Republic v Director of Public Prosecutions & 3 others; Otumba (Exparte Applicant); Rono & another (Interested Parties) (Judicial Review Miscellaneous Application E102 of 2024) [2025] KEHC 8957 (KLR) (Judicial Review) (24 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8957 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E102 OF 2024

RE ABURILI, J

JUNE 24, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS ..... 1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE ..... 2ND RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS ..... 3RD RESPONDENT

THE CHIEF MAGISTRATE'S COURT, MILIMANI ..... 4TH RESPONDENT

AND

SAMWEL BRYAN YONGO OTUMBA ..... EXPARTE APPLICANT

AND

JOYCE CHEROTICH RONO ..... INTERESTED PARTY

JOSEPH BODO OTUMBA ..... INTERESTED PARTY

JUDGMENT

1. The Ex parte Applicant SAMWEL BRYAN YONGO OTUMBA was granted leave to file his substantive motion on 23rd August 2024. Subsequently, he filed the motion before this court dated 28th August 2024 seeking an order of prohibition directed to all the Respondents jointly and severally prohibiting any of them from carrying out and/or proceeding with Nairobi Chief Magistrate's Court

Criminal Case No. E746 of 2024 Republic v Samwel Bryan Yongo Otumba and Joseph Bodo Otumba and or any other criminal proceeding in connection with the same subject matter or loan agreement.

2. He also seeks an order of certiorari quashing the entire criminal case and proceedings in Chief Magistrate's Court Criminal Case No. E746 of 2024 Republic v Samwel Bryan Yongo Otumba and Joseph Bodo Otumba.

3. The application is verified by his affidavit sworn on 28th August 2024.

4. The applicant deposes that he entered into a romantic and business relationship with the 1st Interested Party in early 2021. That their dealings culminated in a loan agreement dated 2nd March 2021, under which, she allegedly advanced him Kshs. 2 million. The loan was secured by two motor vehicles, cheques and a civil decree in his favour from HCCC No. 223 of 2011.

5. He argues that the loan transaction was purely civil in nature as a partial repayment of Kshs. 1 million had already been made in cash. According to the applicant, the prosecution was based on fabricated charges intended to coerce repayment and constituted an abuse of the criminal justice process.

6. That on 21st September 2021, his brother the co-accused Joseph Otumba informed him that he had been summoned to the DCI headquarters and that when the applicant contacted the investigating officer, Mr. Gitonga, the latter allegedly threatened and intimidated the applicant. The same officer later allegedly called Mr. Appel Kwengu, a practicing advocate and pressured him to disown a demand letter that had been issued to a third party Abdikahinya Noor Maalim on behalf of 1st Interested Party.

7. The applicant asserts that he did not draft or sign the demand letter, which had been prepared by Mr. Kwengu of Kwengu & Co. Advocates, whom he had referred to the 1st Interested Party in his professional capacity.

8. The Applicant denies that he ever pretended to be an advocate and that the allegations to that effect were fabricated by Ms. Rono to bolster criminal charges and coerce him into repayment. It is his case that there is no evidence that Rono ever paid him or Mr. Kwengu any legal fees, further negating the impersonation claim. The Applicant states that the demand letter was part of a separate debt collection matter involving a third party and that he had no professional role in its issuance.

9. The Applicant further states that on 23rd September 2021, he wrote a letter to the DPP, explaining the nature of the loan and asserting that the dispute was civil and the DPP responded on 7th October 2021, directing the Inspector General to investigate the matter and report back. However, the applicant states that he received no update until nearly three years later, on 17th June 2024, when a DCI officer named Shethi summoned him. That he voluntarily reported to DCI Headquarters on 22nd June 2024, only to be arrested and informed that the DPP had recommended prosecution.

10. He argues that the prosecution is an abuse of process meant to intimidate him into settling a civil debt. That the charges including obtaining credit by false pretense under Section 316(a) of the *Penal Code* are defective, particularly as the loan was backed by post-dated cheques, which under Section 316A(2) do not form the basis of an offence.

11. He relies on Abdalla v Republic [1971] EA 657 KLR, where the court held that issuance of a post-dated cheque did not amount to a misrepresentation of present ability to pay but is a representation that when the cheque is presented on the future date shown on the cheque, there will be funds to meet it.

12. The applicant also invokes Article 23(3)(f) of *the Constitution*, which empowers courts to grant judicial review remedies in the protection of rights. He further relies on the case of Praxedes Saisi & 7 others v Director of Public Prosecutions & 2 Others (Petition 39 & 40 of 2019) (consolidated) [2023] KESC

6 (KLR) (Civ) (27 January 2023) (Judgement) where the court held that judicial review under *the Constitution* allows a court to assess substantive violations, not merely procedural defects.

13. The applicant asserts that in SC Petition No. 6 (E007) of 2022, the court expanded the scope of judicial review beyond traditional common law limits. The applicant also relies on the case of RP Kapur v State of Punjab AIR 1960 SC 866 where the court laid down guidelines to be considered by courts when reviewing prosecutorial powers.

14. The applicant maintains that the DPP and DCI acted with malice, and that the criminal proceedings are tainted with ulterior motives. He asserts that the issues raised do not require evidentiary probing, as the charges lack key elements of criminal offences

15. The applicant prays for orders of prohibition and certiorari, asserting that he has demonstrated illegality, irrationality and procedural impropriety and that the invocation of criminal process was a deliberate misuse of power to enforce a civil debt simpliciter.

16. The applicant also filed a supplementary affidavit dated 30th April 2025 annexing an affidavit sworn by one Ben Mulwa recanting the statement he recorded with the police and a further affidavit sworn on 12th May 2025.

17. The applicant states that the forensic document examiner confirmed that he examined a photocopy of the letter not the original. He relies on the case of Samson Tela Akute v Republic [2006] KEHC 3513 (KLR) to support his position that the same renders the report inadmissible.

18. The applicant argues that the prosecution is irrational, made in bad faith and amounts to abuse of the criminal justice system and that it is an attempt to weaponize criminal law to settle a personal vendetta. He relies on the case Kuria & 3 Others v AG [2002] 2 KLR 69 where the court is said to have held that criminal law should not be used for personal grudges.

19. He also relies on the case of Republic v Chief Magistrate Mombasa Ex parte Garnjee [2012] KLR 703 where the court held that criminal process must not be used to further civil claims and on the case of R v Horseferry Road Magistrates' Court ex parte Bennett [1994] 1 AC 42 where it was stated that courts must guard the integrity of the criminal justice system from abuse.

20. On forgery and false pretence, he relies on the case of Caroline Wanjiku Ngugi v Republic [2015] eKLR where the court observed that the elements of forgery are false making, material alteration and ability to defraud. He also relies on the Nigerian case of Alake vs The State for the ingredients of the offence of forger.

21. The applicant further avers that there is need to prove that the person charged was indeed the one who put ink to paper and created the document deemed a forgery and to further reaffirm this position he relies on the case of R v Gambling [1974] 3 All ER 479.He further refers to Section 345 and 347 of the *Penal Code* on the forgery definition and elements of the offence of forgery respectively.

22. On the issue of impersonation of an advocate, he argues that the charge sheet with regard to pretending to be an Advocate is defective granted that Sections 33 and 85 of the *Advocates Act* prescribe penalties but do not create a distinct criminal offence, contravening Article 50(2)(n).

23. The applicant also points out a previous acquittal in Criminal Case No. 2035 of 2018, in which he states similar charges were found to be spurious.

24. The Ex parte Applicant also filed written submissions dated 21st January 2025, supplementary written submissions dated 30th April 2025 and further submissions dated 8th May 2025. This court observes that the de[positions were in the form of submissions on points of law which ought not to be the case.

25. It is the Applicant's submission that both Order 53 of the Civil Procedure Rules and Articles 22, 23, and 47 of *the Constitution* allow this court to examine both process and merits. To support this position, he relies on Supreme Court Pet. No. 6 (E007) of 2022 where the court observed that judicial review has evolved into a constitutional tool capable of merit review.

26. The Applicant reiterates that the loan, supported by post-dated cheques, vehicle security (KBW 299K) and a decree, were legitimate and voluntarily entered into. Further, that the Charges of False Pretence and Forgery are defective because the loan was for future repayment and therefore not a false representation of existing fact under Sections 312–313 *Penal Code*.

27. He further submits that while Article 157(6) to (10) grants the DPP discretion, Article 157(11) binds the DPP to act in the public interest and avoid abuse.

28. It is submitted that the High Court has power under Article 165(3)(d)(ii) to intervene where there is evidence of abuse. He relies on the Supreme Court case of Cyrus Shakhalanga Khwa Jirongo v Soy Developers Ltd & 9others [2021] eKLR where the court is said to have rendered itself regarding termination of criminal proceedings on the basis of the dispute being civil in nature and also on account of inordinate delay in instituting an intended prosecution.

29. The Applicant's submission is that the loan was secured by tangible assets and valid documentation and the forensic report and WhatsApp messages indicate a genuine business relationship, not fraud. He further submits that the complainant retained the original logbook, which undercuts the fraud claim.

30. On discrimination and selective prosecution, the applicant argues that he has been unfairly targeted, contrary to Article 27 of *the Constitution*. That the selective prosecution and application of the law against the Applicant contravenes his fundamental right under Article 27 of *the Constitution*. He submits that, he had a legitimate expectation that the Respondents would not abuse their office, power or authority in any unlawful manner, bad faith or to achieve an extraneous purpose by selectively victimising or punishing him.

31. He relies on the case of Peter Ngunjiri Maina v DPP & 2 Others [2017] eKLR where the court is said to have identified various scenarios that would require interrogation to warrant a review of the unfettered discretion of the Director of Public Prosecutions. He also relies on several other cases including Republic vs Commissioner of Police and Another ex parte Michael Monari & Another, [2012] eKLR and Joram Mwenda Guantai vs The Chief Magistrate,[2007] 2 EA 170 to support this position.

