



Republic v Attorney General & 4 others; Marete (Exparte Applicant) (Miscellaneous Application E068 of 2023) [2025] KEHC 3934 (KLR) (Judicial Review) (27 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3934 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E068 OF 2023
JM CHIGITI, J
MARCH 27, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

THE HON THE ATTORNEY GENERAL 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

THE DIRECTOR OF CID 4TH RESPONDENT

CHIEF MAGISTRATE MILIMANI 5TH RESPONDENT

AND

LILIAN GATWIRI MARETE EXPARTE APPLICANT

JUDGMENT

Applicant’s case;

1. The application before this Court is the Notice of Motion dated 11th October, 2023 wherein the Applicant seeks the following orders:
 - a. That this Honourable Court be pleased to issue Orders of Certiorari directed to the 1st, 2nd, 3rd and 4th Respondents, by themselves their servants and/or agents or any other officer acting under their authority to bring before this court for the purpose of being quashed the decision by the Respondents to charge the Applicants with a criminal case which was registered before the 5th Respondent’s Court as Criminal Case No. E 1016/2022 on the 16th day of December 2022.



- b. That this Honourable Court be pleased to issue Orders of prohibition directed to the 5th Respondent, prohibiting the 5th Respondents, servants and/or agents or any other Officers acting with its authority from proceeding with the prosecution, institution of criminal proceedings against the Applicant herein on any matters regarding the aforesaid charge pending the full hearing and outcome of this application.
 - c. That this Honourable Court be pleased to issue Conservatory Orders directed against all the Respondents prohibiting them from instituting, prosecuting or in any other way continuing with any proceedings in the matter herein above stated as the same constitutes an abuse of the Court process, is arbitrary, capricious and brought male fides by the Respondents and violates the Applicants' constitutional rights to a fair trial and the prosecution's intention to enforce.
2. It is the Applicants case that she was employed by Africa Pooling Resources Together Ltd duly registered under the Laws of Kenya on 14th May 2012 with Benard Irungu Makira and Mary Thumbi Ngotho as the directors.
3. She held the position of office administrator up until COVID19 affected her tenure in the year Two Thousand and Twenty (2020) March.
4. The Applicant was charged with one (1) count of conspiracy to defraud, contrary to Section 317 of the Penal Code and fifty-two (52) counts of obtaining money by false pretenses contrary to Section 313 of the Penal Code, a total of fifty-three (53) counts in Criminal Case No. E 1016/2022 at Milimani law court, Nairobi.
5. It is averred that the subject matter of the said charges is an amount of Kshs. 63,839,485/ that had been deposited in the account belonging to APRT SACCO SOCIETY LTD.
6. The Applicant's case is linked to the formation of Africa Pooling Services LTD (APRT LTD) and Africa Pooling Services SACCO (APRT SACCO) the former being incorporated on 10th May 2012 and the latter obtaining registration in 10th December 2014.
7. It is her case that she was arrested by the 4th Respondent at Old Mutual building within Nairobi County on 16th November 2022 and presented before court for plea taking on 17th November 2022 and she was admitted to bail/plea pending trial.
8. It is contended that a pre-trial conference was conducted on 18th January 2023 before the chief magistrate at which stage the 2nd Respondent supplied the list of witnesses and documentary exhibits the intended to rely on the hearing date which was set for 10th May 2023.
9. It is argued that the 2nd and 4th Respondents are in violation of the fair and administrative Justice by preferring and causing the applicant to be charged.
10. The applicant further argues that the conduct of the Respondents is unjust arbitrary and in abuse of their duties.
11. It is the Applicant's case that she has never been a director of Africa Pooling Resources Together LTD, however on 20th August 2018 she together with two other employees were made signatories to the company's bank account domiciled at Co-operative Bank, Westlands branch for purposes of conducting office functions and not for personal gain.
12. It is contended that before the Applicant was added as a signatory to the said bank account, the managing director Hon. Gideon Mwiti was the sole signatory and had previously delegated the signatory duty to other employees.



13. According to her, the financial transactions were conducted with utmost transparency, as all expenditure breakdowns were promptly communicated to the relevant parties and the managing director through text messages and in-person meetings at the office.
14. Further any funds received from the company for daily expenses were strictly authorized by the MD and documented in a diary for audit purposes.
15. The applicant posits that no single evidence has been adduced by the Respondents of her defrauding or obtaining money from anyone under false pretenses and puts them to strict proof hereof.
16. The Applicant canvassed her application by written submissions and further written submissions dated 29th February, 2024 and 29th October, 2024 respectively.
17. It is submitted that the Applicant acknowledges that the authority to prosecute is entirely in the hands of the 2nd Respondent, however the authority has constitutional and statutory constraints as highlighted in Article 157(11) of *the Constitution* and buttressed by Section 4 of the Office of the *Office of the Director of Public Prosecutions Act* which provides:

