Wambugu v Chief Magistrate, Milimani Criminal Division & 4 others (Civil Appeal 388 of 2018) [2025] KECA 880 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KECA 880 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 388 OF 2018

MSA MAKHANDIA, A ALI-ARONI & S OLE KANTAI, JJA

MAY 23, 2025

BETWEEN

JOHN WACIRA WAMBUGU ..... APPELLANT

AND

HON. CHIEF MAGISTRATE, MILIMANI CRIMINAL DIVISION .... 1ST RESPONDENT

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

DIRECTORATE OF CRIMINAL INVESTIGATIONS ..... 3RD RESPONDENT

MIGWI MACHARIA ..... 4TH RESPONDENT

GILBERT NDERITU ..... 5TH RESPONDENT

(An appeal from the Judgment of the Judicial Review Division of the High Court of Kenya at Nairobi (Mativo, J.) delivered on 28{{^th}} September 2018 in JR. No. 620 of 2017)

JUDGMENT

1. The appellant herein was the ex-parte applicant in the matter before the High Court and also the complainant in CMCR. Case No. 95 of 2014, Republic vs. Migwi Macharia and Gilbert Nderitu. The latter are the 4th and 5th respondents herein.

2. The brief facts of the case are that the appellant and his wife, Susan Nyambura Kimani, owned a company known as Kenon Place Limited (the Company), a real estate company situate in Westlands, along Church Road, Nairobi, that was engaged in the development of properties. The company had a financial arrangement with Housing Finance Company Kenya (HFCK), the interested party before the trial court, which financed, inter alia, the developments on L.R. No. 1870/V/217 situate in Westlands, Nairobi (the property). In 2006, the company fell into arrears of its mortgage repayment with HCFK. HFCK gave a statutory notice of its intention to sell the property through a public auction. The

appellant's wife, Susan Kimani, entered into negotiations with HFCK, and the arrears were settled at Kshs. 21,000,000, it was further agreed that the sum would be paid off by selling some apartments on the property through a private treaty.

3. Susan Kimani and Gilbert Nderitu, the "5th respondent", were directors of a second company known as Kenon Management Company (Management Company). In or about November 2006, the management company sought buyers for the apartments to offset the debt with HFCK mentioned above. In the arrangement, 8 properties were sold under the supervision of HFCK.

4. The appellant's case is that, in disposing of some of the apartments, their auditors detected anomalies in some accounts. They thus requested detailed bank statements from HFCK, which were not made available. As the auditors began doing a forensic audit, the 5th respondent, disappeared from the office. The auditors also found the documents the 5th respondent had been working on stolen overnight. They investigated further, checked the transfer documents at the Ministry of Lands, and found that all transfers were genuine except for 8 apartments.

5. In 2014, the appellant complained to the police about forgery in selling 8 apartments involving the 4th and 5th respondents, the lawyer who handled the apartments' transfer, and their property manager. The two were subsequently charged in Criminal Case No. 95 of 2014.

6. The criminal case was heard on the 17th of October 2017, when the appellant gave part of his evidence. The matter was adjourned to 19th of October 2017, when the 2nd respondent sought to withdraw the case under Section 87(a) of the *Criminal Procedure Code*.

7. The appellant's counsel objected to the withdrawal and moved the High Court through a notice of motion dated 27th November 2017, seeking an order of certiorari directed at the 2nd respondent, to quash the decision to withdraw and the subsequent formal application to terminate charges against the 4th and 5th respondents an order of prohibition directed at the respondents jointly and severally prohibiting them from terminating Criminal Case No. 95 of 2014; an order of mandamus compelling the 1st and 2nd respondents to proceed with the hearing of Criminal Case No. 95 of 2014 and an order of mandamus compelling the 2nd respondent to appoint a special prosecutor to take over the prosecution of Criminal Case No. 95 of 2014.

8. The appellant argues that the 2nd respondent's withdrawal of the case was illegal, capricious, and unreasonable and was aimed at assisting the 4th and 5th respondents to escape from criminal liability and, therefore, an abuse of the court process.

9. On its part, the 2nd respondent contends that after the 4th and 5th respondents were charged, further investigations were carried out, which revealed through documents obtained from HFCK the company's involvement and Susan Kimani in the sale. It came to light that based on the agreement between the company and HFCK, the management company sought buyers, HFCK conducted the sales through its advocates, and the sale proceeds were credited to the company's account. The 2nd respondent argues that the appellant did not disclose this information when he complained; his company, having been involved and having been a beneficiary of the proceeds of the sale, cannot turn around and seek to raise a complaint and insist on having the case against the 4th and 5th respondents, prosecuted as this amounted to abuse of court process, hence the decision to terminate the case.

10. The 4th and 5th respondents support the withdrawal of the case. They contend that the case is motivated by a civil case in which the two companies have been sued by the 8 owners of the apartments subject of the criminal case, where they seek to have Susan Kimani transfer a share in the management company to the said owners, who have a reversionary interest in the property.

11. In its judgment, the High Court dismissed the appellant's case as it found the same with no merit. The High Court's judgement precipitated this appeal, where 14 grounds were raised in a memorandum of appeal dated 23rd October 2018. The grounds of appeal may be summarised as follows: that the learned judge erred in law and fact by failing to consider substantive issues raised, including the issue of fraud, forgery and improper exercise of discretion, by wrongly finding that the criminal case could be a vehicle for the fishing of evidence as the appellant was a defendant in the civil matter; by wrongly making a finding that a court in judicial review may find wrong doing and not grant relief; in failing to consider the failures of the 2nd respondent to the prejudice of the appellant; and in failing to see that the 2nd respondent's decision was arbitrary and capricious.

12. The appellant seeks that the judgment of the High Court be set aside; in the alternative, this Court substitutes the order of the High Court by ordering that the decision of the 2nd respondent to withdraw the said charges against the 4th and 5th respondents was unconstitutional and issuance of an order directing the 2nd respondent to proceed with Criminal Case No. 95 of 2014, which is pending before the trial court.

13. The appeal proceeded through written submissions, briefly highlighted at the hearing. The appellant's learned counsel, Mr. Achayo filed submissions dated 26th September 2023, wherein it is submitted that the decision to withdraw the suit was an abuse of the court process as the trial had already commenced. Further, it was submitted that the 2nd respondent helped the 4th and 5th respondents escape criminal liability; the decision was illegal, irrational, and in bad faith; in withdrawing the case, the appellant's rights were violated, and the withdrawal was part of an elaborate scheme to delay and defeat justice.

14. In taking issue with the judgment learned counsel blamed the trial judge for failing to consider that the High Court has power under Article 165 of *the Constitution* to permanently stay and/or quash the decision to withdraw the charges against the accused person; and further to consider that in the matter before the Advocates Disciplinary Tribunal against the 4th respondent, the tribunal had established a prima facie case against him therefore proceeding with the merits of the complaint, which is directly linked to Criminal Case No. 95 of 2014; further it was contended that the judge had failed to observe the provisions of The *Victim Protection Act* which provides that a victim has a right to have their trial begin and conclude without unreasonable delay; the judge had casually made reference to the civil matter where the appellant was a defendant and hence arriving at a finding that the criminal case could be used as a vehicle for the fishing of evidence thus distorting the facts.

15. Learned counsel contended further that the 2nd respondent acted capriciously, oppressively and arbitrarily with the sole intention of assisting the accused, humiliating, intimidating, and otherwise harassing the appellant; the action would amount to a technical acquittal of the accused in CMC Criminal Case No. 95 of 2014, intended to help the accused escape criminal liability for their action and an abuse of court process. In support of the argument, learned counsel relied on the case of Beinosi vs. Wiyley [1973] SA 721 (SCA), where the Court of Appeal in South Africa held that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous to that objective. He also relied on the case of Attahiro vs. Bagudo [1998] 3 NWLL, where the Court of Appeal in Abuja, Nigeria, held that employment of judicial process is regarded as abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice, and a term generally used to proceedings that are wanting in bona fides and is frivolous, vexatious or oppressive and with an element of malice.

16. Learned counsel submitted further that though under Article 157(6)(c) of *the Constitution*, the 2nd respondent may discontinue or take over a case at any stage before judgment and under Article 157(10), he does not require the consent of any person or authority in the exercise of his mandate. The two

articles must be read with Article 157(11), which requires that the 2nd respondent, in the exercise of this mandate, shall have regard to the public interest, the interest of the administration of justice, and the need to prevent and avoid abuse of legal process. He argued that the purview of judicial review proceedings is based on the principles of illegality, irrationality and procedural impropriety, which is the basis of this appeal. He cited in support the case of Meixner & Another vs. Attorney General [2005] 2KLR, where the court held that judicial review deals with the legality of decisions by bodies or persons whose decisions are subject to judicial review and that a court can upset a decision through certiorari on a matter of law if it appears that it was made without jurisdiction or in error of law. He also relied on the case of Municipal Council of Mombasa vs. Republic & Umoja Consultants Limited Civil Appeal No. 185 of 2001, where the court stated that the purpose of judicial review is to ensure that an individual is given fair treatment by the authority to which he has been subjected, and the case of Githunguri vs. Republic [1985] KLR 91, where the court held that notwithstanding the powers conferred upon the Attorney General by Section 26(3) of the former Constitution, the High Court has an inherent power and duty to secure fair treatment for all persons who are brought before it or before a subordinate court to prevent an abuse of the process of the court.

17. Learned counsel further relied on the case of Republic vs. Commissioner of Cooperatives, Ex parte Kirinyaga Tea Growers Co-operatives Savings and Credit Society Limited [1999] EA 254, where the court held that statutory power can only be exercised validly if they are exercised reasonably and that no statute ever allows anyone on whom it confers a power, to exercise such a power arbitrarily, capriciously or in bad faith.

18. Citing Article 47(1) of *the Constitution*, learned counsel stated that administrative action has to be expeditious, efficient, lawful, reasonable, and procedurally fair. Relying on this article, he argued that termination of the proceedings where no reasons were given to the appellant was a violation of the appellant's right under the said article. In support, he relied on the case of Council of Civil Unions vs. Minister for the Civil Service [1885] 374, which defined an unreasonable decision to be an outrageous one that defies all logic that no sensible person who had applied his mind to the question to be decided would have arrived at it. He further cited Allielo vs. Republic [2004] eKLR.

19. Learned counsel further submitted that the 2nd respondent's decision was made against evidence of forgery in a forensic report on record that implicated the accused persons with forgery and whose veracity could only be tested through cross- examination in the criminal trial.

20. In support of the judgement, the 2nd and 3rd respondent's learned counsel, Mr. O.J. Odhiambo, filed submissions dated 24th June 2024 and submitted that constitutionally and statutorily, the responsibility to discontinue any criminal prosecution before a court of law, at any time, before judgment rests with the 2nd respondent, and the consideration or the reasons for the choice of a particular line of action is at the discretion of the 2nd respondent. The action of the 2nd respondent is quasi-judicial, where he considers public interest, the interest of justice and prevention and avoidance of instances that will cause an abuse of the legal process, based on the totality of the evidence, both inculpatory and exculpatory, and in an objective manner. Counsel stated that in the instant case, the 2nd respondent, through the affidavit of Senior Assistant Director of Public Prosecution Grace Murungi, laid bare the process followed, step by step, before deciding to terminate the charges. The reasons for termination were within the appellant's knowledge and amply expressed in the affidavit.

