



**Republic v Office of Director of Public Prosecutions & 2 others; Kikui
 (Exparte Applicant) (Judicial Review Miscellaneous Application E014 of 2025)
 [2025] KEHC 5267 (KLR) (Judicial Review) (29 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5267 (KLR)

**REPUBLIC OF KENYA
 IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
 JUDICIAL REVIEW
 JUDICIAL REVIEW MISCELLANEOUS APPLICATION E014 OF 2025
 RE ABURILI, J
 APRIL 29, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

**THE OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT
 CHIEF MAGISTRATE COURT AT MILIMANI 2ND RESPONDENT
 THE DIRECTOR OF CRIMINAL INVESTIGATIONS 3RD RESPONDENT**

AND

GEORGE NDETI KIKUVI EXPARTE APPLICANT

RULING

1. Vide the chamber summons application dated 6th February 2025, the exparte applicant GEORGE NDETI KIKUVI seeks the following orders:
 - a. Spent.
 - b. That Leave be granted to commence judicial review proceedings for an Order of Certiorari, to move this court the decision of the 1st, 2nd and 3rd Respondent to charge and prosecute the Ex parte Applicant in Criminal Case No. E1082 of 2023 (as consolidated with Criminal Case No. E1332 of 2024) and any other case arising thereof as per on the facts contained in the OB-Report and contents of the charge sheet for purposes of the same being quashed.
 - c. That leave be granted to commence judicial review proceedings for an Order of Prohibition, to prohibit the Respondents from charging the Applicant with the impugned offence(s) before



the Chief Magistrates Court at Milimani or any other Court in the Republic or to register any charge sheet of a similar offence or from same transaction before any Court in the Republic or to sustain any proceedings thereto.

- d. That leave do issue to the Applicant to apply for an Order of Mandamus compelling the 2nd Respondent and 3rd Respondent to release Motor Vehicle Registration Number KCN XXXX, Toyota Landcruiser to effect the judgement issued in Milimani COMMSU E027 of 2024.
 - e. That the leave granted do operate as stay of proceedings in Criminal Case No. E1082 of 2023 as consolidated with Criminal Case No. E1332 of 2024 registered against the Ex-parte Applicant, before the Chief Magistrate's Court at Milimani, on charges inter alia Conspiracy to Commit a Felony contrary to Section 393 of the *Penal Code* pending the hearing and determination of the substantive review application.
 - f. That any other order do issue as the Court may deem fit and just to grant.
 - g. That the costs of this application be provided for.
2. The application is supported by the verifying affidavit of George Ndeti Kikui sworn on 6th February 2025 and a statutory statement of even date.
 3. The Ex parte Applicant's case is that the 1st Respondent instituted and has maintained criminal charges against him unlawfully and contrary to Article 157 of *the Constitution* of Kenya.
 4. According to the Applicant, he advanced a loan of USD 25,000 to Jagger Jacque Limited under a Loan Agreement dated 8th July 2022, secured by personal guarantees from the company's directors and the Complainant, who surrendered a vehicle (KCN XXXX) as collateral.
 5. That upon default, the Applicant obtained a civil judgment in Milimani CMCC No. E027 of 2024, permitting him to sell the vehicle to recover the outstanding debt in default of repayment of the loan facility within 30 days.
 6. It is the Ex parte Applicant's case that the Complainant who is the Interested Party before this court, despite having voluntarily given the vehicle as security, reported it stolen, resulting in the Applicant's criminal prosecution.
 7. The 1st Respondent is said to have initially acknowledged, through a memorandum dated 14th November 2024, that the matter was purely civil in nature and recommended withdrawal of charges. Nonetheless, it is urged that the prosecution persists.
 8. The Applicant further contends that the prosecution is being used to frustrate lawful execution of a civil decree, violating Articles 47, 48 and 50 of *the Constitution*.
 9. The Applicant invokes Article 157(11) of *the Constitution*, which mandates that the DPP, in exercising prosecutorial powers, must have regard to the public interest, the interests of the administration of justice, and avoid abuse of the legal process.
 10. The charges are said to be sustained not for justice but to harass and intimidate the Applicant, especially after civil enforcement efforts against the complainant and company directors succeeded.
 11. The Applicant in his submissions dated 20th March 2025 relies on the case of Republic v Director of Public Prosecutions & 2 others; Ex parte James M. Kahumbura [2019] eKLR, where the court held that prosecution should not be commenced or continued where there is no reasonable prospect of a conviction.