In fulfilling its mandate, the Office shall be guided by *the Constitution* and the following fundamental principles-

- a. the diversity of the people of Kenya;
 - b. impartiality and gender equity;
 - c. the rules of natural justice;
 - d. promotion of public confidence in the integrity of the Office;
 - e. the need to discharge the functions of the Office on behalf of the people of Kenya;
 - f. the need to serve the cause of justice, prevent abuse of the legal process and public interest;
 - g. protection of the sovereignty of the people;
 - h. secure the observance of democratic values and principles; and
 - i. promotion of constitutionalism.
18. Reliance is placed in the case of *Dande & 3 others v Inspector General, National Police Service & 5 others* (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment).
 19. It is submitted that there is no factual basis for the prosecution and charges initiated against her.
 20. Reliance is also placed in *Republic v Inspector General of Police & 3 others Ex-Parte Lilian Wangari & 5 others* (2017) eKLR which quoted with approval the decision in *Koria & 3 Others v Attorney General* [2002] 2KLR 69 wherein the court held that:

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must



be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.”

21. It is contended that the Respondent’s Replying Affidavit is fatally defective as it is unsigned, un-commissioned and undated.
22. It is also submitted that the 2nd, 3rd and 4th Respondents’ decision to charge by the 5th Respondent was irregular and un procedural.
23. It is her case that the 2nd Respondent did not take into consideration the Guidelines on the Decision to Charge 2019, prior to making the decision to charge particularly clauses 3.2.1.1 and 3.2.1.6.
24. Reliance is placed in the case of Justus Mwenda Kathenge v Director of Public Prosecutions & 2 others where it was observed;

“Where a prosecution is based on a complete misapprehension of the facts and the applicable law and where a suspect is being lumped together with others for no credible reason, that is what is called abuse of the process of the court.”

25. The Applicant contends that the decision to charge her was irrational, unreasonable and contrary to the interests of justice by the 2nd Respondent as she who was a mere employee of APRT LTD and as such prays that this Honourable court grants her the reliefs as sought.

The 2nd, 3rd and 4th Respondents’ case;

26. The Respondent opposes the Application through a Replying Affidavit sworn by No 239696 CI Anne Mwangi a police officer attached to the Directorate of Criminal Investigations SACCO fraud investigation unit at Nairobi County. The same is undated.
27. CI Anne Mwangi is the investigation officer in respect to Milimani Chief Magistrate Court criminal case number E1016 of 2022.
28. It is the Respondents’ case that the complaints were reported by different complainants at various police station within Nairobi including, Central Police Station, DCI Headquarters and SACCO Fraud Investigation Unit.
29. It is deponed that that the complainant’s complaints were that they were Defrauded of their monies by African Pooling Together SACCO (APRT) through the SACCO management and staff where the Applicant worked as per office administrator.
30. Section 24 of the *National Police Service Act* mandates the police to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed.
31. The Respondent posited that investigations were commenced and the Applicant together with other suspects witness recorded their statements.
32. According to them, Africa Pooling Resources Together Ltd (APRT) was incorporated on 10th May, 2012 under registration no. CPR/2012/73476 and APRT SACCO was registered on 10th December, 2014, whose main purpose was to provide a platform where members were to accumulate their financial savings and deposit to create a pool of funds where loans can be advanced to members.
33. It is the Respondents’ case that their investigation revealed the following;
 - a. The APRT SACCO engaged in a campaign and advertisements for members to join the SACCO beginning late 2017 and members who joined and were issued share certificates.