21. Learned counsel further submitted that the appellant wants the 2nd respondent to be compelled to continue with the prosecution of a criminal matter based on opinion evidence which he secured and handed over to the police despite the existence of other overwhelming exculpatory evidence showing that the appellant is a beneficiary of the same commercial transaction which he wants to be impugned

through a criminal trial; that the appellant is trying to leverage a commercial dispute through a criminal trial to give him leeway or an advantage in a civil dispute. It would amount to an abuse of process of the court if the sole purpose or objective of the criminal case institution is to assist a litigant in having an advantage over an adversary in a civil case.

22. Further learned counsel argued that the appellant failed to demonstrate that his case fell within the exceptional circumstances in which the court could regulate the 2nd respondent's powers; he had not shown that the 2nd respondent acted improperly or against the interest of justice or that he acted beyond the powers vested upon him by *the Constitution*. The appellant was insincere and had not disclosed material facts. In support of the assertion, learned counsel cited the case of Republic vs. Kensington Income Tax Commissioner, Ex parte Princess Edmond De Polignac [1917] 1KB 495, where the court held that where it had been concluded that the affidavit in support was not candid and did not fairly state the facts, the court ought to refuse to proceed any further with the examination of the merits.

The 1st, 4th, and 5th respondents did not file any submissions.

23. This being a first appeal, it is our duty in addition to considering submissions by the parties, to analyze and re-assess the evidence on record and reach our independent conclusion in the matter. This approach was adopted in Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others [2015] eKLR, where the court cited the case of Selle vs. Associated Motor Boat Co. [1968] EA 123 and held as follows; -

> "An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

24. We have considered the pleadings, evidence placed before the court, submissions by parties, cases cited and the law. We are of the considered view that two issues turn for our consideration: whether the 2nd respondent acted unreasonably, arbitrarily, and capriciously in his bid to withdraw the charges against the 4th and 5th respondents, and whether there is a basis for this Court to interfere with the decision of the 2nd respondent.

25. This appeal arises from judicial review proceedings. The court was required to look into the process leading to the impugned decision, as the matter had not come up on appeal. It was not the court's duty to substitute, review, or look into the merit of the decision. The court ought to have been concerned with whether the 2nd respondent acted independently, not unreasonably, capriciously, and without malice in his decision to terminate the proceedings.

In the case of Pastoli vs. Kabale District Local Government Council & Others [2008] 2 EA 300 it was held:

> " 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 or making the act, the subject of the complaint. Acting without

jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality."

26. The mandate of the 2nd respondent is stipulated in Article 157 of *the Constitution*, which in part provides; -

> 6. The Director of Public Prosecutions shall exercise State powers of prosecution and may—
>
> a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
>
> b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
>
> c. subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).
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> 7. If the discontinuance of any proceedings under clause (6)(c) takes place after the close of the prosecution's case, the defendant shall be acquitted.
>
> 8. The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.
>
> 9. ...
>
> 10. The Director of Public Prosecutions shall not require the consent of any person or authority for commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.
>
> 11. In exercising the powers conferred by this Article, The Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

27. The Office of the Director of Prosecution Act was enacted pursuant to Article 157 (12) of *the Constitution*. Section 4 thereof sets out the guiding principle for the 2nd respondent in the discharge of his function as indicated in Article 157 of *the Constitution* and replicated in Section 5 of the said Act.

28. In the case of Diamond Hasham Lalji & Another vs. The Attorney General & 4 Others Criminal Appeal No. 274 of 2014, this Court cited the case of Ramalingam Ravinthran vs. Attorney General [2012] SGCA 2, where the Court of Appeal of Singapore stated at para 53:

> " The Attorney General is the custodian of prosecutorial power. He uses it to enforce criminal law not for its own sake but for the greater good of the society, i.e. to maintain law and order as well as to uphold rule of law. Offences are committed by all kinds of people in all kinds of circumstances. It is not the policy of the law under our legal system that all offenders must be prosecuted, regardless of the circumstances in which they have committed offences. Furthermore, not all offences are provable in a court of law. It is not necessary in the public interest that every offender must be prosecuted, or that an offender must be prosecuted for the most serious possible offence available in the statute book. Conversely, while the public interest does not require the Attorney General to prosecute any and all persons who may be guilty of the crime, he cannot decide at his own whim and fancy who should or should not

be prosecuted and what offence or offences a particular offender should be prosecuted for. The Attorney General's final decision will be constrained by what public interest requires."

29. In the same case (Diamond Hasham Lalji), the court also considered the case of Matululu and Another vs. DPP [2003] 4 LRC712, where the Supreme Court of Fiji stated:

> " These would have regard to the great width of the DPP's discretion and the polycentric character of official decision making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits. This approach subsumes concerns about separation of powers."

30. The trial court, in arriving at its decision, stated as follows; -

> " No evidence has been tendered to show the DPP abused his discretion or power under *the Constitution*. The duty of the prosecution is to seek justice, not merely to convict or parade people in court without sufficient evidence. The court is inclined to respect the decision of the DPP to terminate the case for two reasons namely; -
>
> (a) it is a constitutional imperative that the constitutional independence of the DPP is respected.
>
> (b) for the court to intervene, there must be clear evidence of a breach of the constitutional duty to act on the part of the DPP or an abuse of discretion. I have carefully considered the law and the authorities and applied the same to the facts of this case. I find that the applicant has not established any grounds to suggest that the DPP illegally exercised his powers. There is no material before me to suggest even in the slightest manner that the impugned decision was undertaken in a manner that can be said to be inconsistent with *the constitution*." (Emphasis ours)

31. As observed by the High Court, the appellant did not lay any evidence that the 2nd respondent acted outside his mandate or that he abused his discretion. The appellant is aggrieved that the 2nd respondent did not utilize evidence he took to him, which he obtained privately, and did not inform him of his decision, which he finds to be prejudicial to him. The 2nd respondent's constitutional mandate is clear; he decides independently and does not take directions or authority from anyone. In this case, the 2nd respondent decided to terminate the criminal proceedings following his own investigations. The appellant is questioning the merit of the 2nd respondent's decision. Should that be the case, the judicial review court was the wrong forum; it is not clothed with the mandate of interrogating the merit or otherwise of that decision but rather the process. In the case of Francis Waguru Mwithukia vs. DPP & Nathaniel Njoroge Kamau [2017] KECA 73 (KLR), on the independence of the 2nd respondent's decision, this Court stated; -

> " In our view, the correct approach was not whether the appellant had cogent evidence to prove the allegations made against the DPP, but rather, in light of the evidence adduced by the appellant, whether the DPP acted independently and reasonably and without malice in his decision to prosecute and whether he was within the law in doing so."

32. In the affidavit objecting to the judicial review proceedings, the 2nd respondent explained how it investigated the matter further. It appeared to him that the appellant did not disclose material facts

and had benefitted from the proceeds of sale forming part of the complaint, which was complained of several years after his company's account had benefitted. The 2nd respondent had no duty to consult or inform the appellant of his decision. He deemed the complaint an abuse of the court process and sought to withdraw the same.

33. We note that the transactions complained of happened in 2006/2007, and the complaint was made in 2014. Yet, no explanation was forthcoming as to why, if at all, there were issues regarding the sale of the apartments; it took the appellant several years to complain. Notably, the appellant feigned ignorance that the sale proceeds were paid into the company's account. That said, we agree with the trial court that the 2nd respondent's independence should be guarded and only interfered with by the court where there is blatant illegality, unreasonableness, or irrationality in his action. Having found that the 2nd respondent did not act outside his mandate and seen no proof that his action was illegal, unreasonable, unjust, influenced by a third party, or that he acted with malice, we find no basis for interfering with the decision.

34. Consequently, the appeal is dismissed with costs to the 2nd and 3rd respondents.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL ALI-ARONI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR