us and was to the learned Judge of the High Court, that a prosecution is being mounted to aid proof of matters before a civil court or where the hand of a suspect is being forced by the sword of criminal proceedings to compromise pending civil proceedings, then section 193A of the Criminal Procedure Code cannot be invoked to aid that unlawful course of action. Criminal proceedings, whether accompanied by civil proceedings or not, cannot and should never be used in the manner that the 2nd and 3rd respondents have done. It is indeed advisable for parties to pursue civil proceedings initially and with firm findings by the civil court on any alleged fraud, proceed to institute criminal proceedings to bring any culprit to book."

We note that the circumstances in the Jirongo case are different from the current case. In Jirongo, it was proved to our satisfaction that the criminal case was instituted to force the accused person's hand to compromise the civil case between him and the complainant. Such unlawful action should not and could not be tolerated. However, in the present case, we reiterate our earlier finding that the appellants did not prove that the same was perpetuated for ulterior motives or amounted to an abuse of the court process or office."

55. In light of the above clarification, we are of the considered view that both the civil suit and the criminal proceedings can be pursued concurrently in this matter. It has not been demonstrated to us satisfactorily that there was an ulterior motive in the institution of the criminal case.

56. The upshot is that the appeal is devoid of merit and dismissed with costs.

57. Order accordingly.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY, 2025.

P.O. KIAGE

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JUDGE OF APPEAL ALI-ARONI

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR