



Republic v Director of Public Prosecutions & 5 others; Rai & 3 others (Interested Parties); Heritage Flowers Limited (Exparte Applicant) (Judicial Review Application E110 of 2023) [2025] KEHC 7144 (KLR) (Judicial Review) (28 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7144 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E110 OF 2023**

**RE ABURILI, J
MAY 28, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

RIYAZ PUNNJANI MUHAMADALI 4TH RESPONDENT

SHIRAZ KARMALI 5TH RESPONDENT

CHIEF MAGISTRATES' COURT AT MILIMANI 6TH RESPONDENT

AND

SHAILESH KUMAR RAI INTERESTED PARTY

RANJEETA PANDEY RAI INTERESTED PARTY

ROSALIA BLOOM LIMITED INTERESTED PARTY

DIAMOND TRUST BANK INTERESTED PARTY

AND

HERITAGE FLOWERS LIMITED EXPARTE APPLICANT



JUDGMENT

1. The Exparte Applicant is Heritage Flowers Limited, a Limited Liability Company. By its Notice of motion dated 16th August 2023, it seeks the following orders:
 - a. That the Honourable Court be and is hereby pleased to issue a Judicial Review Order of Certirari to call-up, remove, deliver up to this Honourable Court and quash the impugned decision by the 1st, 2 & 3rd Respondents, reposed in the prosecution of the interested parties in Milimani Criminal Case No.E604 of 2023 (Republic V Shailesh Kumar Rai & 4 Others) instituted unlawfully on 28th July,2023.
 - b. That the Honourable Court be and is hereby pleased to issue a Judicial Review Order of Prohibition to restrain the 1st,2nd and 3rd Respondents or anyone claiming under or pursuant to their authority, from proceedings with the prosecution of the interested parties in Milimani Criminal Case No.E604 of 2023 (Republic v Shailesh Kumar Rai &4 Others) or any other such suit premised on the particular as instituted vide the charge sheet dated 28th July,2023.
 - c. That Costs be provided for on a full indemnity basis.
2. The application is predicated on the statutory statement dated 11th August 2023 and the verifying affidavit sworn on the even date by Mr. Shailesh Kumar Rai, the 1st Interested Party and one of the Directors of the exparte applicant.
3. The Ex parte Applicant's case is that the instigation of the criminal prosecution against the Interested Parties herein is a criminalization of a shareholder dispute between the 4th Respondent Riyaz Punjani Muhamadali and the 1st and 2nd Interested Parties, Shailesh Kumar Rai and Ranjeeta Pandey Rai as shareholders of the Exparte Applicant company for which the Exparte Applicant has not lodged any complaint with the 2nd and 3rd Respondents, who are the DCI and the Inspector General of Police of the National police Service.
4. It is also the Exparte Applicant's case that the criminal proceedings are contrived to coerce the 1st and 2nd Interested Parties to cede to the 4th Respondent's claim as pleaded and sought in Milimani High Court Commercial Case No.E894 of 2021 Punjani Riyaz Mahamadali v Shailesh Rai Kumar & Ranjeeta Pandey Rai.
5. It is deposed by the 1st Interested Party that the Exparte Applicant, a reputable and leading exporter of floriculture, incorporated in the year 2014 is a limited liability company comprised of 3 shareholders/ directors, constituting the 4th Respondent Riyaz Punjani Muhamadali as a director in the Exparte Applicant company, holding 50 shares, the 1st Interested Party who is the Applicant's Managing Director and holder of 25 shares and the 2nd Interested Party who is equally a director in the exparte Applicant company and holder of 25 shares.
6. It is also pleaded and deposed that the 1st and 2nd Interested Parties are husband and wife while the 3rd and 4th Interested Parties are employed by the Exparte Applicant within its finance and accounting departments respectively. It is also averred that the 5th Interested Party is a limited liability company and the Applicant's overseas agent.
7. According to Mr. Shailesh Kumar Rai, the charges preferred relate to alleged monies stolen from the Exparte Applicant whereas complaints of such monies missing have never been received by the Board of Directors nor has the same been raised by external auditors.



8. It is the Exparte Applicant's case that all the offences particularized in the charge sheet dated 28th July 2023 are founded on the 1st Respondent's-DPP's decision to criminalize contractual documents entered into and/or witnessed by the Interested Parties. Further, that the validity and lawfulness of these documents is uncontroverted and as such, the 4th Respondent is barred by the doctrine of privity of contract from challenging the same in his personal capacity.
9. The 1st Interested Party further depones that the woes between the Interested Parties and the 4th Respondent began when the 1st Interested Party declined to advance to the 4th Respondent a personal loan of Kshs.10,00,000/= from the Exparte Applicant company to enable the 4th respondent pay the 5th Respondent as he had obtained a loan of USD 290,000 from the latter.
10. It is claimed by the Interested Parties through the depositions by the 1st interested party that when the request was declined, the 4th Respondent vide a letter dated 1st July 2021 tendered his resignation as Director and purported to sell his 50 shares to the 1st and 2nd Interested Parties at Kshs.200,000,000/=, which transfer notice was accepted by the 1st and 2nd Interested Parties pending valuation of shares by the Exparte Applicant's auditors. However, that the 4th Respondent communicated that he was not bound by the valuation of the said shares by auditors and demanded for the 1st and 2nd Interested Parties to submit an acceptance value of the shares.
11. It is further averred that in a turn of events, after the appointment of the 2nd Interested Party as a Director, the 4th Respondent withdrew his authority to the Board to sell his shares claiming that he was at liberty to sell his shares to a third party, the 5th Respondent. The 4th Respondent, it is deposed, started frustrating the operations of the Exparte Applicant and even shared confidential documents such as sales reports to competitors.
12. The Exparte Applicant's further case is that the 4th Respondent purported to forge minutes of the Board which purported to appoint the 5th Respondent as a Director in the Applicant's Board. The officers of the 2nd Respondent are said to have raided the private residence of the 1st and 2nd Interested Parties and confiscated several items, which orders to search and seize were set aside, while a search and freeze order over the bank accounts of the 2nd and 5th Interested Parties was also issued by the court.
13. The Exparte Applicant's further case is that after a long silence, the 1st Interested Party was summoned by the 2nd Respondent to confirm the contents of 'unknown documents' and that at the same time, the 3rd and 4th Interested Parties were arrested and reasons for the arrest were not disclosed.
14. According to the Exparte Applicant, the 1st to 3rd Respondents' conduct amounts to a gross violation of the Interested Parties' rights under Articles 27,28,29,39,40,47 and 50 of *the Constitution* as no evidence has been provided connecting the Interested Parties to the alleged conspiracy to defraud or forgery with regard to the operations of the Exparte Applicant.
15. It is also asserted that the maintenance of the impugned criminal proceedings exposed the Exparte Applicant and Interested Parties to reputational damage and incurring of daily loses. Further, that the Exparte Applicant faces imminent debt call-ups owing to the huge overdraft facility held with the Bank of India and that there is also a risk of being exposed to law suits from various suppliers of agro-chemical products.
16. The Ex parte Applicant also filed two further affidavits dated 19th December 2023 and 4th March 2024. In which affidavits the Exparte Applicant contends the 1st Respondent has not discharged the evidential burden to justify prosecutorial discretion and has not controverted key averments in the Exparte Applicant's affidavit.



17. The Ex parte Applicant also states that the 1st Respondent failed to objectively assess the totality of the evidence both for and against the Interested Parties and to satisfy himself that it established a realistic prospect of conviction.
18. That the criminal proceedings are alleged to be an abuse of the legal process, vexatious, oppressive and motivated by ulterior purposes. The Ex parte Applicant asserts that court processes must be used honestly and in good faith and not as a tool for oppression of the Interested Parties for ulterior motives.
19. It is the Ex parte Applicant's further case that counts I-IV of the charge sheet pertain to offences allegedly occasioned upon the Ex parte Applicant. According to the Ex parte Applicant, it is an abuse of process to approve charges related to alleged conspiracy to defraud and money laundering initiated by the 4th Respondent without a complaint from the Ex parte Applicant itself.
20. The charges, it is claimed, are in the nature of a complaint being pursued on behalf of the Ex parte Applicant, in blatant disregard of the proper legal avenue under section 238 of the Companies Act, 2015.
21. The deponent further asserts that as shareholders in the Ex parte Applicant company, they have no proprietary rights to the company's property apart from the shares they own. It is also the Ex parte Applicant's case that the 1st Respondent ignored the pending civil suit No. HCOMM E894 of 2021 which suit seeks the same prayers as those being pursued in the impugned trial court proceedings in Criminal Case No. E604 of 2023 risking conflicting outcomes and consequently, abuse of process. Further, that the Ex parte Applicant's Articles and Memorandum of Association expressly allow it to conduct any business approved by the board of directors and that it has not received any requisition by its members to convene a meeting to rescind the lawful commission agreement as is by law required.
22. The Ex parte Applicant also avers that 2nd Respondent's investigations and recommendation to charge the Interested Parties were conducted without confirming whether the Ex parte Applicant had resolved to lodge the complaint.
23. The Ex parte Applicant relies on *Jirongo v Soy Developers Ltd & 9 others* (Petition 38 of 2019) [2021] KESC (KLR) to support its position that where either a civil or criminal claim is being employed to perpetuate ulterior motives of general to abuse the process of the court in whatever, manner, then criminal procedure cannot be invoked to aid the unlawful cause of action.
24. According to the Ex parte Applicant, the 2nd Respondent's affidavit is tainted with falsehoods and it contradicts the contents of the complaint produced as annexure MM1 which evinces that the Ex parte Applicant has 3 directors. The Ex parte Applicant also states that it can conduct business with a quorum of 2 members present and as such, the issue of quorum cannot be a factual or legal foundation to mount any of the charges in the impugned charge sheet.
25. Mr. Shailesh Kumar Rai, the 1st Interested Party, asserts that his deposing of affidavits as a shareholder is irrelevant as he was authorized by the Board of Directors to plead on behalf of the Applicant. He further claims that the impugned proceedings do not pursue any direct claim vested in him but are rather in the form of a derivative claim properly vested in the Ex parte Applicant.
26. Mr. Shailesh also urges this Court to undertake a merit review having demonstrated the pleaded constitutional violations, pursuant to the holding in *Edwin Harold Dayan & 3 Others v The Inspector General, National Police Service & 5 Others* [Petition No.6(E007) of 2022].



