



Mwangi v Director of Criminal Investigations & another; Raei Investment Limited & another (Interested Parties) (Judicial Review Miscellaneous Application E120 of 2024) [2025] KEHC 9583 (KLR) (Judicial Review) (25 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9583 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E120 OF 2024**

RE ABURILI, J

JUNE 25, 2025

BETWEEN

EDWIN KARINGA MWANGI APPLICANT

AND

THE DIRECTOR OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

AND

RAEI INVESTMENT LIMITED INTERESTED PARTY

MERCY OKIRO, ARBITRATOR INTERESTED PARTY

JUDGMENT

1. This judgment determines the ex parte applicant’s notice of motion dated 30th September, 2024 filed pursuant to leave to apply granted on 20th September, 2024 by Ngaah J.
2. The Applicant seeks the following judicial review orders:
 - a. an Order of Mandamus compelling the 1st and 2nd Respondents to release the original Service Level Agreement dated 8th January, 2018 to the Applicant for further independent forensic investigations.
 - b. an Order of Prohibition prohibiting the Respondents relying on the questioned forensic examination and consequently taking further actions in relation to preferring any charges arising from the forensic examination.



- c. an Order of Certiorari to quash the decision of the 2nd Respondent to prefer charges against the Applicant arising from the findings of the forensic examination and any other decision arising therefrom.
 - d. Costs of the Application be provided for.
3. The Notice of motion is supported by the affidavit sworn by Edwin Karinga Mwangi, who is the ex parte applicant herein, the statutory statement and the applicant's verifying affidavit filed in support of the chamber summons for leave to apply dated 17th September, 2024 and the annexures thereto.
 4. The ex parte applicant's case is that on 8th January 2018, the Applicant and the 1st Interested Party entered into a Development Consultancy Service Level Agreement, pertaining to proposed residential developments on Land Reference Nos. 3734/202 and 3734/209, located in Lavington, Nairobi. That the Applicant duly discharged his contractual obligations and subsequently demanded remuneration for the services rendered under the agreement.
 5. The applicant claims that despite him complying with the terms of the contract, the 1st Interested Party failed, refused, and/or neglected to remunerate the Applicant in accordance with the agreed terms. That as a consequence of the 1st Interested Party's failure to remit the payment, the Applicant declared a dispute, leading to the commencement of arbitration proceedings.
 6. It is the ex parte applicant's case that at the commencement of the arbitration, counsel for the 1st Interested Party raised concerns regarding the authenticity of the 1st Interested Party's signature on the agreement, alleging forgery and demanded that the document be submitted to the 1st Respondent, the Directorate of Criminal Investigations (DCI) for forensic examination. That the Applicant agreed to release the original document in his possession for forensic examination, as requested by the 1st Interested Party.
 7. That pursuant to Order for Directions No. 2 dated 22nd February 2024, the 2nd Interested Party directed the Applicant to submit the original Development Consultancy Agreement to the Arbitrator by 1st March 2024, which directive the applicant is said to have complied with by surrendering the original Service Level Agreement, which was subsequently forwarded to the 2nd Interested Party via a forwarding letter dated 29th February 2024.
 8. The applicant states that during an arbitral session held on 9th April 2024, the 2nd Interested Party notified the Applicant that the original agreement had already been forwarded to the DCI Parliament for further forensic investigation. That thereafter, the Applicant was ordered to comply with pre-trial directions, which he did by preparing and filing the requisite pre-trial documents as instructed.
 9. That on 8th July 2024, the Applicant received a letter from the 2nd Interested Party, dated 10th June 2024, originating from the 1st Respondent, in which letter, Mr. Samuel L. Kimani, an officer of the 1st Respondent, enclosed the results of the forensic document examination and requested that the original document be withheld pending further directions from the 2nd Respondent on the disposal of the complaint lodged by the 1st Interested Party.
 10. The applicant avers that the forensic examination revealed that the signature attributed to the 1st Interested Party did not originate from the directors of the 1st Interested Party.
 11. Aggrieved by both the process and the outcome of the forensic examination, the Applicant formally notified the Arbitral Tribunal of his objections and requested the return of the original document to facilitate an independent investigation.



12. The applicant states that due to the delay by the 1st Respondent in releasing the original agreement, the Applicant wrote to the 1st Respondent, expressing his dissatisfaction with the process and outcome of the examination and requested for the immediate release of the original document.
13. That despite the Applicant's persistent efforts to retrieve the agreement from the 1st and 2nd Respondents, these attempts have been unsuccessful, prompting the Applicant to seek further intervention from the 2nd Interested Party.
14. That on 22nd July 2024, the 2nd Interested Party formally wrote to the officer in charge of investigations at the 1st Respondent, demanding the release of the original document.
15. Later, on 25th July 2024, the 2nd Interested Party notified the Applicant via email that the officer in charge of investigations at the 1st Respondent had refused to release the original document and had instead forwarded it to the 2nd Respondent for further action.
16. That the 2nd Interested party vide a letter dated 5th September, 2024 raised concerns with the 1st Respondent as to the conduct of its officer in the handling of the matter and the actions arising therefrom.
17. However, that until the time of filing of these proceedings, the Respondents had not provided satisfactory reasons for withholding the original document and that all attempts by the Applicant to recover it have been futile.
18. The applicant contends that the actions of the 1st Respondent constitute a violation of the principles of natural justice, that his right to access justice has been gravely impaired by the actions of the Respondents, as they have effectively prevented him from conducting an independent forensic examination, which alleged obstruction has directly led to the suspension of the ongoing arbitral proceedings, which should not have been delayed to that extent.
19. The applicant asserts that the decision by the officer of the 1st Respondent lacks any rational connection to the purpose for which it was made, that the actions of the 1st Respondent amount to an abuse of discretion, with the unreasonable delay or failure to act in accordance with duties imposed by law constituting a violation of legitimate expectations and an abuse of power.
20. In light of the foregoing, the Applicant approached this court seeking for redress.
21. Opposing the application dated 30th September, 2024, the 2nd respondent Director of Public Prosecutions filed grounds of opposition dated 9th October, 2024 contending that the ex parte applicant's Application is misconceived, bad in law and fatally defective as it seeks an order of Certiorari to quash a decision which is yet to be made by the 2nd Respondent; that the application is pre-emptive and presumptuous as there is no decision that has been made by the 2nd Respondent over the subject matter herein capable to be quashed by the court by issuance of an order of Certiorari as sought, the position is confirmed by the applicant under paragraph 14 of his supporting affidavit that a decision is yet to be made.
22. That the instant Application is incompetent and unmerited as it seeks to have the Respondents prohibited from performing what they are constitutionally and statutorily mandated to do/perform, the 1st Respondent is mandated under Articles 244, 245 of *the Constitution* as read with sections 24 and section 35 of the *National Police Service Act* No.11A of 2011 to among other roles, detect and investigate crime and the 2nd Respondent is mandated under article 157 of *the Constitution* as read with the Office of the Director of Public Prosecution (ODPP) Act, 2013 to conduct prosecutions.



23. That the application offends article 157(10) as it seeks to have the 2nd Respondent directed or controlled by way of issuance of an order compelling him together with the 1st Respondent to surrender the stated Service Level Agreement yet the matter is still under investigations.
24. That the Respondents having acted within the law and in exercise of their respective constitutional and statutory mandates, the instant application has not met the threshold of the Judicial Review Application as was espoused in the case of Commissioner of Income Tax v Pan African Paper Mills (EA)Ltd.(2018)eKLR cited by Justice Ngaah in the case of Republic v Joe Mucheru, Cabinet Secretary Ministry of Information Communication and Technology & 2 others; Katiba Institute & another (Exparte); Immaculate Kasait, Data Commissioner (Interested Party) (Judicial Review Application E1138 of 2020) [2021] KEHC 122 (KLR) (Judicial Review) (14 October 2021).
25. That by the institution of the instant application, the applicant is blatantly abusing the court process considering that the matters complained of are under investigation and no formal decision has been made over the same, thus, the applicant intends to use the instant application to avoid being investigated over the forgery complaint lodged against him by the 1st Interested Party.
26. The 2nd respondent urged the court to dismiss the application with costs.
27. The 1st interested party filed grounds of opposition dated 28th October, 2024 contending that the application fails to identify or particularize any unconstitutionality, illegality, irrationality, procedural impropriety or any unfairness whether in the investigative or in the administrative actions of the 1st respondent in the investigative process that was followed by DCI to probe the criminal complaint of forgery against the applicant by the 1st interested party.
28. That the contents of the forensic document's examiners' report DCI/ORG/8/3/1/228/2024 dated 21st march 2024 determined that the applicant had indeed forged the original Development Consultancy Agreement the subject of these proceedings.
29. That there is no prove of breach of any of the applicant's rights under the law or *the constitution* to warrant the orders sought and that there is no contrary evidence to rebut the legal presumption of legality and propriety of official acts done by the respondents.
30. That there is no legal basis for interfering with the respondents' lawful and constitutional mandates of investigating criminal offences and where there is sufficient evidence gathered against the applicant to sustain criminal charges against him and that the original documents subject of the forgery investigations is critical evidence to sustaining the criminal charges hence it will be detrimental to the investigations and the complainant if the document is released to the applicant who is the person of interest.
31. filed the instant application seeking orders of certiorari, prohibition and mandamus against the Respondents. The main ground for the orders sought is that the 1st Respondent had investigated a complaint lodged by the 1st interested Party over a Service Level Agreement which had been allegedly been executed by the two parties, which Agreement was a subject of Arbitration which was being presided over by the 2nd Interested Party. The 1st Interested Party had alleged that the Applicant had forged the signature of the said Agreement presented to the Arbitrator thus, the 1st Respondent acted on the compliant by getting the said Agreement and subjected the same to the document examiner who indicated that indeed, the document had been forged. Thereafter, the 1st Respondent upon completion of the investigation, he forwarded the file to the 2nd Respondent for advice and direction. The 2nd Respondent is yet to direct on how the matter shall be disposed of. In the meantime, the Applicant has filed the instant Application.



32. That this court has a duty to uphold the rule of law and due process and that the applicant has come to court to frustrate criminal charges against him and that mere existence of arbitration proceedings cannot prevent the respondents from investigating criminal complaints nor prevent prosecution for offences committed.

33. The 1st interested party urges this court to dismiss the application with costs

Submissions

34. The application was canvassed by way of written submissions.

35. In his submissions dated 24th March 2025, the ex parte applicant framed two issues for determination and submitted on the same. The issues are:

- i. Whether the Respondents' refusal to release the subject document for an independent forensic examination, their continued and unjustified retention of the document, their interference with the arbitration proceedings, and their failure to honor a formal undertaking to surrender the document violate the Ex-Parte Applicant's rights and constitute acts of illegality, procedural impropriety, and irrationality; and
- ii. Whether the Ex-parte Applicant is entitled to the reliefs sought.

36. On the first issue, the applicant submitted that the Respondents' refusal to release the subject document for an independent forensic examination, their continued and unjustified retention of the document, their interference with the arbitration proceedings, and their failure to honor a formal undertaking to surrender the document violate the Ex-Parte Applicant's rights and constitute acts of illegality, procedural impropriety, and irrationality.

37. The applicant relies on Article 47(1) and (2) of *the Constitution* which guarantees every person the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

38. On the broad grounds on which the Court exercises its judicial review jurisdiction, reliance was placed on the Ugandan case of *Pastoli v Kabale District Local Government Council and Others* [2008] 2 EA 300 wherein the Court cited with approval the case of *Council of Civil Unions v Minister for the Civil Service* [1985] AC 2 and *An Application by Bukoba Gymkhana Club* [1963] EA 478 at 479 setting out the parameters for judicial review which are proof of illegality, irrationality and procedural impropriety of the impugned decision.

39. Further reliance was placed on the cases of *Agnes Ngenesi Kinyua aka Agnes Kinywa v Director of public prosecution & another* [2019] eKLR Odunga J cited the case of *Kuria & 3 Others v Attorney General* [2002] 2 KLR 69, on the powers and duty of this court to prohibit criminal prosecutions which are laced with extraneous matters divorced from the goals of justice.

40. It was submitted that the Respondents' unjustified and unreasonable delay in releasing the original document, despite the completion of investigations and the existence of an undertaking, has inflicted substantial prejudice by obstructing the arbitration process and delaying dispute resolution; thereby violating the principles of administrative efficiency, accountability and prompt decision-making, thereby warranting the intervention of this Court through judicial review.

41. The applicant further submitted that the Respondents' continued withholding of the original document without sufficient justification amounts to a violation of the right to fair administrative action, as enshrined in Article 47 of *the Constitution* and the *Fair Administrative Action Act*. That the



Respondents' failure to provide a cogent explanation for retaining the document, coupled with their disregard of a lawful undertaking, renders their conduct arbitrary and unreasonable, thus justifying judicial intervention.

42. That the 1st Respondent's officer engaged in conduct amounting to an abuse of administrative power by providing contradictory explanations regarding the status and whereabouts of the original document, which conduct erodes transparency, accountability and good governance, which are fundamental pillars of lawful public administration thereby necessitating judicial review to safeguard procedural integrity and prevent further injustice.
43. Further submission was that the Respondents' failure to release the original document has deprived the Ex-Parte Applicant of the opportunity to conduct an independent forensic examination, an essential safeguard for ensuring a fair hearing and just resolution of the dispute. This denial, according to the applicant, constitutes a violation of his constitutional right to a fair hearing under Article 50 of *the Constitution* and contravenes the principles of natural justice.
44. Additionally, that the Respondents' actions have eroded public confidence in the integrity of administrative processes and the fairness of decision-making. Given the public interest in ensuring that administrative functions are conducted with transparency, accountability, and adherence to the rule of law, judicial review is necessary to uphold the integrity of governance and restore trust in the proper functioning of administrative systems.
45. In response to the 2nd Respondents' grounds of opposition dated 9th October 2024 and their submissions of even date, the Ex-Parte Applicant submits that while the Respondents are vested with the authority to investigate and prosecute, such powers must be exercised in a manner that upholds the principles of legality, reasonableness, procedural fairness, and administrative efficiency. Any deviation from these standards warrants judicial scrutiny.
46. In the instant matter, the Ex-Parte Applicant submits that he has been subjected to persistent, unexplained phone calls from the Respondents, summoning him to their offices for unspecified "talks." This, he submits, is, despite his full cooperation, having recorded a statement and furnished all relevant materials to facilitate the investigation. That failure the respondents have failed to clarify the purpose of these summonses, raising concerns about procedural irregularity and potential abuse of investigative powers.
47. Moreover, that despite their statutory mandate to conduct investigations and prefer charges where necessary, the Respondents have failed to take any concrete action for over a year since the commencement of investigations and the issuance of a forensic report. This inaction, according to the applicant, amounts to an unreasonable and unjustified delay, which prejudices the Ex-Parte Applicant and undermines the credibility of the investigative process.
48. The Ex-Parte Applicant submits that any investigative and prosecutorial process must be conducted with diligence and finality, ensuring that justice is neither delayed nor denied. He reiterates that the Respondents' failure to act within a reasonable timeframe necessitates the intervention of this Court to prevent further prejudice and uphold the integrity of due process.
49. Additionally, that the Respondents have failed to adhere to fundamental procedural requirements in the investigative process, particularly by neglecting to summon him to record a cautionary statement or any other statement under inquiry, as mandated under the Guidelines on the Decision to Charge, 2019. It is argued that the absence of this critical procedural safeguard raises serious concerns regarding the lawfulness, fairness and rationality of the Respondents' actions.



50. Reliance was placed on in *George Joshua Okungu & Another v The Chief Magistrate's Court Anti-Corruption Court at Nairobi & Another* [2014] eKLR on the effect of delayed prosecution after investigations thereon had closed.
51. The Ex-Parte Applicant further submits that the Respondents' failure to take any meaningful action on the complaint for over a year is neither reasonable nor justifiable in an open and democratic society founded on human dignity, equality, and freedom. That such an inordinate and unexplained delay amounts to an implied and unjustifiable limitation on fundamental rights and freedoms, particularly the right to fair administrative action under Article 47 of *the Constitution*, undermines the rule of law and the integrity of administrative processes and also compromises the Ex-Parte Applicant's legitimate expectation of an expeditious and fair resolution. In the circumstances, judicial intervention is warranted to prevent further procedural impropriety and ensure adherence to constitutional and statutory obligations.
52. The case of *Re Hardial Singh and Others* [1979] KLR 18; [1976-80] 1 KLR 1090 was relied on where Simpson, J (as he then was) held that in the ordinary way and particularly in cases, which affect life, liberty or property, the concerned authority should give reasons and if he gives none the court may infer that he had no good reasons. Similarly, that where the reason given is not one of the reasons on which the he is lawfully and justifiably entitled to rely, the Court is entitled to intervene since such action would then be based an irrelevant matter.
53. Without prejudice to the foregoing and in further response to the Respondents' grounds of opposition, the applicant submits that the release of the original document would not, in any way, impede or hinder the Respondents from carrying out their investigative mandate. That there exists no lawful justification for continued retention of the subject document, as its release would merely accord the Ex-Parte Applicant an equitable opportunity to conduct an independent forensic examination, thereby upholding the principles of procedural fairness and equality of arms in the ongoing proceedings.
54. It was submitted that the Respondents' continued retention of the document, despite the completion of investigations by the Directorate of Criminal Investigations (DCI), constitutes an unreasonable, unjustified, and procedurally improper administrative action.
55. Further, that the Respondents had previously undertaken to release the document upon conclusion of forensic examination, yet they have failed to honor this commitment, thereby breaching the principle of legitimate expectation.
56. Additionally, that since investigations have already been concluded, the release of the subject document would not, in any way, impede the Respondents from proceeding with the process of preferring charges, if at all. That the unjustified withholding of the document prejudices the Ex-Parte Applicant's right to a fair hearing and due process, warranting the intervention of this Court to uphold the principles of legality, fairness, and administrative propriety.
57. It was submitted that the Ex-Parte Applicant is an Advocate of this Court, practicing under the firm of Karinga Mwangi & Co. Advocates, and has, at all times, fully cooperated with the Respondents, dutifully complied with every summons issued to him without fail, demonstrating utmost good faith and respect for the investigative process yet the Respondents continue to act in a manner that frustrates his legitimate rights and expectations, warranting this Court's intervention.
58. On whether the Ex-parte Applicant is entitled to the reliefs sought, it was submitted that the Applicant has sufficiently demonstrated a basis for the reliefs sought, as the Respondents' actions constitute illegality, procedural impropriety, and abuse of power.