- b. That APRT Ltd opened bank accounts No's. 01136286729600, domiciled at Co operative Bank among other.
 - c. That APRT SACCO Ltd registered till number 666741 in relation to short code 419751 above by Alex Mutuma as administrator.
 - d. That members of the SACCO sent their savings contributions through till number 666741.
 - e. That from till number 666741, which was used as an M-Pesa collection/utility account, monies were later transferred to operations till number 663555 where the monies were transferred to various beneficiary bank account including account Ac No. 01116416442400 domiciled at cooperative bank Aga Khan walk branch in the names of Lilian Gatwiri Marete - the Exparte applicant herein and account number 011206431155000 where Ex-parte applicant herein is a signatory together with one of the accused person.
 - f. That further the Exparte applicant here in made several cheque/cash withdrawals from Account No. 01136286729600 in the name of APRT Limited.
 - g. That for monies received at APRT Ltd account, the greatest beneficiaries were staff among them the Exparte applicant herein.
34. Upon conclusion of the investigation, the DPP established that the file met the threshold for prosecution and therefore a decision to charge was made to charge the Applicant herein and others in Milimani Chief Magistrate court criminal case number E1016 OF 2022.
35. In arriving at the decision to charge, the DPP took cognizance of Article 157 of *the Constitution* and did not abuse his Office, abrogate, breach, infringe on any provision of *the Constitution* or any human and fundamental rights of the Applicant or any other written law or regulations,
36. The 2nd, 3rd and 4th Respondents filed their written submissions dated 19th July, 2024.
37. It is their submission that for an application for judicial review the applicant must demonstrate that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.
38. The court should concern itself with process of the decision making and not the merit of the decision being challenged as was held in the case of Municipal Council of Mombasa Vs Republic & Umoja Consultants Ltd (2002) eKLR.
39. Section 24 of the *National Police Service Act* mandates the police to investigate any complaint brought to their attention to determine whether a criminal offence has been committed.
40. Article 157 (6a) of *the Constitution* of Kenya provides that:
- The Director of Public Prosecutions shall exercise state powers of prosecution and may 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.
41. Article 157(10) of *the Constitution* provides;
- “The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his powers or functions, shall not be under the direction or control of any person or authority.”



42. It is their case that the Applicant has not placed any evidence to illustrate that the offence in question is unlawful or that the Respondents acted in excess of their mandate, abrogate, breach, infringe on any provision of *the Constitution* or any human and fundamental rights of the Applicant or any other written law.
43. Reliance is placed in Michael Monari case where the court held that:
- “... As long as the prosecution and those charged with the responsibility of making the decision to charge act in a reasonable manner, the High Court would be reluctant to intervene. It is not the duty of the court to go into the merits and demerits of any intended charges to be preferred against any party..... it would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment”
44. The Respondents posit that the Applicant has failed to demonstrate illegality, irrationality or procedural impropriety in a manner that demands the intervention of this Honourable court through Judicial review.

Analysis and determination;

45. The following are the issues for determination;
1. Whether an Affidavit that doesn't have a Jurat is fatal.
 2. Whether or not the applicant has made out a case for the grant of the order sought.
 3. Who will bear the cost of the application?

Whether an Affidavit that doesn't have a Jurat is fatal.

46. The 10th Edition Black's Law Dictionary at page 68 defines an affidavit as follows:-"A voluntary declaration of facts written down and sworn to by a declarant before an officer authorised to administer oaths.
47. The making of affidavits is governed by the Oaths and Declaration Act Chapter 15 Laws of Kenya. Section 5 outlines what particulars will be stated in the jurat or attestation clause. It provides:-"Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."
48. Further, Section 8 states: -"A magistrate or commissioner for oaths may take the declaration of any person voluntarily making and subscribing it before him in the form in the Schedule."
49. From the above provisions, it can be deduced that an affidavit must state the place and date the oath is taken and it should be in the presence of a Magistrate or Commissioner for Oaths.



50. The Supreme Court of Kenya in the case of Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others (2018) eKLR made the observation:-

“We have no hesitation in finding that the purported Replying Affidavit filed by the 1st Respondent is fatally defective as the same contravenes all the legal requirements for the making of an affidavit. Hence it has no legal value in the matter before us. We have checked all the eight copies of the Replying Affidavit as filed in the Court Registry and confirmed that none of the copies was signed, commissioned and dated. Consequently, as the same is defective, it is deemed that there is no Replying Affidavit on record filed by the 1st Respondent.”

51. Lady Justice Maureen Odero J in Z-U-DG v SJK-U (2021) eKLR held as follows:-

“An Affidavit is a statement made on oath. It is the jurat which elevates a written statement to the status of an Affidavit. Without a jurat and in absence of commissioning by a Commissioner of Oaths, a Magistrate or a Notary public the statement remains a mere unsworn written document and does not have the legal value of an Affidavit.”

To add its voice, this court makes a finding that an affidavit also carries evidence which a party relies upon. The importance of commissioning the affidavit is an affirmation that the deponent wants to assure the court that the evidence he produces can be relied on by the court. An unsworn affidavit makes the documents annexed legally untenable before any court of law. In the absence of such an affirmation, it only makes the affidavit as was stated in the case of Z-U-DG v SJK-U (supra) a document with no legal value.

52. The Supreme Court in Gideon Sitelu Konchellah (supra) further held: -

“A Replying Affidavit is the principal document wherein a respondent’s reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence of this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1st Respondent on 17th August, 2018 are of no effect. Curiously, we further note that even the said Written Submissions are not dated, though this possibly might not have been fatal had the foundational document, the Replying Affidavit, been in order. From a perusal of the Written Submissions, it is clear to us that they are substantially based and relies on the undated and unsworn Replying Affidavit. Also, there are no Grounds of Objection raising any specific points of law of any preliminary or jurisdictional nature. The upshot is that as the 2nd and 3rd Respondents had categorically stated that they do not oppose the application, the Court will therefore be excused for therefore deeming the application as opposed entirely.”