12. The Ex parte Applicant also argues that the alleged fraudulent transfer in Count 4 was resolved when an NTSA official pleaded guilty in MCCR No. E105 of 2024 (Republic v Jackson Muinde).
13. It is also his case that despite charges being filed in December 2023, no witness has been presented. Further, that a fresh charge was filed a year later, after a director of the company failed to pay the civil decree underscoring ulterior motives.
14. The Ex parte Applicant submits that a preliminary objection by the Interested Party based on Section 9(3) of the Law Reform Act was raised, however the delay is excusable given the evolving context, and the impugned prosecutorial conduct only crystalized after the 1st Respondent's letter of 14 November 2024 and the decision to charge him afresh made on 16th January 2025.
15. According to the Ex parte Applicant, the instant application was filed on 10th February 2025, shortly after consolidation of the criminal matters, and is therefore within time.
16. The Ex parte Applicant also asserts that under Order 53 Rule 1(4) of the Civil Procedure Rules, the Court has discretion to order that leave operates as a stay of proceedings.
17. Reliance is placed in the cases of R (H) v Ashworth Special Hospital Authority [2003] 1 WLR 127, and Taib A. Taib v Minister for Local Government & Others, where the courts are said to have affirmed that courts may stay proceedings to preserve the status quo pending review.
18. The 1st and 3rd Respondents filed a Replying Affidavit sworn on 6th March 2025 by Chief Inspector Amina Abdi. They contend in the deposition that a complaint was lodged by the Interested party that her ownership details of the Subject vehicle (Chassis No, TRJXXXX20, Toyota Prado) were fraudulently altered on the NTSA TIMS portal to reflect George Ndeti Kikuvi as the registered owner. Further, that upon investigations, it was established that the Ex parte Applicant had unlawfully obtained possession of the said vehicle and its original logbook under the guise of securing a purported loan. It is also the 1st and 3rd Respondent's case that upon review of the evidence, the 1st Respondent made the decision to charge.
19. That the Ex parte Applicant was arraigned for plea taking vide Milimani Criminal Case No. E1082 of 2023 Republic vs. George Ndeti Kikuvi on 6th December 2023, and that in the course of the proceedings, one Jackson Muindi was arrested where he pleaded guilty to having conspired with the Ex parte Applicant to fraudulently transfer the motor vehicle in question.
20. According to the 1st and 3rd Respondents, Willis Oyugi Mbogo was similarly charged for conspiring to defraud the 1st Interested Party of the subject motor vehicle and he was charged alongside the Ex parte Applicant in MCCR E1082 of 2023(Republic vs. George Ndeti Kikuvi & Another).
21. The 1st and 3rd Respondents also urge that the subject vehicle remains a critical evidentiary exhibit essential to proving the charges and its release would irreparably prejudice the prosecution's case.
22. The Respondents also challenge the Ex parte Applicant's application on grounds that the application to seek to have this court quash the 1st Respondent's decision was filed over 14 months later contrary to Order 53 of the Civil Procedure Rules 2010 and Section 9(3) of the Law Reform Act which provide for a mandatory statutory time limitation of six months in respect to applications for prerogative orders.
23. On the above issue the 1st and 3rd Respondents in their submissions dated 23rd March 2025 rely on the case of Republic v Attorney General Cabinet Secretary Ministry of Agriculture & another [2018] eKLR where the court dismissed the application for being time barred. This was also the position in the case of Republic v Kiambu Land Dispute Tribunal & 2 others Ex parte Wambui Chege Macharia & 2 others [2016] eKLR also relied on by the 1st and 3rd Respondents.