59. In their written submissions dated 9th October, 2024, the 2nd respondent DPP submitted, relying on the Pastoli case (supra) and argued that the grant of the orders is not as of right to the applicant, as it is subject to the discretion of the court. Further, that the existence of a civil dispute or arbitration for that matter cannot prevent the police from investigating and prosecuting a suspect in respect of a related criminal complaint.
60. On alleged failure by the respondents to return to the applicant the Development Service Level Agreement, it was submitted that the subject document was submitted to the 1st respondent for investigations into alleged forgery following the complaint lodged by the 1st interested party and that the first respondent having investigated and submitted its findings to the 2nd respondent awaiting directions, the applicant came to court seeking for release the original document which, if released, would prejudice the investigations into alleged forgery, now that there is prima facie evidence that the signatures purported to have been for the director of the 1st interested party have been found not to be his.
61. It was submitted that the institution of the instant application is premature and pre-emptive since no decision has been made on whether to charge or not charge the Applicant thus, there is no decision in place capable of being quashed by the court. Further, that the matter is still under investigation and therefore, the court cannot be asked to stop the Respondents from doing what they are constitutionally and statutorily mandated to do, noting that no law or constitutional right has been breached. The respondents maintain that they acted within their powers in receiving the complaint and the document for forensic examination to establish the truth concerning the alleged forgery.
62. They submit that So far, due process has been followed hence the application filed herein should be dismissed with costs and that the mere fact that there exists Arbitration proceedings or any other proceedings of civil nature, does not in itself stop the police from investigating the complaint of criminal nature relating to the civil cases or disputes. That all that matters is whether there is a genuine complaint lodged and that there is sufficient ground(s) to show that an offence had been committed.
63. They urge this court to dismiss this application with costs.
64. On behalf of the 1st interested party, submissions were filed opposing the application and relying on the grounds of opposition dated 28th October, 2024 in reiteration of the facts giving rise to the dispute herein.
65. It was submitted, relying on Republic v Minister for Home Affairs and others v Sitamze [2008] e KLR on the grounds for the courts' intervention in judicial review and a submission made that the application does not deserve the orders sought.
66. That the applicant would still enjoy the right to fair trial if he is prosecuted hence there is no reason for release of the original document which is the primary evidence in the forgery complaint, where the DCI has established that indeed there was forgery. Reliance was placed on Paul Ongili Owino v Republic [2106] e KLR where the court dismissed a petition seeking to interfere with criminal prosecution.
67. The 1st interested party also submitted that there is a presumption of regularity of acts of officials hence the court should not interfere in such investigations.
68. Further, that the existence of arbitral proceedings which are civil in nature does not bar criminal investigations and prosecution as this is conduct trials to establish the veracity lawful process protected by section 193 A of the *Criminal Procedure Code*. Reliance was placed on Republic v Commissioner of Police and another exparte Michael Monari and another [2012]e KLR where the court affirmed the duty of the police to investigate crimes and establish the veracity of the evidence against accused



persons whose right to fair trial is guaranteed by courts. The 1st interested party urged this court to dismiss the application with costs.