53. Article 159 of *the Constitution* cannot come as a saving grace to the petitioner at this instance. The said Article cannot be used to circumvent the mandatory rules of practice laid down in law. This is not a mere technicality. In the case of Raila Odinga vs I.E.B.C & 2 others (2012) eKLR the Supreme Court held: -

“Article 159 (2) (d) of *the Constitution* simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court.”



54. It is this court's finding that the Replying Affidavit is fatally and incurably defective rendering the Respondents' submissions a dead letter that is holding unto nothing.
55. That said, the applicant still bears and carries the burden of proof under The Evidence acts.

Whether or not the applicant has made out a case for the grant of the order sought.

56. In the case of *Gwer & 5 others v Kenya Medical Research Institute & 3 others* (Petition 12 of 2019) [2020] KESC 66 (KLR) (Civ) (10 January 2020) the Supreme Court held that,

“Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

57. This Court in *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

58. The Black's Law Dictionary, 9th Edition defines judicial review as: “A court's power to review the actions of other branches or levels of government; esp., the court's power to invalidate legislative and executive actions as being unconstitutional. 2. The constitutional doctrine providing for this power. 3. A court's review of a lower courts or an administrative body's factual or legal findings”.
59. Mark Ryan, in his book, ‘Unlocking Constitutional and Administrative Law’, (3rd ed Routledge/ Taylor & Francis Group, 2014) on page 506 defines Judicial Review as: ‘The constitutionally justified as a legal control on the misuse of public law powers, including both statutory and common law prerogative powers.’
60. The Supreme Court in the case of *Dande & 3 others v Inspector General, National Police Service & 5 others* [2023] KESC 40 (KLR) in *SGS Kenya Limited v Energy Regulatory Commission & 2 others* SC Petition No 2 of 2019 [2020] eKLR observed as follows:‘

“The petitioner approached the High Court by way of the prescribed procedures under Judicial Review, which revolve around the paths followed in decision-making. Such a course, as the appellate court properly held, is not concerned with the merits of the decision in question. The law in this regard, which falls under the umbrella of basic ‘Administrative Law’, is clear enough, and it is unnecessary to labour the point. ‘We have, however, observed that the appellate court was right in its finding that the High Court should not have gone to the merits of the Review Board decision as if it was an appeal, nor granted the order of mandamus, since the 1st respondent did not owe any delimited statutory duty to the petitioner.”



More recently in *Praxedes Saisi & 7 others v Director of Public Prosecutions & 2 others* (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment) Praxedes Saisi case the court stated that:

“It is our considered opinion that the framers of *the Constitution* when codifying judicial review to a constitutional right, the intention was to elevate the right to fair administrative action as a constitutional imperative not just for state bodies, but for any person, body or authority.”

61. 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.
62. It is this court’s finding that the evidence that the Applicant has tendered is content that can be advanced before the trial court for purposes of arguing the criminal case. The applicant has not in any way argued case of the infringement of any of the Bill of Rights provisions or rights.
63. The court is under a duty to protect the mandated of the statutory organs like the Respondents when it comes to the investigation and the prosecution of crimes.
64. The Applicant’s case is that the 2nd Respondent did not take into consideration the Guidelines on the Decision to Charge, 2019 prior to making the decision to charge particularly clauses 3.2.1.1 and 3.2.1.6.
65. It was upon the Applicant to demonstrate to the court how the Respondents acted unprocedurally in arriving at the decision to charge. The applicant has not shown to the satisfaction of the court how the Respondents acted maliciously and illegally in arriving at the said decision. The upshot is that this court cannot interfere with the discretion that was exercised by the Respondents in arriving at the decision to charge the Applicant in the instant case.
66. The Applicant does not say that investigations were not conducted. The investigations were conducted in a manner that the applicant does not challenge. The Applicant has not proven that the decision complained of is tainted with illegality, irrationality and procedural impropriety.
67. In the case of *Pastoli vs Kabale District Local Government Council & Others*, (2008) 2 EA 300, the court held that:

“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: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).

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 provisions 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: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

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 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 legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

68. In order to succeed in her Application, the Applicant must prove that the 2nd 3rd and 4th Respondents’ decision to charge was irregular and unprocedural. The applicant does not demonstrate how the decision to charge was irregular or unprocedural.

Disposition;

69. The application has not met the threshold and the strict principles as set out in the case of *Pastoli vs Kabale District Local Government Council & Others*, (2008) 2 EA 300, case (supra).

Order;

This suit is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MARCH 2025

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J. CHIGITI (SC)
JUDGE