Responses

27. In response, the 1st to 3rd Respondents filed Grounds of Opposition dated 2nd October 2023 and a Replying Affidavit sworn on 4th October 2023 by Chief Inspector CI Martin Munene. In the affidavit, he deposes that the investigations and subsequent criminal proceedings against the Interested Parties is a lawful process. Further, that upon recommendations by FATF, the DCI formed the Financial Investigation Unit to investigate money laundering and to enforce the [Proceeds of Crime and Anti-Money Laundering Act](#) of 2009, (POCAML A).
28. The 1st to 3rd Respondents contends that the investigations were based on a complaint by the 4th Respondent as indicated in referral form dated 31st March 2022. He also deposes that upon subjecting the evidence at hand to the public interest test and the evidentiary threshold test, the 1st Respondent was satisfied that the evidence at hand supported the proposed charges.
29. Chief inspector Martin Munene avers that the allegations by the 4th Respondent that the resolutions giving rise to a contract between the 5th Interested Party and the Ex parte Applicant were fraudulent and forgery are captured by the cybercrime and forensic report and audit report. The 1st and 2nd Interested Parties are said to have, as a result of the forged resolution, signed a commission agreement without involving the majority shareholder/director (4th Respondent) which agreement allowed for the deduction of 2% of total sale value.
30. The 2nd Interested Party is said to have registered Rosalia Bloom Ltd the 5th Interested Party where the 1st Interested Party is also a signatory and that the purpose of Rosalia Bloom Limited is to siphon the 1st and 2nd Interested Parties' ill-gotten gains from the fraudulent commission agreement.
31. The deponent for the 1st to 3rd respondents further avers that their investigations unearthed overwhelming evidence to support the charges levelled by the 1st Respondent. Further, that the Interested Parties have not demonstrated how the 1st to 3rd Respondents violated their constitutional rights. CI Munene reiterates that the investigations culminating in the criminal proceedings were undertaken within the confines of the law and further, that the accused persons will be accorded a fair hearing and they will have their day in court. He further deposes that the 2nd Respondent is not a party to the existing civil suit cited as Milimani High Court Commercial Case No. E894 OF 2021.
32. The 4th Respondent Riyaz Punjani Muhamadali in his Replying Affidavit sworn on 27th September 2023 states that the 1st Interested Party has no locus standi to execute an Affidavit instituting a judicial review case. Further, that the Exparte Applicant cannot be used as a bargaining tool when officers are charged with criminal offences. Further, that the 1st and 2nd Interested Parties have been charged with criminal offences of stealing, forgery, conspiracy to defraud and money laundering which are not shareholder disputes but illegalities.
33. The 4th Respondent deposes that the prosecution of the interested parties herein is not based on malice and that the accused persons will have their day in court before the trial court and if the evidence tendered is not sufficient, they will be acquitted. He further takes issue with the fact that the verifying affidavit in support of the application is sworn by the 1st Interested Party making him on the one hand an accused person while on the other hand, he executes affidavits on behalf of the company to exonerate himself and his wife who is the 2nd Interested Party.
34. The 2nd and 5th Interested Parties filed a Replying Affidavit sworn by 2nd Interested Party. Upon examination by the court, I note that the affidavit is a word for word replica of the verifying affidavit



sworn my Mr. Shailesh Kumar Rai, the 1st Interested Party and as such, this Court will not reproduce the contents here, to avoid repetition and wasting of judicial time and resources.

35. The 3rd and 4th Interested Parties filed their Replying Affidavits both of which are sworn by the said parties on 5th March 2024. This court observes that the two affidavits are also a replica of the verifying affidavit sworn by the 1st Interested Party and as such, the court finds no need to repeat the contents of the said affidavits herein.

Submissions

36. The application was canvassed by way of written submissions. The Ex parte applicant filed written submissions dated 14th May 2024 arguing that the core issue in the case is the exercise of prosecutorial discretion by the 1st Respondent. It argues that the ODPP failed to justify this discretion adequately, as it only filed grounds of opposition, not a replying affidavit, thereby failing to controvert the applicant's sworn allegations.
37. The Exparte Applicant in support of this position relies on the cases of Daniel Kibet Mutai & 9 others v Attorney General [2019] eKLR, Attorney General & 6 others v Mohamed Balala & 11 others [2014] eKLR and Gideon Sitelu Konchellah v Julius Lekakeny ole Sunkuli & 2 others [2018] eKLR. It maintains that grounds of opposition, being unsworn, are insufficient to counter affidavit evidence.
38. On the substantive issue, the applicant submits that although the ODPP is independent under Article 157(10) of *the Constitution*, it must act within legal limits and be guided by public interest, justice, and the need to prevent abuse of process as stipulated under Article 157(11).
39. The Exparte applicant relies on the cases of Edwin Harold Dayan supra, Michael Sistu Mwaura Kamau v EACC & 4 others [2017] eKLR and Republic v Director of Public Prosecutions & 2 others; Evanson Muriuki Kariuki (interested party); Ex parte James M. Kahumbura [2019] eKLR to demonstrate that prosecutorial discretion is not absolute and may be reviewed if abused. The Applicant also relies on the Kahumbura case where the court defined abuse of process as a situation where the prosecution is so unjust or improper that, despite the case being otherwise legally sound, the court ought to prevent it from going forward.
40. Reliance is also placed on the case of Diamond Hashal Lalji & another v Attorney General & 4 others [2018] eKLR citing with approval the case of Jago v District Court (NSW) 168 LLR 23, 87 ALR 57), where Brennan J explained that abuse of process arises when court proceedings are initiated for reasons that the law does not recognize as legitimate.
41. The Exparte Applicant further submits that court processes must be used properly, honestly and in good faith and must not be abused or employed to settle personal scores. It relies on the case of Rosemary Wanja Mwangiru & 2 others v Attorney General & 3 others [2013] eKLR to support this position.
42. The Exparte Applicant further relies on Republic v Attorney General Ex parte Kipngeno arap Ngeny, Civil Application No. 406 of 2001 and Reuben Mwangi v Director of Public Prosecutions & 2 others; UAP Insurance & another [2021] eKLR, arguing that prosecutorial powers must be exercised with caution to avoid oppressive or vexatious prosecutions lacking a prima facie case.
43. The Exparte Applicant also submits that the charges against the Interested Parties cannot be sustained without a direct complaint by it. It relies on the case of Director of Public Prosecutions v Attorney General & 12 Others, Civil Appeal 206 of 2016 [2022] KECA 397 KLR, where the court is said to have reiterated this position.



44. The Exparte Applicant stresses that, being a separate legal entity from its members, can only act through resolutions of its members at a general meeting or through its agents, as was established in the case of *Nextgen Office Suites Ltd & another v Netcom Investments Limited & another, Shah Minakshi Navichandra* [2021] eKLR.
45. Regarding derivative claims, the Exparte Applicant relies on sections 238 and 239 of the *Companies Act* and the cases of *Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another* [2017] eKLR and *Nextgen Office Suites Ltd* supra.
46. According to the Exparte Applicant, the law is not silent in addressing scenarios where a disgruntled shareholder may be keen on pursuing remedies vested in a company. Further, that the position in law regarding the pursuit of an indirect or derivative claim by a disgruntled member of a company is well settled under sections 238 and 239 of the *Companies Act* which requires that derivative claims, in any form, must be pursued explicitly under the *Companies Act*, which reserves the forum as being at the High Court.
47. It is also the Exparte Applicant's submission that this judicial screening protects the company from a multiplicity of proceedings by a multitude of individual shareholders and other applicants concerning the same wrong inflicted on the company.
48. The Exparte Applicant invites the court to exercise its inherent power to prevent abuse of court process that is vexatious, oppressive, or otherwise improper. The Applicant relies on the decision in *Satya Bhamu Gandhi v Director of Public Prosecutions & 3 others* [2018] eKLR, where the court held that all courts possess inherent jurisdiction to prevent their processes from being abused as instruments of oppression.
49. The Exparte Applicant submits that the impugned criminal proceedings constitute an abuse of process, instituted by the ODPP at the behest of the 4th Respondent in blatant disregard of company law principles requiring derivative claims under the *Companies Act* and before the High Court.
50. The Exparte Applicant alleges forum shopping and misuse of criminal processes to gain advantage in ongoing shareholders' disputes, citing the Supreme Court's position in *Edward Dande* case supra and *Jirongo* case supra that criminal proceedings should not be used to coerce compromise of pending civil proceedings.
51. According to the Exparte Applicant, the timing and conduct of the 4th Respondent's complaint demonstrates that the proceedings were intended to harass, intimidate and oppress the Interested Parties, akin to the "galloping litigant" phenomenon condemned in the case of *Rosemary Wanja Mwangi & 2 others v Attorney General* [2013] eKLR.
52. The Exparte Applicant further submits that the impugned charges rest on unfair, partisan investigations and lack a reasonable basis, violating the Interested Parties' right to a fair trial as emphasized in *Republic v Director of Public Prosecutions & 2 others; Evanson Muriuki Kariuki; Ex parte James M. Kahumbura*.
53. The Exparte Applicant also relies on the case of *Thomas Mboya Oluoch & another v Lucy Muthoni Stephen & another* [2005] eKLR, where the court observed that litigation founded on dubious and self-serving evidence constitutes malicious prosecution and abuse of the State's prosecutorial machinery.
54. The 1st to 3rd Respondents also filed submissions on 3rd October 2023.



55. The 1st Respondent submits that the decision to charge in Criminal Case No. 604 of 2023 – Republic v Shaillesh Kumar Rai & 4 Others was lawful, independent, and grounded in both legal and evidentiary standards. That Article 157 (10) of *the Constitution* of Kenya, 2010, empowers the DPP to institute criminal proceedings without requiring consent from any person or authority and mandates independence from external direction or control.
56. The powers under the said Article, it is submitted, are regulated by the *Office of the Director of Public Prosecutions Act*, No. 3 of 2013 and the Decision to Charge Guidelines, 2019. The Guidelines it is submitted require that the 1st Respondent subjects all evidence to a two-stage test (Evidential and Public Interest) for making charging decisions.
57. The evidential test is said to require sufficient, credible, and reliable evidence for a realistic prospect of conviction. The public interest test considers broader justice concerns. It is submitted that the evidence in Criminal Case No. 604 of 2023 satisfied both tests. Further that the DPP exercised discretion based on objective analysis and the wider interest of justice.
58. The 1st to 3rd Respondents submit that the Ex Parte Applicant herein has not demonstrated how, if at all, the 1st Respondent made the decision to charge the 1st, 2nd, 3rd and 4th Interested Parties unlawfully and that all that it has done is to claim that its rights were infringed without specifying which rights were infringed and how the 1st to 3rd Respondents infringed these rights of the Exparte Applicant.
59. The 1st to 3rd Respondent further submit that the *Criminal Procedure Code* clearly states that a civil suit is not a bar to criminal proceedings and as such any averment by the Ex Parte Applicant that the existence of Milimani High Court Commercial Case No. E894 of 2021-Punjani Riyaz Mahamadali v Shaillesh Rai Kumar & Ranjeeta Pandey Rai is grounds to bar the prosecution of Criminal Case No. 604/2023 Republic v Shaillesh Kumar Rai & 4 Others by the 1st Respondent is not based on any good law. Reliance is placed in the case of James Mutisya & 5 Others v Alphayo Chimwanga Munala & 2 Others [2021] eKLR.
60. The 1st to 3rd Respondents also submit that there is no requirement in any written law that a complaint must be accompanied by a Company Resolution. Second, that when a director an offence commits they cannot hide behind the lack of a resolution. This, in their view, would be tantamount to expecting an accused person to report himself, terming the arguments by the 1st Interested Party to be absurd. Third, that Section 23 of the *Penal Code* requires that where a person is charged with the management and control of a company, their liability is personal.
61. The 1st to 3rd Respondents also submit that a complainant is one who lodges a complaint with the police or any other lawful authority that some offense or criminal act has been committed. In addition, that the Complainant in Criminal trials includes a prosecutor as was held in the case of Republic vs. Mwaura 1979 KLR 209. This position was also reiterated by the courts in the cases of Ruhi vs. Republic 1985 KLR 373 and Roy Richard Elimma & Another vs. Republic CR. APPEAL N0. 67 of 2002.
62. It is submitted that the complainant in the criminal case is a natural person, Riyaz Punjani, C/O Heritage Flowers Limited, and that a criminal prosecution does not require a company resolution. The 1st to 3rd Respondents state that criminal trials are determined by the weight of evidence and the law, not by the identity of the complainant or the manner in which the complaint was made.
63. They also submit that the Directorate of Criminal Investigations is obligated to act on any complaint it receives and that the presence or absence of a company resolution does not invalidate the evidence



- supporting the charges. At most, that the lack of a company resolution may serve as a defense to be tested during trial.
64. They argue that more so, the charges conspiracy, stealing, money laundering and forgery are brought against the Interested Parties in their individual capacities and cannot be resolved based on a company resolution.
 65. It is also submitted that the Applicant has not produced the relevant Occurrence Book (OB) entry to substantiate the claim regarding the absence or presence of a resolution. The 1st to 3rd Respondents also argue that the 1st Interested Party was running the company unilaterally and is now aggrieved that the investigation has uncovered evidence of alleged misconduct he believed would remain hidden.
 66. The 1st to 3rd Respondents submit that, based on the Applicant's own arguments, there is no company resolution by the Interested Party authorising the commencement of these judicial review proceedings. They argue that judicial review, being civil in nature, requires a formal resolution from the company or its directors indicating the time, place, and minutes of the meeting where the decision to file the proceedings was made.
 67. They note that none of the Applicant's annexures (SRK-1 to SRK-17) contains such a resolution. Specifically, that SRK-1, dated 1st April 2019 which predates the alleged offences (which occurred between September 2021 and August 2022) and therefore cannot be construed, even liberally, as authorisation for the present proceedings. To support this position, the 1st to 3rd Respondents rely on the case of *Bugerere Coffee Growers Limited -versus- Sebaduka & Another* [1970] EA 147.
 68. It is submitted that the Applicant must demonstrate with adequate precision the rights that have been violated as was held by the courts in the cases of *Anarita Karimi Njeru v Attorney General* (1979) KLR 154 and *Trusted Society of Human Rights Alliance v AG. & 2 others* [2012] eKLR.
 69. The 1st to 3rd Respondents also submit that independent institutions such as the 1st Respondent are not inhibited from carrying out their functions based on one interpretation of the opinion of the Interested Party and Applicant. They urge that instead, *the Constitution* and the law give liberty and power to independent institutions to carry out their mandate and in particular, the 1st Respondent is duty bound to exercise constitutional functions with regard to public interest.
 70. On the above submission, the 1st to 3rd Respondents rely on the following authorities *In the Matter of Interim Independence Electoral Commission* (2011) eKLR, *Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 Others* [2015] eKLR, *In the Matter of the Principle of Gender Representation in the National Assembly and Senate*, SC Application No. 2 of 2012, Republic v Attorney General; *Law Society of Kenya (Interested Party); Ex-parte: Francis Andrew Moriasi* [2019] eKLR, *Michael Monari & Anor vs. The Commissioner of Police & 3 Others* Miscellaneous Application 68 of 2011, *Francis Mbugua vs. Commissioner of Police and 2 Others* Petition No. 79 of 2012 and *Paul Ng'ang'a Nyaga & 2 others v Attorney General & 3 others* [2013] eKLR.
 71. On the issue of concurrent proceedings in criminal and civil Courts, reliance is placed in the case of *Amir Lodges Ltd & another v Mohammed Omar Shariff & another* [2022] eKLR where the court held that the same was permissible unless it can be demonstrated that the prosecution of the criminal case will either result to infringement of the rights and fundamental freedoms of the accused persons or will lead to the contravention of *the Constitution*.
 72. The 4th and 5th Respondents filed written submissions dated 12th June 2024.
 73. In their submissions, they challenge the locus standi of Heritage Flowers Limited to file the judicial review application seeking to quash and prohibit the prosecution of five individuals in Criminal Case



- No. E604 of 2023 (Republic v Shailesh Kumar Rai & 4 Others). They argue that the company is not an accused person and has not demonstrated authority, via a board or shareholder resolution, to institute the judicial review proceedings.
74. According to the 4th and 5th Respondents, the application, executed by the 1st Interested Party, is a misuse of the company's corporate identity to shield individuals from prosecution for serious offences including stealing by directors, forgery, conspiracy to defraud and money laundering involving substantial sums of money.
 75. The 4th and 5th Respondents contend that these proceedings are not in the company's interest but for the personal protection of the accused who are the interested parties herein. They cite Order 4 Rule 1(4) of the Civil Procedure Rules, which requires that where a company is a plaintiff, the verifying affidavit must be sworn by an officer authorized under the company seal.
 76. The 4th and 5th Respondents rely on the case of *Ansapar Beverages Limited v Development Bank of Kenya Ltd & 5 Others* (HCCC No. 1155 of 2000) where the court held that a company must authorize institution of any suit through a board or general meeting resolution. They also rely on *Spire Bank Limited v Land Registrar & 2 Others* [2019] eKLR, where the Court of Appeal emphasized that the intention behind Order 4 Rule 1(4) is to prevent unauthorized litigation on behalf of the corporate entity. It is also submitted that since no authority is shown in this case, the instant suit is incompetent and should be struck out as fatally defective.
 77. On whether the 4th Respondent had a right to lodge the complaint that led to the prosecution, the 4th and 5th Respondents argue that any person aggrieved by criminal conduct can lodge a complaint. They refer to Black's Law Dictionary, 10th Edition and the *Criminal Procedure Code*, on the definition of a complainant broadly. They also rely on the case of *Kinoti & 7 Others v Chief Magistrates Court Milimani Law Courts & 4 Others; Sanga & 2 Others (Interested Parties)* [2022] KEHC 11622 (KLR) where the court confirmed that a complainant is any party who alleges an act or omission against another party which is punishable by law. Further reliance is placed on the case of *Musau Ndunda & 4 Others v Inspector General of Police & Another* [2016] eKLR, where it was held that any citizen or legal entity can make a criminal complaint.
 78. It is their submission that a derivative suit suggested by the applicants was not necessary as the proceedings initiated were criminal, not civil, and that the 1st Respondent (ODPP) retains the exclusive constitutional power to commence criminal prosecutions under Article 157 of *the Constitution*.
 79. The 4th and 5th Respondents further submit that while the Director of Public Prosecutions (DPP) enjoys constitutional independence under Article 157(10) of *the Constitution*, such independence is not absolute and must be exercised within the limits set out in Article 157(11). They rely on *Cyrus Shakhalanga Khwa Jirongo v Soy Developers Ltd & 9 others* [2021] eKLR, where the Court held that although the DPP is not subject to direction or control, where Article 157(11) is not adhered to, the High Court under Article 165(3)(d)(ii) has jurisdiction to interrogate the decision and make appropriate orders.
 80. They argue that the application before the Court seeks to invoke this jurisdiction by alleging that the institution of Criminal Case No. E604 of 2023 (R v Shailesh Kumar Rai & 4 Others) constitutes an abuse of court process and violates the Interested Parties' constitutional rights. In support of the legal threshold for abuse of process, they cite *Meme v Republic & another* (2004) eKLR, where it was stated that abuse of process arises where court procedures are used improperly for vexation, oppression, or other ulterior motives.