Analysis and Determination

69. I have considered the application and the responses thereto by the respondents and 1st interested party. In my view, the issues arising for determination are:
- a. Whether the Respondent's continued retention of the document violates the Applicant's constitutional rights or is contrary to the law;
 - b. Whether the Applicant is entitled to judicial review orders of mandamus, prohibition and certiorari in the circumstances.
70. Under Section 35 of the *National Police Service Act* and Section 118 of the *Criminal Procedure Code*, the DCI is vested with statutory authority to investigate offences and seize any item deemed necessary for purposes of evidence. Forgery is an offence under Sections 345 and 349 of the *Penal Code*.
71. In the instant case, the DCI acted on a formal complaint and took possession of the Development Service Level Agreement, the disputed document, a which the applicant was relying on to institute arbitration proceedings claiming that he had performed his part of the bargain but that the 1st interested party had defaulted to pay him his fees as per the contract.
72. The 1st interested party on the other hand denied that its directors ever signed any such agreement with the applicant. Despite the denial and protests by the 1st interested party, the exparte applicant nonetheless declared a dispute and invoking the clause on arbitration in the contentious agreement, he filed a case before the arbitrator, the 2nd interested party herein. It was while the matter was pending hearing before the arbitrator that the 1st interested party reported to the DCI who through the 2nd interested party, obtained the original contested agreement and submitted it to the DCI for forensic examination to determine whether the signatures on the said agreement belong to the directors of the 1st interested party.
73. The forensic report which was shared with the exparte applicant shows that the signatures were not of the directors of the 1st interested party company hence the DCI decided to withhold the original agreement for further evidence gathering to enable them take appropriate legal action.
74. The exparte applicant however complains that the DCI had already done forensic examination and results were out but that they had taken too long to return it to him for an alternative forensic examination to be undertaken since he did not trust those results by the DCI.
75. The exparte applicant also laments that he had been receiving calls from one of the DCI officers over the said document and that he wants the original agreement to engage his own private documents examiner to prove the DCI wrong. He claims that the DCI had taken too long to release the documents which was prejudicial to him applicant.
76. From the facts of this case, it is not in contention that the document in question is the central piece of evidence in the suspected offence of forgery. That being the case, where DCI has received a formal complaint as was the case herein, from the 1st interested party of an alleged forgery of the signatures of its director to make it appear as if the 1st interested party had an agreement with the exparte applicant herein, and the DCI is engaged in investigations to determine whether the complaint is genuine or not, this Court finds no illegality, irrationality or procedural impropriety in the conduct of the Respondents in this regard.



77. This is because, the standard of proof in criminal cases, should one be preferred against the *ex parte* applicant, is one beyond reasonable doubt and secondary evidence cannot be used to establish such a case hence the need to preserve original evidence in allegations of forgery. Furthermore, the applicant is presumed innocent until proven guilty and he is under no obligation to give self-incriminating evidence. It is therefore important that the original documents in investigations involving alleged forgery are preserved.
78. In *Onditi & Another v DCI, Rongai & Another* [2025] eKLR, Gichohi J upheld the DCI's authority to retain original title documents amid forgery allegations, and declined to grant the orders sought by the applicant suspects for release of the said documents that formed the substratum of an ongoing criminal investigation, particularly where expert analysis and possible prosecution were pending.
79. In my view, it is important that original documents suspected to have been forged be retained by the DCI until a decision is made by the 2nd respondent on whether to prefer charges against the *ex parte* applicant in which case, the *ex parte* applicant can still request for second forensic examination on the said signatures. To release such original documents to the *ex parte* applicant before investigations are concluded would severely prejudice the administration of justice.
80. The Applicant claims that he seeks to use the impugned original document in civil proceedings despite it being under active criminal investigation. Regrettably, this Court cannot sanction the use of a potentially forged documents in civil judicial proceedings by the person suspected to have forged signatures of a complainant to create an agreement to benefit himself, when such document is under active criminal investigations.
81. Allowing the release of such a document compromises the integrity of the criminal investigation, particularly in forgery cases where the original document is the *corpus delicti* (i.e., the central piece of evidence).
82. By allowing the document's use in a civil suit despite allegations of forgery, the court risks enabling the use of fraudulent or illegal evidence to pursue financial gain. This would amount to an abuse of the court's civil jurisdiction, where fraud is being used as a sword rather than a shield. It offends the clean hands doctrine, which stipulates that no person should benefit from their own wrongdoing. No doubt, once returned, the document can be altered, destroyed, hidden or manipulated, thereby rendering forensic findings inadmissible or inconclusive.
83. Additionally, this would Create the impression that courts tolerate or facilitate fraud; undermine the public's perception of judicial impartiality and the sanctity of evidence; and set a dangerous precedent of encouraging litigants to weaponize falsified documents knowing they can secure civil remedies before investigations conclude.
84. There exists a conflict between the civil and criminal justice systems when a civil court relies on a document whose authenticity is being disputed in a criminal inquiry. There is also a risk of inconsistent findings, where a civil court might accept the document as valid while a criminal court may find it forged.
85. It is therefore important that where it exists a conflict between the civil and criminal justice systems, a civil court should not rely on a document whose authenticity is being disputed in a criminal inquiry. Courts or tribunals cannot be allowed to indirectly enforce an alleged illegal contract or recognize an alleged tainted document which is under scrutiny by the investigative agency as that would offend the



principle of "ex turpi causa non oritur actio enunciated in the case of *Holman v Johnson* [1775] 1 Cowp 341, in which Lord Mansfield stated that:

“No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.”

