



Republic v Inspector General of Police, National Police Service & 2 others; Kassim (Exparte Applicant) (Judicial Review E001 of 2025) [2025] KEHC 8037 (KLR) (Judicial Review) (28 May 2025) (Judgment)

Neutral citation: [2025] KEHC 8037 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW E001 OF 2025
RE ABURILI, J
MAY 28, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

THE INSPECTOR GENERAL OF POLICE, NATIONAL POLICE SERVICE 1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATION 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

AND

MAALIM ADAN KASSIM EXPARTE APPLICANT

JUDGMENT

1. This matter was initially filed a Kiambu High Court vide HCJR E027 of 2024 through Chamber Summons dated 15th October, 2024 and on 16th October, 2024, Dorah Chepkwony J granted the Ex parte Applicant leave to apply for judicial review orders. The substantive motion dated 6th November, 2024 was subsequently filed on 6th November, 2024. The respondents then raised an objection to geographical jurisdiction of Kiambu High Court, which objection was heard inter partes and vide a ruling delivered on 9th December, 2024, the learned judge transferred the matter to this Court for hearing and final determination.
2. The Notice of motion dated 6th November, 2024 is brought under the provisions of Sections 8 and 9 of the *Law Reform Act* and Order 53 Rule 3 of the Civil Procedure Rules, 2010. The motion seeks the following prayers:



- i. An Order of Certiorari to bring into this Honorable Court and quash the decision of the 1st and 2nd Respondents respectively or officers subordinate to the 2nd Respondent, to commence criminal investigations against Maalim Adan Kassim the Applicant with regard to Title Numbers 3X/VII/5X5(Nairobi Block 49/1XX7), 36/VII/5X4(Nairobi/Block 49/1XX6), L.R N 36/VII/1X6(Nairobi Block 49/1X8), L.R No 36/VII/1X5(Nairobi Block 49/1X7 and or any recommendations on such investigations made by the Director of Public Prosecutions.
 - ii. An Order of Prohibition directed to the 1st and 2nd Respondents or their officers subordinate to them, prohibiting them from carrying on with the further investigations against Maalim Adan Kassim, the Applicant, with regard to Land Reference Numbers Title Numbers 3X/VII/5X5(Nairobi Block 49/1XX7), 36/VII/5X4(Nairobi/Block 49/1XX6), L.R N 36/VII/1X6(Nairobi Block 49/1X8) L.R No36/VII/1X5(Nairobi Block 49/1X7 arresting the Applicant and making any recommendations with regard to the said parcels of land to the Director of Public Prosecutions.
 - iii. An Order of Prohibition directed at the 2nd Respondent or through officers' subordinate to him prohibiting him from carrying on with any further investigations touching on the applicant Maalim Adan Kassim and or preferring any criminal charges against the Applicant.
 - iv. An order directing the Chief Land Registrar to forthwith lift the restriction registered by the 1st and 2nd Respondents over Title Numbers 3X/VII/5X5(Nairobi Block 49/1XX7), 36/VII/5X4(Nairobi/Block 49/1XX6), L.R N 36/VII/1X6(Nairobi Block 49/1X8) L.R No36/VII/1X5(Nairobi Block 49/1X7.
 - v. Any other relief that this Honourable Court may deem fit to and expedient to grant.
3. The Notice of Motion application is supported by the verifying affidavit sworn 15th October 2024 by the applicant Maalim Adan Kassim and the Statutory Statement of even date.
 4. The subject matter of the present Judicial Review proceedings concerns ongoing criminal investigations being undertaken by the 1st and 2nd Respondents against the ex parte Applicant in relation to certain parcels of land situated in Nairobi namely: Block 49/1XX7, Nairobi/Block 49/1XX6, Nairobi Block 49/1X8 and Nairobi Block 49/1X7.
 5. The ex parte Applicant contends that he is the legitimate, registered, and bona fide proprietor of the subject properties, having lawfully acquired the same in the year 2022. He further avers that he remains the current owner in possession thereof.
 6. His case is that on 14th September, 2024 at about 11.00am hours, police officers acting under instructions of the 1st and 2nd respondents arrived at his home with a search warrant issued by the Chief Magistrate's Court. The asserts that the police officers harassed and intimidated him and his family.
 7. That upon the applicant inquiring on what was happening, the police officers told him that they were from Starehe Police Station and attached to the 2nd Respondent and were carrying out criminal investigations relating to the disputed legal ownership of Land Reference Numbers 36/VII/1X6, 3X/VII/5X5, 36/VII/5X4, Nairobi/Block 49/1X8, Nairobi/Block 49/1XX7, Nairobi/Block 49/1XX6 situated at Eastleigh Estate within Nairobi.
 8. The ex parte applicant avers that at no time was he summoned or requested by the 1st and 2nd respondents to voluntarily submit himself to investigations or to visit their offices to record a statement prior to the said actions by the 1st and 2nd respondents. He further argues that it is evident that the 1st and 2nd respondents are carrying out investigations with regard to a dispute between Ngamau Limited



together with other undisclosed third parties against himself with regard to ownership of the disputed property.

9. The applicant also asserts that the 2nd respondent has continued to summon him to the headquarters and also to Ruaraka Police Station every week and that he has been subjected to continuous harassment, threat and mental anguish.
10. Further, that the 1st and 2nd respondents are acting at the behest of unnamed complainants with whom they have conspired with intent to use the criminal justice system to gain unfair and undue advantage should the dispute proceed to the Environment and Land Court.
11. The applicant asserts that he is entitled to the secure protection of the law as guaranteed under Articles 25,27,28,29,47,49,50 and 51 of *the Constitution*. He further states that arrest is a most drastic recourse which should only be resorted to in the most exceptional circumstances. It is also his averment that if a right or fundamental freedom of a person is likely to be adversely affected, he has a right to be given reasons for that action.
12. Additionally, the applicant proclaims that the 1st and 2nd respondents are bound under Article 244(4) of *the Constitution* to comply with constitutional standards of human rights and fundamental freedoms.

The Respondents' Response.

13. The Respondents filed grounds of opposition dated 8th November 2024 and a Notice of Preliminary Objection dated 4th February 2025.
14. In their grounds of opposition, the respondents contend that the judicial review application is premature, incompetent, and an abuse of court process. They claim the applicant is improperly seeking to block legitimate criminal investigations into alleged land fraud, thereby interfering with the statutory and constitutional mandates of the investigative authorities.
15. They further contend that the application wrongly invites the court to intervene in matters reserved for the criminal trial process, and emphasize that judicial review is concerned with procedural fairness, not the merits of a case. The respondents contend that there is no evidence of illegality, irrationality, or procedural impropriety in the investigations, and that granting the orders sought would undermine their lawful functions under the *National Police Service Act*. They urge the court to dismiss the application with costs.
16. The respondents contend that the dispute concerns land matters, specifically involving Land References Nairobi/Block/49/1X8, Nairobi/Block/49/1X7, Nairobi/Block/49/1XX6, Nairobi/Block/49/1XX7, and therefore falls within the exclusive jurisdiction of the Environment and Land Court (ELC) as provided under Article 162(2)(b) of *the Constitution*.
17. They assert that, under Article 165(5)(b), the High Court lacks jurisdiction to hear and determine this judicial review application. They also note that the Environment and Land Court has the power to issue judicial review remedies under Section 7(b) of the *Environment and Land Court Act*. Finally, they contend that the application improperly seeks to interfere with lawful police investigations protected under Section 24(e) of the *National Police Service Act*.

Submissions.

18. The ex parte applicant filed written submissions dated 18th March 2025. He argues that fundamental rights and freedoms are inherent and may only be limited as allowed by *the Constitution*. He emphasizes



- that the respondents, being State organs, are constitutionally bound to uphold national values such as the rule of law, human rights, integrity, and accountability under Article 10(2).
19. The applicant also submits that the 1st and 2nd respondents violated these constitutional principles by arbitrarily and unlawfully assaulting and torturing the applicant under the guise of an arrest him in a matter involving a nonexistent dispute with no complainant. It is also submitted that while police have powers to investigate, such powers must be exercised lawfully and reasonably within constitutional limits.
 20. He relies on the case of Republic v County Director of Education, Nairobi & 4 others Ex-parte Abdukadir Elmi Robleh [2018] eKLR where the court is said to have observed that a notice as contemplated under Article 47 of *the Constitution* as read with section 4(3) of the *Fair Administrative Action Act* must not only be prior to the decision but must also be adequate and must disclose the nature and reasons for the proposed administrative action. This was also the position in the case of Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR relied on by the applicant.
 21. The applicant further relies on Msagha vs. Chief Justice & 7 Others Nairobi HCMCA no. 1X62 of 2004 (Lessit, Wendo & Emukule, JJ on 3/11/06) (HCK) [2006] 2 KLR 553 where the court is said to have held that the principle of natural justice, particularly the right to be heard ("audi alteram partem"), is a fundamental rule derived from English common law and widely adopted due to British colonial influence. Further, that it is essential that any judicial or quasi-judicial body upholds this principle as a decision made without hearing the affected party is inherently unfair.
 22. The ex parte applicant argues that the respondents' decision to arrest and prosecute him was unlawful, irrational and a breach of the principle of proportionality. The applicant argues that police cannot arrest citizens arbitrarily with the excuse that they will have an opportunity to defend themselves during trial. He states that arrest and prosecution must be based on substantive legal grounds and be exercised reasonably.
 23. The applicant relies on Republic v Commissioner of Co-operatives ex parte Kirinyaga Tea Growers Cooperative Savings & Credit Society Ltd [1999] EALR 245, where the Court of Appeal held that statutory powers must be exercised reasonably and not arbitrarily or in bad faith. He also relies on the case of Republic v Ministry of Planning and Another ex-parte Professor Mwangi Kaimenyi (Misc. Application No. 1769 of 2003), where the court held that courts can intervene when public bodies act unreasonably, in bad faith, or consider irrelevant factors.
 24. The applicant also relies on the case of Patrick Ngunjiri Muiruri v DPP [2017] eKLR, where the Court is said to have emphasized that while the DPP's discretion is broad, it is not unaccountable. That the courts can review the DPP's decisions for rationality and procedural fairness. He also relies on R v Inspector General of Police & 3 Others Ex Parte Lillian Wangari & 5 Others [2017] eKLR, and R v Attorney General ex parte Kipngeno Arap Ngeny (HCC App. No. 406 of 2001), where the court held that there must be a proper factual foundation before instituting criminal proceedings, failing which the prosecution would be suspect for ulterior motive or improper purpose.
 25. The applicant further relies on the case of Republic v Director Public Prosecution & 2 others; Evanson Muriuki Kariuki (Interested Party); Ex parte James M. Kahumbura [2019] eKLR, where the court stressed that prosecutions without proper basis are vexatious and actionable. Reliance is also placed in Republic v Chief Magistrate's Court at Mombasa ex parte Ganjee & Another, where the court condemned the use of criminal processes to advance civil disputes, terming such actions as an abuse of process; and the decision in Evanson Muriuki supra where it was stated that vexatious proceedings which are those lacking legal basis and intended to harass or annoy, should not be allowed to proceed.



26. The applicant argues that the intended prosecution is tainted with malice, lacks prospects of success, and would amount to a waste of public resources. In support, he cites Justice Mativo's dicta in *Evanson Muriuki supra*, emphasizing the prudent use of prosecutorial resources.
27. It is the applicant's further submission that he seeks judicial review remedies specifically prohibition and certiorari to stop the threatened arrest and prosecution. He also relies on *Kenya National Examinations Council v Republic ex parte Geoffrey Gathenji Njoroge, Civil Appeal No. 266 of 1996*, where the Court of Appeal clarified that prohibition prevents a public body from taking unlawful future action, while certiorari quashes decisions already made that are ultra vires or violate natural justice.
28. The applicant further argues that the respondents failed to file a replying affidavit and instead filed only grounds of opposition, which are inadequate responses to allegations made on oath. It is his case that the failure to respond to the application by way of a replying affidavit renders the averment in the application uncontroverted as grounds of opposition are not a proper way of responding to issues raised under oath.
29. This position according to the applicant is supported by *Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR, where the court cited the case of *Peter O. Nyakundi & 68 others v Principal Secretary, Ministry of Devolution & Planning* [2016] eKLR, and by *Kennedy Otieno Odiyo & 12 Others v Kenya Electricity Generating Co. Ltd* [2010] eKLR, where the courts held that grounds of opposition are general legal denials and cannot rebut affidavit evidence.
30. The applicant also relies on the case of *Faustina Njeru Njoka v Kimunyee Factory Limited* [2022] eKLR, where the courts reiterated that a replying affidavit is the proper way to respond to sworn allegations and that where none is filed, the application remains unchallenged. The applicant also cites *Gulleid v Registrar of Persons & another* [2021] KEHC 110 (KLR), where the High Court ruled that uncontroverted factual claims in the absence of a replying affidavit are deemed proved on a balance of probabilities.
31. Lastly, the applicant responds to the respondents' preliminary objection that the matter should be heard by the Environment and Land Court (ELC) on account of it involving land. The applicant argues that the matter at hand challenges the legality of the arrest with intention to charge him, which falls within the jurisdiction of the High Court.
32. The applicant relies on *Republic v Chairman, National Land Commission & 2 others ex-parte Peter Njore Wakaba & Macharia Kinyanhui* [2016] eKLR, where Odunga J affirmed that judicial review is a sui generis jurisdiction not limited to civil or criminal categorization.
33. The applicant further outlines the scope of the Environment and Land Court under Section 13 of the *Environment and Land Court Act*, arguing that since his grievance concerns abuse of police powers and not a land dispute per se, the High Court remains the proper forum.
34. The respondents filed written submissions dated 18th March 2025 in which they argue that while they are alive to the fact that this court has jurisdiction to entertain matters in relation to criminal proceedings, prayer no.(iv) which seeks an order against the Land Registrar is not viable as the said Land Registrar has not been enjoined as a party to this case.
35. The respondents rely on the case of *Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others* [2012] eKLR, Supreme Court Application No. 2 of 2011 on the issue of jurisdiction of this court to hear the instant application. In that case, the court held that a court can only exercise jurisdiction as conferred by *the Constitution* or written law and not outside what is arrogated.



36. The respondents refer to section 24(e) of the *National Police Service Act* which provides for the functions of the Kenya Police Service, section 35 on the functions of the Director Criminal Investigations and section 51 (j) on the mandate of the police service.
37. According to the respondents the applicant has failed to show that the respondents' actions are tainted with illegality, irrationality and procedural impropriety since they acted within the ambit of the law in commencing criminal investigations against him in regard to the impugned parcels of land.
38. The respondents also rely on the case of Commissioner of Police and Another Ex-P Michael Monari & Another [2012] eKLR HCJR Application No 68 of 2011, Nairobi where the court reiterated the duty of the police to investigate any complaint once a complaint is made.
39. It is submitted that the role of judicial review in criminal cases is limited and that once the Court is satisfied that the grounds for prohibiting a criminal trial have not been established, it cannot go ahead to try and determine the innocence or otherwise of an accused person.
40. The respondents rely on the case of Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR where the court emphasised that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties, the Court would not have jurisdiction in a judicial review proceeding to determine such a matter.

Analysis and Determination.

41. I have considered the application, the verifying affidavit, the statutory statement, the respondents' grounds of opposition and preliminary objection, and the written submissions by the parties. The following issues arise for determination:
 - i. Whether this Court has jurisdiction to entertain the judicial review application in light of the respondents' preliminary objection grounded on Article 162(2)(b) and Article 165(5)(b) of *the Constitution*; ii. Whether the applicant is entitled to the judicial review remedies sought.
42. Whether the High Court has jurisdiction to entertain this judicial review application in light of the respondents' preliminary objection based on Article 162(2)(b) and 165(5)(b) of *the Constitution*. The principles governing preliminary objections were laid down in the landmark case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696, where Law, JA held:

“So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

Newbold, P further emphasized that:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection



does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

43. The Supreme Court in *Independent Electoral and Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR echoed this principle, observing that a proper preliminary objection serves two key purposes: conserving judicial time and shielding parties from unnecessary litigation. However, the Court cautioned against using preliminary objections to prematurely dispose of cases that ought to be heard on their merits.
44. The Court is further guided by the Supreme Court’s pronouncement in *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others* [2014] eKLR, where the court reiterated the relevant principle from the precedent-setting case *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors* (1969) EA 696 as follows:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
45. In that context, this Court is persuaded that a challenge to jurisdiction qualifies as a proper preliminary objection within the meaning of *Mukisa Biscuit* and related jurisprudence. I am satisfied that the respondents’ preliminary objection is properly before the Court.
46. It is trite law that a court must determine the issue of jurisdiction at the earliest possible opportunity. As was held in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR:

“Jurisdiction is everything. Without it, a court has no power to make one more step.”
47. Jurisdiction is defined in *Halsbury’s Laws of England* (4th Ed.) Vol. 9 at page 350 as:

“...the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.”
48. The respondents argue that the dispute concerns land matters involving several properties within Nairobi Eastleigh estate, thereby falling under the exclusive jurisdiction of the Environment and Land Court (ELC) pursuant to Article 162(2)(b) of *the Constitution*. They contend that, by virtue of Article 165(5)(b), the High Court lacks jurisdiction in the matter.
49. They further submit that the Environment and Land Court is empowered to grant judicial review remedies under Section 13 (7) (b) of the *Environment and Land Court Act*.
50. The applicant counters that the argument and contends that the dispute lies not in land ownership but in the legality of actions undertaken by the 1st and 2nd respondents, specifically in relation to arrest and investigation. He argues that the supervisory jurisdiction of this Court under Article 165(6) and (7) squarely covers his grievances.
51. Upon review, this Court agrees with the applicant. While the subject of the police investigation may involve land, the legal question before this Court concerns the lawfulness of the respondents’ exercise



of investigative and prosecutorial powers and not the resolution of ownership or occupation of land dispute. This matter falls within the supervisory jurisdiction conferred upon the High Court by Article 165 (6) and (7) of *the Constitution*.

52. Judicial review proceedings are sui generis in nature and are governed by Article 165(6) and (7) of *the Constitution* while enforcing violation of Article 47 and 50(1) of *the Constitution* on the right to Fair Administrative Action and the right to a fair hearing. The applicant does not seek declaratory or proprietary relief in relation to land; rather, he challenges the legality, rationality, and procedural propriety of the police investigations. That now takes this court to the question of whether this court can issue an order removing the restriction place don the title pending investigations and the straight answer is no. removal of restrictions or encumbrances from the register is the function of the Land Registrar and the Environment and land Court.

53. In Republic v Chairman, National Land Commission & 2 others ex-parte Peter Njore Wakaba & Macharia Kinyanjui [2016] KEHC 5468 (KLR), the Court stated:

“However, where the matters raised fall both within their jurisdiction and outside, it would be a travesty of justice for the High Court to decline jurisdiction since it would mean that in that event a litigant would be forced to institute two sets of legal proceedings. Such eventuality would do violence to the provisions of Article 159 of *the Constitution*. As was held by this Court in Nairobi High Court Petition No. 613 of 2014 Patrick Musimba vs. The National Land Commission and Others:

“...it would be ridiculous and fundamentally wrong, in our view, for any court to adopt a separationistic view or approach and insist on splitting issues between the Courts where a court is properly seized with a matter but a constitutional issue not within its obvious exclusive jurisdiction is raised.”

54. This reasoning was affirmed in Patrick Musimba v National Land Commission & Others, Nairobi High Court Petition No. 613 of 2014, where the Court rejected a rigid separation of issues between the Environment and Land Court and the High Court in cases raising both constitutional and statutory questions.

55. Accordingly, this Court finds that it has jurisdiction to hear and determine the present judicial review application. The respondents’ preliminary objection is therefore found to be devoid of merit and is hereby dismissed.

56. On Whether the applicant is entitled to the judicial review remedies sought.

57. The applicant has challenged the decision to investigate him, contending that he was neither summoned nor requested to appear at the police station to record a statement. He further alleges that he was not given prior notice before adverse action was taken against him and that no reasons were supplied for the decision to investigate.

58. However, the applicant admits in his verifying affidavit that during a raid on his home, the police were acting under a valid search warrant issued by the Chief Magistrates Court. While the police are not required to give prior notice before executing a search warrant, they are constitutionally bound under Article 244(c) and (d), as well as the *Fair Administrative Action Act*, to act fairly, reasonably, and with respect for human rights.



59. The *National Police Service Act*, the *Criminal Procedure Code*, and *the Constitution* permit arrest without prior summons, provided it is not arbitrary, oppressive, or actuated by malice. The mere fact that the applicant was not summoned prior to arrest does not, of itself, render the action unlawful.
60. In *Republic v OCS, Nairobi Central Police Station & 2 Others; Ex parte Applicant: Sixtus Gitonga Mugo* [2020] KEHC 7039 (KLR) the court observed that:
- “There are general principles, which should underlie the approach to investigations. The police must at all times uphold the rule of law, the integrity of the criminal justice system and respect the fundamental rights of all human beings to be held equal before the law, and abstain from any wrongful discrimination.
- “The primary duty of the police is to seek justice within the bounds of the law, not merely to seek prosecution. The police serve the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion not to pursue criminal charges in appropriate circumstances. The police are required to protect the innocent and to seek prosecution of the culpable, and to consider the interests of victims and witnesses.
- The decision to investigate is of great importance. It can have the most far-reaching consequences for an individual. A wrong decision to investigate or conversely, a wrong decision not to investigate, both tend to undermine the confidence of the community in the criminal justice system. For victims, a decision not to investigate can be distressing. The victim, having made what is often a very difficult and occasionally traumatic decision to report a crime, may feel rejected and disbelieved. It is therefore essential that the investigations receive careful consideration.”
61. Notably, while the applicant claims that he was never summoned, he simultaneously depones that he has been summoned on several occasions to both DCI headquarters and Ruaraka Police Station in relation to the alleged land fraud. These statements are contradictory and undermine his claim of procedural unfairness.
62. The applicant also alleges harassment, threats, and mental anguish, but no evidence has been placed before this Court to substantiate those claims. No complaint was lodged with the Independent Policing Oversight Authority (IPOA) under Section 6 of the IPOA Act, nor was any constitutional petition filed under Article 22 for enforcement of rights.
63. In the absence of credible evidence of bad faith, procedural impropriety, or violation of rights, the Court finds no basis to interfere with the investigative and arrest powers of the police merely because no summons was issued.
64. The applicant further claims that unnamed complainants are weaponizing the criminal justice system in a civil land dispute. It is a cardinal principle that he who alleges must prove. The burden rests with the applicant to demonstrate that the criminal process has been abused. In the absence of such proof, the Court must decline to intervene.
65. In this case, no evidence has been presented to show that the complainants are his known adversaries in a land dispute, or that the investigations are driven by ulterior motives.
66. Judicial review cannot be used to shield individuals from legitimate investigations. The availability of oversight mechanisms, such as IPOA and Article 22 petitions, underscores this point.