81. They further rely on the reasoning in *Maina & 4 others v Director of Public Prosecutions & 4 others (Constitutional Petition E106 & 160 of 2021)* (Consolidated) [2022] KEHC 15 (KLR), which adopted the test from *Jago v District Court (NSW)* 168 LLR 23, 87 ALR 57, where Brennan J explained that abuse of process occurs when proceedings are instituted for purposes the law does not intend to serve.
82. The 4th and 5th Respondents also submit that the charges in the criminal case arose from a complaint made by the 4th Respondent to the National Police Service (NPS), the 2nd Respondent, which has investigative powers under Article 245 of *the Constitution* and Section 35 of the *National Police Service Act*.
83. Reliance is placed in the case of *Republic v Commissioner of Police & Director of Public Prosecution ex parte Michael Monari & Another* Misc. Application No. 68 of 2011, where the Court emphasized that the police have a constitutional duty to investigate complaints and only need reasonable suspicion to prefer charges, with the sufficiency of evidence being a matter for the trial court.
84. The 4th and 5th Respondents argue that the 2nd Respondent's investigations revealed incriminating evidence supporting the charges under the *Penal Code* and that there was reasonable and probable cause. They rely on *Glinski v McIver* [1962] AC 726, where Lord Devlin defined reasonable and probable cause as sufficient grounds for believing the accused was probably guilty, but not that the prosecutor necessarily believes in the probability of conviction.
85. To reinforce the lawful exercise of prosecutorial discretion, the case of *Reuben Mwangi v Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties)* [2021] eKLR is relied on, where the Court, quoting from *Hon. James Ondicho Gesami v Attorney General & Others*, Petition No. 376 of 2011, held that requiring an accused to face criminal prosecution in accordance with the law does not violate their constitutional rights.
86. Further reliance is placed on *Diamond Hasham Lalji & another v Attorney General & 4 others* [2018] eKLR, where the Court of Appeal affirmed that prosecutorial discretion is subject to limited judicial interference, only in the clearest and most exceptional cases.
87. The 4th and 5th Respondents also submit that challenges to the accuracy or weight of evidence or facts gathered are properly determined by the trial criminal court, not the judicial review court. They rely on *Rosemary Wanja Mwangiru & 2 others v Attorney General & 3 others* [2013] eKLR which case underscores that it is the trial court that is best placed to evaluate the quality and sufficiency of evidence.
88. The 4th and 5th Respondents also assert that the prosecution was founded on reasonable and probable cause, based on credible investigative findings, and was not motivated by malice or bad faith. They submit that the criminal proceedings do not amount to an abuse of process, and that the Ex parte Applicant's claims of ulterior motive, coercion, or vendetta are baseless and unsupported.
89. The 4th and 5th Respondents maintain that the DPP's decision was made in line with Article 157(11) of *the Constitution* and in the public interest. They reiterate the principle from *Michael Monari & Another v Commissioner of Police & 3 Others*, Misc. Application No.68 of 2011 that courts should not usurp the investigatory and prosecutorial mandates of the DPP and the police, so long as they in a justifiable manner.
90. Regarding the prayer to quash the ODPP's decision to prosecute, the Respondents note that the Interested Parties have already been arraigned and the criminal trial is underway. They submit that the application improperly seeks a merit review of the DPP's charging decision, which is outside the scope of judicial review. Moreover, that the company cannot assert constitutional violations on behalf of natural persons. That no abuse of process or unlawful conduct by the ODPP has been demonstrated.



91. The 4th and 5th Respondents rely on the reasoning by Mumbi Ngugi J. in *Kipoki Oreu Tasur v Inspector General of Police & 5 others* [2014] eKLR, emphasizing that the criminal justice system must function independently, and superior courts should only intervene in the clearest of circumstances where violation of fundamental rights is demonstrated.
92. They argue that the Ex parte Applicant has not discharged the burden of proving any violations of the Interested Parties' fundamental rights that would justify interference with the criminal proceedings in *Milimani Criminal Case No. E604 of 2023 (Republic v Shailesh Kumar Rai & 4 Others)*. Consequently, the decision to charge and prosecute should not be quashed, stayed, or prohibited, as there is no indication of abuse of prosecutorial discretion.
93. On the issue of concurrent civil and criminal proceedings, the 4th and 5th Respondents note that the Ex parte Applicant alleges the criminal proceedings are intended to settle scores arising from a civil shareholder dispute. They however submit that civil proceedings concerning shareholder issues, unlawful appointments and related claims can run concurrently with criminal proceedings under Section 193A of the *Criminal Procedure Code*. They rely on appellate and High Court decisions in support of this position, including *Lalchand Fulchand Shah v Investments & Mortgages Bank Ltd & 5 others* [2018] eKLR and *Maina & 4 others v DPP & 4 others* [2022] KEHC 15 (KLR), affirming that civil and criminal cases may proceed in parallel unless there is demonstrable abuse of court process or violation of due process rights.
94. The 4th and 5th Respondents also argue that the Applicant has not shown that the criminal process has been misused, or that the rights of the accused persons are threatened. They argue that the criminal proceedings and the civil suit in HCOMM E894 of 2021 involve distinct subject matters. That the former involves criminal charges including stealing, forgery, conspiracy to defraud and money laundering, while the latter concerns a shareholder dispute. That the allegations of forum shopping or manipulation of the criminal process to gain advantage in the civil suit are said to be unsubstantiated.
95. They also rely on the case of *Dande & 3 others v Inspector General, National Police Service & 5 others* [2023] KESC 40 (KLR), where the court noted that where a prosecution is being mounted to aid proof of matters before a civil court or where the hand of a suspect is being forced by the sword of criminal proceedings to compromise pending civil proceedings, then Section 193A of the *Criminal Procedure Code* cannot be invoked to aid that unlawful course of action.
96. In conclusion, the 4th and 5th Respondent's submit that the Applicant lacks locus standi and has failed to demonstrate any abuse of prosecutorial power by the 1st Respondent or infringement of the Interested Parties' constitutional rights. They maintain that the charges are valid, the prosecution is lawful and the accused persons have been duly arraigned before a competent court within constitutional timelines and will receive a fair trial under Article 50 of *the Constitution*.

