



**Republic v Divisional Criminal Investigation Officer, Butula Sub-County;  
 Mulamba & another (Interested Parties); Musumba (Exparte) (Judicial  
 Review E007 of 2024) [2025] KEHC 5458 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5458 (KLR)

**REPUBLIC OF KENYA  
 IN THE HIGH COURT AT BUSIA  
 JUDICIAL REVIEW E007 OF 2024  
 WM MUSYOKA, J  
 APRIL 30, 2025**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**DIVISIONAL CRIMINAL INVESTIGATION OFFICER, BUTULA SUB-COUNTY ..... RESPONDENT**

**AND**

**PATRICK MULAMBA ..... INTERESTED PARTY**

**SEBASTIAN MULONGO ..... INTERESTED PARTY**

**AND**

**WILLIAM MUSUMBA ..... EXPARTE**

**JUDGMENT**

1. These Judicial Review proceedings were initiated under certificate of urgency, by way of an ex parte chamber summons, dated 3<sup>rd</sup> September 2024, for leave to file a Motion for a declaratory and prohibition orders, directed at the respondent, to declare that intended investigations and prosecution of the ex parte applicant was in abuse of the criminal process; and to prohibit the investigations, possible arrest and prosecution.
2. The ex parte application was placed before me, on 6<sup>th</sup> September 2024, and I granted leave sought for bringing proceedings for a prohibition order, but not declaration, and directed that the substantive Motion be filed within 21 days. The Motion was filed as directed, on 24<sup>th</sup> September 2024, bearing an even date. The said Motion is limited to the prayer for prohibition.



3. The case for the ex parte applicant is set out in the statement, dated 4<sup>th</sup> September 2024. There is a verifying affidavit, sworn on an unknown date in 2024. It is averred that there were ongoing investigations against him, at the behest of the interested parties, which could lead to his arrest and prosecution. He stated that the investigations and possible prosecution are about matters of a purely civil and commercial nature, between him, the interested parties and other individuals not named as parties. He has produced bundles of documents to support that assertion. He avers that as these are matters of a civil and commercial nature, they are devoid of any criminal element, and the criminal process ought not be deployed, to address any issues arising from the commercial transactions between him and the interested parties.
4. I have not seen a response to the Motion, by the respondent. There is, however, a replying affidavit, by the 1<sup>st</sup> interested party. His affidavit was sworn on 13<sup>th</sup> December 2024. He avers that he had lodged a complaint against the ex parte applicant, with the police, over a debt owed to him by the ex parte applicant, who had failed to settle it. He asserts that the police have a mandate, in law, to collect intelligence, undertake investigations, prevent crime, maintain law and order, and apprehend offenders. He submits that he did not do any wrong in filing his complaint, and the respondent would do no wrong, if he investigated the matter, recommended the ex parte applicant for prosecution and arrested him upon the prosecutorial authorities approving his prosecution. He further submits that no evidence has been submitted to demonstrate that a decision to investigate, arrest and charge him had been made, to warrant the prohibition order.
5. The application was canvassed by way of written submissions, following directions made on 16<sup>th</sup> December 2024. The ex parte applicant and the 1<sup>st</sup> interested party have filed written submissions.
6. In his submissions, the ex parte applicant argues that the criminal process is being abused, and cites Republic vs. Chief Magistrate's Court at Mombasa ex parte Ganijee & another [2002] eKLR [2002] KEHC 1120 (KLR) (Waki, J), Kuria & 3 others vs. Attorney General [2002] 2 KLR 69 (Mulwa, J) and Vincent Kibiego Saina vs. The Attorney General HC Miscellaneous Application No. 1088 of 1999 (Kuloba, J)(unreported). It is submitted that commercial disputes ought to be resolved through the civil rather than criminal process, arguing that the claims by the interested parties did not meet the threshold for criminal fraud or obtaining money by false pretences. He cites Republic vs. Director of Public Prosecutions & another Ex Parte Chamanlal Vrajlal Kamani & 2 others [2015] eKLR (Odunga, J) and Kigorogolo vs. Rueshereka [1969] EA 426 (Phadke, Ag. J). He submits that the involvement of the respondent, in what is purely a private financial dispute, contravenes the *Fair Administrative Action Act*, Cap 7L, Laws of Kenya.
7. The 1<sup>st</sup> interested party submits that for a party to succeed in an application for judicial review, it must be established that the act or decision complained of was tainted by illegality, irrationality and procedural impropriety, according to Pastoli vs. Kabale Local Government Council & others [2008] EA 300 and Republic vs. Ethics and Anti-Corruption Commission Ex Parte Nairobi City County Assembly & 13 others [2019] eKLR [2019] KEHC 10914 (KLR) (Mativo, J). He submits that there was no proof that the respondent had decided to investigate, arrest and charge the ex parte applicant. It is submitted that it would be within the powers of the police, under the *National Police Service Act*, Cap. 84, Laws of Kenya, to do any of the things that the ex parte applicant would like the respondent to be prohibited from doing.
8. There is only one issue for me to determine, whether the order of prohibition should issue against the respondent.
9. The order of prohibition is provided for under sections 8 and 9 of the *Law Reform Act*, Cap 26, Laws of Kenya, and the process for obtaining it is provided for in Order 53 of the Civil Procedure Rules.