86. This principle essentially prevents individuals from benefiting from their own wrongdoing in a court of law. If a person's legal claim is directly linked to an illegal or immoral act they committed, the Court will refuse to hear the case. The idea is that the court should not be seen as condoning or assisting such behavior.
87. Furthermore, in view of the clear provisions of Article 50(2)(a) and (l) of *the Constitution* guaranteeing every accused person the right to be presumed innocent until the contrary is proved and the right to refuse to give self-incriminating evidence, although the Applicant argues that retention of the document violates his right to fair administrative action and legitimate expectation as well as the right to a fair hearing before the arbitrator and to seek independent forensic examiner, whereas these rights are guaranteed under Articles 47 and 50 of *the Constitution* respectively, the rights do not shield a suspect from lawful investigative processes. In other words, the presumption of innocence does not translate into immunity from investigation. It is a procedural right that safeguards the accused during trial, not a bar to the collection of evidence.
88. Thus, the right against self-incrimination is a shield at trial, not a basis for reclaiming a document lawfully seized during investigations. Furthermore, the applicant, if accused of the alleged forgery, has an automatic right to be supplied with documents that the prosecution may want to use in the criminal case. This is a right guaranteed under Article 50(2) (j) of *the Constitution*.
89. Further, the Court must also balance individual rights with the broader public interest in effective criminal justice. This is because Judicial review is not available to pre-empt or frustrate lawful investigations. Where the state's investigative machinery is in motion, courts must refrain from issuing orders that obstruct that process.
90. Additionally, the retention of the document by the DCI is not only lawful but necessary to uphold the integrity of the investigations and possible prosecution.
91. Further, the existence of civil proceedings, in this case, arbitral proceedings, which were, from the evidence on record, resisted by the 1st interested party from the onset, does not in itself bar the DCI and the DPP from investigating and prosecuting the applicant should there be evidence pointing to criminality, unless bad faith is demonstrated. In this case, there has been no evidence of bad faith or the investigations being a vendetta or intended to achieve collateral purpose other than justice for the complainant victim of the alleged crime of forgery.
92. It is for the above reasons that this court finds that the applicant has failed to demonstrate that the Respondents acted unlawfully, unreasonably, or with procedural impropriety. On the contrary, the Respondent's actions are firmly anchored in law and supported by binding precedent.
93. Accordingly, I decline to grant the prayers sought in the application dated 30th September 2024. The notice of motion dated 30th September, 2024 is hereby dismissed.
94. Each party to bear their own costs.
95. I must however mention as I close that although leave to apply was granted by Ngaah J on 20th September, 2024, and the applicant granted 7 days to file and serve the motion, it was not until 2nd October, 2024 that the main motion was filed and even then, the full court fees was not paid. Only Ksh



1500 was paid out of Kshs 10,000 payable for judicial review substantive motions. I have not seen any order enlarging the seven days granted by the court for filing of the application. For that reason, even if the court were to find that the application was meritorious, it was incompetently before the court as it was filed out of the seven days granted by the court with no leave of court sought to enlarge that period and therefore this court would have struck out the application on two fronts. One, for being filed out of the leave granted and second, for failure to pay full court fees on the substantive notice of motion.

96. This filed is closed.

DATED, SIGNED & DELIVERED VIRTUALLY AT NAKURU THIS 25TH DAY OF JUNE, 2025.

R.E. ABURILI

JUDGE