Analysis and Determination

97. I have considered the pleadings, affidavits, responses and written submissions filed by the parties before this court. The issues for determination are as follows:
 - a. Whether the judicial review application is properly before this court
 - b. Whether the court should grant the reliefs sought
 - c. What orders should this court make?
98. On whether the judicial review application is properly before this court, the epicenter of these proceedings and which issue has been raised by the 4th Respondent is the fact that the judicial review



application which seeks to quash criminal proceedings initiated against the Interested Parties has been instituted by Heritage Flowers Limited a company where the 1st and 2nd Interested Parties are Shareholders and Directors and where the 3rd and 4th Interested Parties are employees.

99. The Interested Parties are the persons who stand charged with a raft of criminal offences including conspiracy to defraud, forgery and even money laundering. However, the application before this court has not been brought by the Interested Parties themselves as the persons directly affected by the criminal process, where they have been charged with several criminal offences. Instead, the proceedings are brought in the name of the company in which they serve as directors and or employees.
100. The question is, whether, the Exparte applicant company, being a separate legal personality, under the principle in *Salomon v Salomon & Co. Ltd* [1897] AC 22, that a company is a distinct legal person separate from its directors and shareholders, and whether criminal liability imposed on directors and employees personally does, in principle, affect the company.
101. From the affidavits sworn by the 1st interested party, him and the 2nd interested party are a spouse and directors of the exparte applicant company. The two are said to have incorporated the 3rd interested party company and are suspected to be syphoning money from the exparte applicant company wherein the 4th and 5th respondents are shareholders, with the help of the employees of the exparte applicant company, to the detriment of the company and its shareholders. No doubt, the allegations against the interested parties, if true, would demonstrate that the interested parties were acting against the interests of the Exparte applicant company and therefore, there is no way the exparte applicant company would bring judicial review proceedings to protect its directors and employees from criminal liability.
102. Furthermore, there is no resolution by the Board of directors of the said exparte applicant company to bring these proceedings which are initiated in the name of the company. There is sufficient authority on this issue as cited by the respondents in their submissions.
103. In addition, could the company have resolved to cushion the directors and employees who are accused of stealing from the said same company? Thus, as the exparte applicant company is not demonstrated to be an accused by the criminal process, and is not the subject of any investigative or prosecutorial action, I find that it lacked the locus standi to bring these proceedings, which proceedings are equally a non-starter for want of Board of Directors' Resolution authorizing the filing of these proceedings and even the swearing of the affidavits by the 1st interested party or any of his fellow interested parties.
104. This alone, in my view, renders these proceedings fundamentally flawed in law. First, it raises a serious question of locus standi. The principle that undergirds standing is that a party who approaches the court must demonstrate that they are directly affected by the impugned action. Judicial review is concerned with decisions that affect rights, duties, or legitimate expectations of individuals or legal persons. Where criminal investigations or prosecutions have been commenced against specific individuals, it is those specific individuals who have the legal right to challenge those decisions. The Interested parties are not the applicants in this case and neither have they challenged the criminal proceedings initiated against them as individuals and in their own capacities.
105. The decision to investigate or prosecute relates to alleged criminal conduct by the directors and employees of the Company. The company is not the subject of the investigation or of any charge. It is not alleged to have committed any offence, and there is no indication that the prosecution has taken any steps against the company as a juridical entity. Consequently, the company is not a party aggrieved by the actions of the DPP and therefore lacks the requisite standing to bring this judicial review application.



106. It follows that the use of the company's name to challenge a prosecutorial decision that affects individuals personally is also legally improper because it amounts to a misuse of the distinct legal personality of the company. The principle of corporate personality, as settled in the case of *Salomon v Salomon & Co Ltd* [1897] AC 22, dictates that a company is a separate legal person from its directors and shareholders.
107. The Courts have also reiterated this position that a company is distinct from its shareholders, directors and agents. In the case of *Extreme Auto Center Limited & another v Jamal* (Civil Appeal E637 of 2022) [2024] KEHC 5862 (KLR) (Civ) (24 May 2024) (Judgment), the court stated that:
- “In the case of *Salomon V Salomom* [1897] A C 78 and affirmed in several other cases. See: (i) *Victor Mabachi & Another V Nurtun Bates Ltd* [2013] e KLR (ii) *Antony Francis Wareham t/a A F Wareham & 2 others V Kenya Post Office Savings Bank* [2004] e KLR among others, where the courts have held that a body corporate is a *persona juridica*, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil.”
108. Similarly, the Court of Appeal in the case of *Waruhiu K'owade & Ng'ang'a Advocates v Mutune Investment Limited* [2016] KECA 835 (KLR) observed as follows:
- “Even if the said person is the principal shareholder of the respondent company, we are mindful of the fact that, and it is an elementary principle of law, a company is a separate and distinct entity from its shareholders. This was stated in the ancient case of *Salmon vs Salmon* [1895-9] AII ER 33 and has on numerous occasions been endorsed as the true position in law by this Court. See for example in *M.S.K v S.N.K* [2010] eKLR (Civil Appeal (Application) No. 277 of 2005).”
109. The Court of Appeal in the case of *S M M alias G S M alias S S M v C A K M alias C A K M* [2017] KECA 522 (KLR) also observed that:
- “In any event, the company is a legal entity, separate from that of its shareholders and/or directors. See *Salmon v Salmon* [1897] AC 22. The company, being a juristic person, was not a party to the proceedings before the High Court, and neither was it joined in this appeal, and no order can issue against it or in respect of any property owned by it. The appellant's claim as a shareholder of [particulars withheld] Company Limited is therefore misplaced.”
110. It cannot be denied that the acts of a company may be attributed to its officers and the company may be liable for civil or criminal wrongs committed on its behalf by such officers. However, the reverse is not true. Individuals are personally liable for acts committed in their personal and individual capacity or in excess of their powers, and they cannot use the legal personality of the company as a shield to evade liability for such acts.
111. Allowing the directors to invoke the name of the company to challenge criminal proceedings against themselves would amount to a distortion of this principle and would be tantamount to allowing the directors and employees of the company to misuse the corporate form to avoid personal accountability. In other words, a company cannot be used merely to protect individuals' characters or actions.
112. Courts must be cautious against such attempts to obscure or frustrate the administration of criminal justice. The law does recognize the importance of piercing the corporate veil in appropriate cases where the company is being used to perpetuate fraud, illegality, or to defeat the ends of justice. However,