It would issue where there is assumption of unlawful jurisdiction or excess jurisdiction. The function of the order is to forbid encroachment into jurisdiction, and to prevent implementation of orders or decisions made outside jurisdiction.

10. *Municipal Council of Mombasa vs. Republic, Umoja Consultants Limited* [2002] eKLR (Kwach, Omolo & O’Kubasu, JJA), discussed what ought to be considered when judicial review orders are sought. It is about the process leading up to the making of the impugned decision. That would naturally raise the issue of jurisdiction to make the decision as the first criteria. The next would be issues around natural justice, whether the parties affected had been given an opportunity to be heard prior to the decision-making. The issue of what was considered, and an assessment of whether what was considered was relevant. It would not be a review of the merits of the decision, but the process of decision-making. *Pastoli vs. Kabale Local Government Council & others* [2008] EA 300 brought into the matrix consideration of issues around legality, irrationality and procedural impropriety. These summarise jurisdiction, natural justice and fair administrative action.
11. *Kenya National Examinations Council vs. Republic ex parte Geoffrey Gathenji Njoroge & 9 others* [1997] KECA 58(KLR)(Omolo, Tunoi & Shah, JJA) was specific on what prohibition, as a judicial review order, encompasses. It is directed at an inferior tribunal or body, forbidding it from acting or continuing to act in excess of jurisdiction or absence of it, or from departing from the rules of natural justice. It is not a merit review exercise, and the court does not seek to correct the decision, or course or practice or procedure of the inferior tribunal or body.
12. The complaint by the ex parte applicant is that the interested parties have engaged the services of the respondent, by way of deploying the criminal process, to collect a civil debt, settle scores and commence a case that is not prosecutable. The respondent did not file any papers. The 1<sup>st</sup> interested party has argued that there was no evidence that any decision had been made by the respondent, either way. In any case, he has argued, the respondent has jurisdiction, under the *National Police Service Act*, to carry out investigations, effect arrests and bring charges.
13. The jurisdiction of the police was confirmed in *Commissioner of Police & The Director of Criminal Investigations Department & another vs. Kenya Commercial Bank Limited & 4 others* [2013] eKLR (Maraga, Ouko & Murgor, JJA). That would mean that the respondent would be within his mandate to investigate the ex parte applicant, and to eventually arrest and charge him, should there be adequate evidence gathered to support any charges against him. A problem would only arise where the mandate is exceeded, or is exercised in a manner which offends the principles of natural justice and fair administrative action.
14. On the argument that the dispute between the ex parte applicant and the interested parties is a pure civil dispute, that ought to be directed to the civil court, instead of being litigated in the criminal court, the law recognises and provides for the concurrent jurisdictions of the civil and criminal courts, and the propriety and validity of concurrent civil and criminal proceedings. The *Criminal Procedure Code*, Cap 75, Laws of Kenya, expressly legislates it, at section 193A, by providing that “the fact that any matter in issue in any criminal proceedings is also directly in issue in any pending civil proceedings shall not be a ground for stay, prohibition or delay of the criminal proceedings.”
15. That provision has received judicial consideration. In *Kuria & 3 others vs. Attorney General* [2002] 2 KLR 69 (Mulwa, J), it was said that “... It is not enough to state that because there is an existence of a civil dispute or suit, the entire criminal proceedings, commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the Applicant are under serious threat of being undermined by the criminal process.”



16. It was said, in *Lalchand Fulchand Shah vs. Investments & Mortgages Bank Limited & 5 others* [2018] eKLR (Musinga, M’Inoti & Murgor, JJA), that “... In terms of section 193A of the *Criminal Procedure Code*, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings does not bar the commencement of criminal proceedings. However, where the criminal proceedings are oppressive, vexatious and an abuse of the court process or amounts to a breach of fundamental rights and freedoms, the High Court has the powers to intervene. But that power has to be exercised sparingly as it is in the public interest that crime is detected, and suspects brought to justice.”
17. The ex parte applicant has not demonstrated that the respondent has acted in a manner that exceeds his power and jurisdiction, by way of using criminal proceedings in an oppressive and vexatious way, or acted in a manner amounting to abuse of fundamental rights and freedoms, in view of the legal position stated above. There is nothing that stops the interested parties from pursuing civil and criminal proceedings concurrently, against the ex parte applicant. There has been no demonstration, that whatever civil endeavours the ex parte applicant is making, would be hampered by any criminal investigations, or the resultant criminal charges.
18. I am not persuaded that the application for the judicial review order of prohibition is substantiated, and I find that it lacks merit. It is hereby dismissed. The 1<sup>st</sup> interested party shall have the costs. The stay order, made on September 6, 2024, is hereby discharged. The Motion herein, dated September 24, 2024, is disposed of in those terms. Orders accordingly.

**DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 30<sup>TH</sup> DAY OF APRIL 2025.**

**W MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Ms. Azenga Alenga, legal researcher.

Advocates

Mr. Ouma, instructed by Charles BG Ouma & Company, Advocates for the ex parte applicant.

Mr. Were, instructed by Fwaya Masakhwe Were & Company, for the 1<sup>st</sup> interested party.