24. The 1st and 3rd Respondents also submit that as was held by the Supreme Court in *Raila Odinga versus Independent Electoral and Boundaries Commission & Others* [2013] eKLR, Article 159(2)(d) of *the Constitution* cannot be a panacea for all ills. The 1st and 3rd Respondents reiterate that the application has been filed 14 months later as the decision to charge was made on 6th December 2023 and on 23rd December 2023 the Ex parte Applicant's co-accused was charged and both the applicant's criminal case and Mr. Willis Oyugi's criminal case were consolidated pursuant to the court's orders dated 16th January 2025.
25. On the whether the Ex parte Applicant's arraignment was lawful, the 1st and 3rd Respondent's rely on Article 157(6) of *the Constitution* on the powers of the 1st Respondent. They also rely on the cases of *Pauline Raget Adhiambo Agot v DPP and 5 Others* (2010) Petition No. 446 of 2015 on the independence of the 1st Respondent and *Republic v The Commissioner of Police & the Director of Public Prosecution Ex parte Michael Monari & Another Misc. Application No. 68 of 2011, Nairobi* on the statutory and constitutional powers of the 1st and 3rd Respondents.
26. The 1st and 3rd Respondents also rely on the case of *Maina & 4 others vs Director of Public Prosecutions & 4 Others; Constitutional Petition E106 & 160 of 2021* (Consolidated) (2022) KEHC 15 (KLR) (Constitutional and Human Rights) (27 January 2022) (Judgment) on the issue of criminal proceedings running concurrently with civil proceedings.
27. The Interested Party in response to the application filed both a preliminary objection dated 21st February 2025 and a Replying Affidavit sworn on 3rd March 2025.
28. Her case is that the instant application is defective as it offends Order 53 Rule 2 of the Civil Procedure Rules and Section 9(3) of the *Law Reform Act* on the statutory limitation of six months.
29. She also urges that the contention that fresh charges were levelled against the Ex parte Applicant on 16th January 2025 is utterly misleading as it can be seen from 'Annexure MMD5' that the trial court only consolidated MCCR E1332 of 2024 Republic vs. Willis Oyugi Mbogo with MCCR E1082 of 2023 Republic vs. George Ndeti Kikuvi.
30. On the issue of the statutory time limitation the Interested Party in her submissions of 24th March 2024 relies on the case of *Wilson Osolo v John Ojiambo Ochola & Another* 1995 eKLR where the court observed that there is no provision for extension of time to apply for leave to seek for an order certiorari. A similar position is said to have been held in the case of *Republic v Cabinet Secretary, Ministry of Land & Physical Planning & 3 others; Mugo (Exparte Applicant); Kamumo & another (Interested Parties)* (Judicial Review Miscellaneous Application E008 of 2023) [2023] KEELC 19067 (KLR) (26 July 2023) (Ruling).
31. On the grant of conservatory orders the Interested Party relies on the cases of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* (2014) eKLR and *Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others* [2015] eKLR.
32. On the test of prima facie case, the Interested Party submits that the Ex parte Applicant has failed to state his claims with precision and demonstrate how the decisions made by the 1st and 3rd Respondents on 6th December 2023 to charge him were ultra vires in nature or contravened his constitutional rights.
33. Further, that the threshold for establishing a prima facie case in criminal proceedings is not proof beyond reasonable doubt, but reasonable suspicion as was posited by the court in the case of *Republic v Chief Magistrates Court & 3 Others Ex Parte Jeconia Okungu Ogutu & Another* [2014] eKLR.



- The Interested Party also argues that the Ex parte Applicant has not established a high threshold for irreparable harm, citing the trial process's safeguards and the potential for a fair hearing.
34. They also argue that a person's criminal offence does not constitute irreparable harm, as long as due process is followed and the loss of reputation or financial hardship can be remedied. To support this position reliance is placed in the cases of Republic v Chief Magistrates Court at Nairobi & Another Ex Parte Mike Sonko Mbuvi Gideon Kioko [2021] eKLR and Kuria & 3 Others v Attorney General [2002] 2 KLR 69.
 35. According to the Interested Party, the trial process protects against unfair prosecution, as Article 50 of *the Constitution* guarantees a fair hearing. Further that the prosecution has a reasonable basis and the Ex parte Applicant has not shown irreparable harm. She also argues that courts should not interfere unless there is clear abuse of discretion. It is also her submission that no evidence has been presented to prove the prosecution's actions were ultra vires or against natural justice.
 36. The Interested Party also relies on the case of Republic v Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703 where the court is said to have emphasized public interest in criminal trials, stating they should proceed unless they are an abuse of process.