where a company is not itself a party to the prosecution or otherwise directly affected by it, it cannot act as a proxy to challenge the prosecution of its directors or employees. Doing so would undermine the integrity of the legal process and an invite to the court to entertain a suit that is not grounded in any actual or justiciable claim on the part of the applicant.

113. I further observe that the manner in which the application has been brought raises procedural impropriety and possibly an abuse of court process. By filing the suit in the name of the company while seeking relief that pertains to the personal legal interests of specific individuals, the applicant has sought to conflate personal and corporate interests in a manner that obscures the real parties in interest. This is misleading and an unacceptable practice which is testing the waters and this court cannot fall prey to such attempts.
114. I reiterate that generally, a company cannot bring judicial review proceedings to stop the prosecution of its directors or employees, where the company is not a party to the criminal charges, unless it can demonstrate a direct legal interest or that its own rights are being infringed by the said prosecution.
115. More so, this Court's jurisdiction in judicial review is invoked to scrutinize the legality, rationality and procedural propriety of public administrative decisions that affect the rights or interests of identifiable persons. The court must therefore be certain as to who the applicant is, what interest they seek to protect and how that interest has been affected. An application that masks the real applicant behind a corporate entity that is not itself affected runs afoul of these requirements.
116. Besides, the use of judicial review to challenge a criminal process is already an exceptional remedy, reserved only for the clearest cases of abuse of power or illegality. Courts are generally reluctant to interfere with the constitutional mandate of the National Police Service and Director of Public Prosecutions respectively, to investigate and prosecute crime. The threshold is high, there must be evidence that the prosecution is being undertaken for an improper purpose, that it is manifestly oppressive, or that it constitutes an abuse of the court process.
117. Even where such circumstances exist, the proper parties to invoke the court's jurisdiction are those against whom the prosecutorial decisions are being made. In this case, if the directors and employees of the company believe that the criminal charges against them are unlawful or brought in bad faith, it is open to them to bring proceedings in their personal capacities to challenge the said criminal charges. The use of the company to pursue what is effectively a personal remedy not only deprives the court of jurisdiction but also misleads the court as to the real dispute before it. The practice of entities bringing suits for private motives masked as institutional claims must not be allowed.
118. In conclusion, the application before the court, having been brought by a company that is not the subject of the impugned criminal process, is found to be misconceived and incompetent. The company lacks standing to seek the reliefs sought and the use of its name to challenge personal criminal charges against its directors and employees amounts to a misuse of corporate personality and an abuse of court process.
119. The proper course, if any, would have been for the individuals facing the criminal proceedings to approach the court in their own names and demonstrate, with cogent evidence, that the prosecution against them meets the threshold for judicial intervention. In the absence of such a proper application, this court must decline to allow the remedies sought by the company.
120. Even assuming that the company had the locus standi to bring these proceedings, having reviewed the evidence adduced by the 1st to 3rd Respondents in their Replying Affidavit, I am not persuaded that the process of investigation or prosecution of the interested parties is demonstrably unlawful,



irrational, or procedurally improper, especially at the instance of a third party like the ex parte applicant company herein.

121. This Court is persuaded that indeed, there exists valid suspicion that there are offences that might have been committed by the interested parties and as such, it would only be prudent for the court to avoid interfering with the 1st and 2nd Respondents constitutional mandate as contemplated under Articles 157 and 244 of *the Constitution*, respectively.

122. Additionally, it has been restated time and again that under section 193A of the *Criminal Procedure Code*, the existence of a civil case does not bar criminal proceedings from being instituted or from running parallel unless it can be proven that the same is actuated by malice. This position was reiterated in the case of Alfred Lumiti Lusiba v Pethad Ranik Shantilal & 2 others [2016] eKLR where the court held that:

“The law is clear that the pendency of a civil suit is not a bar to criminal proceedings; it acknowledges the fact that the trial of the tortfeasor in a criminal prosecution need not be affected by the pending civil action against him. It is implied, therefore, that a civil suit cannot be stayed because of the prosecution of the tortfeasor for the obvious reason that the cause of action is neither rooted in the prosecution of the tortfeasor nor in his subsequent conviction... The conclusion that one can draw from section 193A of the *Criminal Procedure Code* together with the decisions of the learned judges in aforementioned cases is that both civil and criminal jurisdictions can run parallel to each other and that neither can stand in the way of the other unless either of them is being employed to perpetuate ulterior motives or generally to abuse of the process of the court in whatever manner.”

123. In light of all the foregoing, I find and hold that the application dated 16th August 2023, having been filed by Heritage Flowers Limited and not by the Interested Parties who are facing the criminal charges which are sought be quashed, and without the Company’s resolution and authorization, is incompetent and fatally defective. It is hereby struck out.

124. Each party shall bear their own costs of these proceedings.

125. This file is closed.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF MAY, 2025

R.E. ABURILI

JUDGE