67. The Applicant relies on the Respondents' failure to file a replying affidavit to assert that his allegations remain uncontroverted. While it is trite law that unchallenged evidence may be deemed admitted, this principle is not absolute, particularly in judicial review proceedings, which are primarily concerned with the legality of the decision-making process rather than the merits of the decision itself. The Court is guided by the principle that judicial review remedies are discretionary and must be granted based on established legal thresholds, regardless of whether the Respondents have filed responses.
68. It is a well-established principle that judicial review is a discretionary remedy grounded on evidence, not merely procedural default. As was held in *Pastoli v Kabale District Local Government Council and Others* [2008] 2 EA 300, judicial review is concerned with "illegality, irrationality and procedural impropriety" and the Applicant must still demonstrate the presence of one or more of these grounds to merit relief. Accordingly, the mere absence of a replying affidavit, without more, is insufficient to warrant the grant of judicial review orders.
69. In the present case, the applicant has not annexed any documentary or corroborative evidence to support his allegations of harassment, bad faith, or abuse of power. Bare assertions, even if unchallenged, do not automatically translate into proof of illegality or impropriety sufficient to warrant the quashing of an investigative process.
70. Courts must exercise caution to ensure that they do not impede or stifle lawful investigations merely on the basis of unsubstantiated allegations. It is incumbent upon an applicant to place credible material before the Court demonstrating that the respondents have acted unlawfully, arbitrarily, or in breach of constitutional or statutory safeguards. In the absence of such evidence, the Court is disinclined to interfere with the investigatory mandate vested in the relevant authorities.
71. The Court in the case of *Faustina Njeru Njoka v Kimunye Tea Factory Limited* [2022] KEELC 491 (KLR) cited by the applicant observed as follows;

30. The application before the court was defended by the respondent by way of grounds of opposition and preliminary objection. The applicant on its part has argued that failure by the respondent to file a replying affidavit resulted to the application being unchallenged and uncontroverted. The legal provision on ways of opposing an application is Order 51 rule 14 of the Civil Procedure Rules which provides that;

"Any respondent who wishes to oppose any application may file any one or a combination of the following documents —

31. The applicant has opposed the application herein by way of grounds of opposition and preliminary objection. From the provisions of Order 51 rule 14, it is evident that the mode elected by the respondent to oppose the application is one recognised and allowed by the law.

72. The court went on to state:

I now move to the grounds of opposition adduced by the respondent. It is argued that the grounds of opposition as filed do not contain a single statute and they contain matters of facts without supporting evidence. According to the applicant, failure to respond to the application by way of replying affidavit rendered the averments in the application uncontroverted. A perusal of the grounds of opposition shows that the said grounds largely respond to the averments in the application, simply put they address issues of fact.



34. I have considered the court of appeal authority relied upon by the applicant in Civil Appeal No. 95 of 2016 in the case of Daniel Kibet Mutai & 9 others v Attorney General [2019] eKLR where the court cited with authority the case of Peter O. Nyakundi & 68 others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another [2016] eKLR which stated

“As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that they were victims of the post-election violence. Ground of Opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath.

35. Further in the case of Kennedy Otieno Odiyo & 12 Others v. Kenya Electricity Generating Company Limited [2010] eKLR the court held as follows:-

“The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the applicant in its supporting affidavit. Thus, what was deponed to was not countered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant’s supporting affidavit, means that the respondents have no claim against the applicant”.

36. From the authorities I have cited above, grounds of opposition are to be deemed as general averments and do not deny or respond to issues in an application. A preliminary objection and grounds of opposition though means of opposing an application they are not to be used when one intends to deny allegations in an application. In my view a replying affidavit would best serve to deny issues raised in an application. It has been held that where a replying affidavit is not filed then in essence the averments in an application are deemed as uncontroverted and unchallenged. In considering the mode of opposition opted to by the respondents and the averments therein I find that the issues in the application are not rebutted and the application stands unopposed.

37. However, though having held as such, the application by the applicant should not be deemed as having been allowed. This court has a duty to consider the application and proceed to determine it on its merits.

73. It is clear from the above excerpt that although the court appreciates that the issues in the application are not rebutted and the application stands unopposed, the court must proceed to determine the application on its merits.

74. In view of the foregoing, this Court finds that the ex parte Applicant has failed to demonstrate that the Respondents acted unlawfully, irrationally, or in breach of any constitutional or statutory provisions in undertaking the impugned criminal investigations and/or contemplated prosecution.

75. The Applicant has not met the threshold for the grant of the judicial review orders sought. Judicial review remedies, being discretionary in nature, are not to be issued lightly, particularly where doing so would fetter or interfere with the lawful exercise of investigatory or prosecutorial powers. Accordingly, the application dated 6th November 2024 is found to be devoid of merit and the same is hereby dismissed.

76. Each party shall bear its own costs of the application.

77. This file is closed.



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

R.E. ABURILI

JUDGE