Analysis and Determination

37. I have considered the chamber summons application, affidavit and statement. I have also considered the responses by the 1st and 3rd Respondents and the Interested Party, the affidavit evidence adduced and written submissions by all the parties and case law relied upon and one issue falls for determination and that is whether the court ought to grant the orders sought by the Ex parte Applicant.
38. At the onset this court has to first address the issue raised by the 1st and 3rd Respondents in their Replying Affidavit and the Interested Party in both its preliminary objections and Replying Affidavit that the Ex parte Applicant's application is time barred.
39. The 1st and 3rd Respondents oppose the application on grounds, inter alia, that it is time barred under Section 9(3) of the *Law Reform Act* and Order 53 Rule 2 of the Civil Procedure Rules. They argue that the decision to charge the Applicant was made on 6th December 2023, over 14 months before the present application was filed. They also assert that the prosecution is based on reasonable suspicion and the Applicant has not demonstrated an abuse of discretion on their part.
40. The Interested Party, in her preliminary objection and replying affidavit, similarly argues that the application is fatally defective for violating statutory timelines. She also disputes the Applicant's characterization of the consolidated proceedings as a fresh prosecution.
41. It is true that Order 53 Rule 2 of the Civil Procedure Rules and Section 9(3) of the *Law Reform Act* provide for a limitation period. I will reproduce the above provisions of the below or emphasis:

Order 53 rule 2 provides thus:

2. Time for applying for certiorari in certain cases [Order 53, rule 2]

Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.



42. The *Law Reform Act* under Section 9(3) provides as follows:
- (3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.
43. Having established that the provisions only apply where the Applicant is seeking an order of certiorari, the court notes from the application that the Applicant seeks the following orders:
- i. That Leave be granted to commence judicial review proceedings for an Order of Certiorari, to move this court the decision of the 1st, 2nd and 3rd Respondent to charge and prosecute the Ex parte Applicant in Criminal Case No. E1082 of 2023 (as consolidated with Criminal Case No. E1332 of 2024) and any other case arising thereof as per on the facts contained in the OB-Report and contents of the charge sheet for purposes of the same being quashed.
44. The Ex parte Applicant in his defence on the issue of the statutory limitation urges that the subject correspondence that is the subject of the intended subject of the judicial review proceedings was issued on 14th November 2024. Further, that the consolidation of his case with Criminal Case No. E1332 of 2024 was done on 16th January 2025 and as such, the instant application was made on 10th February 2025 well within the allowable timeline.
45. I have examined the Ex parte Applicant's application, the statutory statement supporting affidavit, annexures and submissions. It is clear that the Applicant's grievance is not directed solely at the initial charges instituted against him on 6th December 2023, which, as correctly observed by the respondents and interested parties, would be statute barred, but rather at the prosecutorial conduct culminating in the consolidation of his case with that of one Willis Oyugi Mbogo on 16th January 2025.
46. The applicant submits in support of his prayers at paragraph 5 of his written submissions that he was unlawfully and illegally annexed to another accused person in a purely civil case. He further takes issue with the failure by the ODPP to consider the advisory given by the Assistant Deputy Director of Public Prosecutions in her letter addressed to the Deputy Director Prosecutions, clearly supporting the position that the interested party complainant had admitted in the civil case that she had voluntarily given the motor vehicle to the applicant as security for the loan.
47. Additionally, the applicant only came to court after consolidation of the charges facing him and another case, and this was even after he had filed suit in the Civil Court, against the interested party complainant. It is worth noting that the Civil proceedings against the Complainant were instituted after the applicant was charged in court with the offence of conspiracy to steal.
48. In my humble view, the applicant's application for leave to apply for judicial review orders is hinged on the new facts and following the consolidation of his criminal case with another, Willis Oyugi Mbogo in January 2025 which fall within the statutory period of six months.
49. This Court finds that the act of consolidating the two criminal cases was not a mere procedural incident. It entailed a fresh prosecutorial decision which had the effect of introducing new factual and legal aspects, particularly given the temporal connection to the civil decree issued in Milimani Comm Case No. E027 of 2024 and the advisory by the Assistant Deputy Director of Public Prosecutions



that the applicant ought not to be charged with the criminal case, owing to the admission of the complainant that she had surrendered her motor vehicle to the applicant voluntarily as security for the loan advanced to her by the applicant, yet the respondents still went ahead to consolidate the already existing charge with another, thereby creating a new cause of action which in my view, the applicant is entitled to challenge and this right to a hearing is guaranteed by Article 50(1) of *the Constitution* which stipulates that:

50. Fair hearing

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

50. It is my humble view that the consolidation brought forth a new prosecutorial theory that the Ex parte Applicant and Mr. Oyugi acted in concert to defraud the Complainant, which facts which had not featured before, noting that the earlier charge was of conspiracy to commit a felony namely, stealing of a motor vehicle belonging to the complainant. This development, I reiterate, gave rise to a distinct cause of action that revived the Applicant's right to seek judicial review, specifically through the remedy of certiorari and prohibition.
51. Accordingly, the Court is persuaded that the application for leave to apply for an order of Certiorari is not time-barred.
52. I therefore decline to uphold the preliminary objection and proceed to determine the merits of the prayers for leave and whether the leave if granted should operate as stay.
53. The reasons for leave before commencing judicial review proceedings were explained by Waki J. (as he then was) in *Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others*, Mombasa HCMISC APPL No. 384 of 1996 and the dictum in that decision is that, leave is meant to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless; to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration; to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error; and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.
54. The Learned Judge further held that leave may only be granted if on the material available, the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the Applicant; the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. Granting of leave to file for judicial review is an exercise of the court's discretion but as always it has to be exercised judiciously.
55. It is therefore clear from the above that in an application for leave such as the present one, this court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence placed before court and make the decision as to whether the Applicant's case is sufficiently meritorious to justify leave.
56. Having considered the Ex parte Applicant's case, I find that the Applicant has raised an arguable case. The grounds presented are serious and should be fully examined at the substantive hearing. The Applicant has also demonstrated a clear connection between the criminal proceedings and the already determined civil dispute, wherein the complainant readily admitted surrendering her motor vehicle subject of the consolidated charges to the applicant as security for the loan advanced to her leading to



entry of judgment on admission against her in the civil suit, thereby raising concerns about abuse of process and the violation of constitutional rights.

57. I find the prayers for leave to be merited. I grant leave sought to apply.
58. The Applicant has also sought for the leave to operate as stay of proceedings in Criminal Case No. E1082 of 2023 as consolidated with Criminal Case No. E1332 of 2024 registered against the Ex parte Applicant, before the Chief Magistrate's Court at Milimani, on charges inter alia Conspiracy to Commit a Felony contrary to Section 393 of the Penal Code pending the hearing and determination of the substantive review application.
59. In R (H). v Ashworth Special Hospital Authority (2003) 1 WLR 127, it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the status quo pending the final determination of the claim for judicial review. The main consideration is always whether or not the decision or action sought to be stayed has been fully implemented. In Taib A. Taib v The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006 the court held that:
- “ ... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act...”
60. In this case, the applicant seeks to stay proceedings in Criminal Case No. E1082 of 2023 as consolidated with Criminal Case No. E1332 of 2024 registered against the Ex parte Applicant, before the Chief Magistrate's Court at Milimani, on charges inter alia, Conspiracy to Commit a Felony contrary to Section 393 of the Penal Code pending the hearing and determination of the substantive review application.
61. As Criminal Case No. E1082 of 2023 as consolidated with Criminal Case No. E1332 of 2024 is yet to be prosecuted, I find that it is in the interest of justice that this court should stay such process until the substantive motion once filed, is heard and determined. I therefore order that the leave so granted shall operate as stay of criminal proceedings in Criminal Case No. E1082 of 2023 as consolidated with Criminal Case No. E1332 of 2024 until the substantive motion once filed is heard and determined on its merits. This is because the application is likely to be rendered nugatory and the applicant himself rendered a pious explorer in the judicial process if the criminal proceedings continue and at the end of the day, his application is found to be successful.
62. The final orders are that:
- a. The applicant is granted leave to apply for judicial review orders sought in prayer Nos. b, c & d of the chamber summons dated 6th February, 2025.
 - b. The applicant to file and serve the substantive judicial review application within 21 days of today's date in a fresh file.
 - c. The leave so granted shall operate as stay of prosecution or continuation of the criminal proceedings of and against the ex parte applicant in Criminal Case No. E1082 of 2023 as



consolidated with Criminal Case No. E1332 of 2024 until the substantive motion once filed is heard and determined on its merits.

d. Costs if any, shall be in the substantive motion.

63. It is so ordered.

64. This file is closed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI 29TH DAY OF APRIL, 2025

R.E ABURILI

JUDGE

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