32. The Applicant further submits that all grounds or principles cited by the Court in Jared Benson Kangwana vs. Attorney General Nairobi High Court Misc. Application No. 446 of 1995 (unreported) are relevant to these proceedings as each of the principles has been violated in one aspect or another by the prosecution mounted against him and which is sought to be quashed and prohibited.

33. The Applicant submits that it was unreasonable and absurd for the investigating officer to become an accuser in his own case hence demonstrating bias, lack of objectivity or partiality. In this regard, the applicant relies on Prof Sir William Wade in his book Administrative Law as cited in R vs. Somerset County Council, ex parte Fewings and Others [1995] 1All ER 513 at 524 on the nature of the duty of a public body which is applicable mutatis mutandis to a public officer for the proposition that any action to be taken by a public body must be justified by positive law.

34. He further relies on the case of George Okungu & Another vs. Chief Magistrate's Court Anti-Corruption Court a Nairobi & Another [2014] eKLR where the court observed that the court will not

hesitate to put a halt to ongoing criminal proceedings where the same constitute an abuse of process and are being carried out in breach of or threaten breach of constitutional rights.

35. The Applicant also submits that the 3rd Respondent's Investigations officers acted in excess and in abuse of their powers since before a criminal prosecution can be mounted, it is the responsibility of the 2nd Respondent to direct and review the work of the 3rd Respondent. Reliance is placed in the case of Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi High Court Misc. Civil Application No. 743 of 2006 [2007] eKLR where the court observed that a power which is abused should be treated as a power which has not been lawfully exercised.

36. It is the Applicant's submission that courts are the temples of justice and the last frontier of the rule of law. To support this position, reliance is placed in the case of Republic vs. Judicial Commission of Inquiry into The Goldenberg Affair, Honourable Mr. Justice of Appeal Bosire and Another Ex Parte Honourable Professor Saitoti [2007] 2 EA 392; [2006] 2 KLR 400.

37. Further, the Applicant submits that this Court has the powers and the constitutional duty to supervise the exercise of the Respondent's mandate whether constitutional or statutory as long as the challenge properly falls within the parameters of judicial review.

38. The Applicant submits that it is clear that the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognised under *the Constitution* and the *Office of the Director of Public Prosecutions Act*, that would, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion. The Applicant relies on the case of Koinange vs. Attorney General and Others [2007] 2 EA 256 to support this position.

39. He also urges that to permit the prosecutor to arbitrarily exercise his constitutional mandate based on ulterior motives as is alleged in these proceedings would amount to the court abetting abuse of discretion and power and criminality. He places reliance on the case of Regina vs.Ittoshat [1970] 10 CRNS 385 at 389 where the court held that it is not only a right but the duty of the court to protect citizens against harsh and unfair treatment.

40. The Applicant argues that as was held by the court in the case of R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No.406 of 2001, the mere fact that the applicant will be subject to a criminal process where he will get an opportunity to defend himself is not reason for allowing a clearly flawed, unlawful and unfair trial to run its course.

41. The Applicant submits that as held by the Court in Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR the High Court has the power to review the foundational basis of the DPP's decision to charge.

42. It is the Applicant's further submission that as was held in the case of *Gerald Ndoho Munjuga V R HC Criminal Appeal No. 213 of 2011* (Nyeri), the offence of obtaining by false pretences does not relate to future events. He submits that the offences of obtaining credit by false pretences are anchored on the loan agreement so that there was no way the offences could have been committed before the execution of the loan agreement.

43. The Applicant also argues that a fundamental principle in Judicial Review cases is that except in claims of violations of fundamental human rights and freedoms, the concern of the courts has nothing to do with the merits of the decision but the process in arriving at that decision and that in the instant case, the loan agreement dispels any commissions of any Criminal Offence as the terms of the loan are very clear and the Interested party is holding securities which have not been proved to be fake.

44. The applicant argues that while he does not challenge the respondents' jurisdiction to investigate and prosecute, he maintains that they committed an error of law in the manner they exercised their powers. He cites JGH Marine A/S Western Marine Services Ltd & 2 others v Public Procurement Administrative Review Board & 2 others [2015] eKLR, where the court held that an error of law, such as failing to consider relevant criteria and considering irrelevant material, amounted to acting without jurisdiction. This, he submits, demonstrates that even where jurisdiction exists, the manner of its exercise can render the resulting decision unlawful.

45. The applicant contends that the respondents were bound by the doctrine of legality, which requires public authorities to act within the law and in accordance with the purpose and limits of the powers conferred upon them. He argues that their actions in his case failed to meet this threshold, rendering them flawed and illegal.

46. That a decision is illegal, he submits, where it exceeds the terms of the power authorizing it, pursues objectives not intended by the law, is unsupported by any legal basis, or fails to implement a legal duty. Evaluating illegality, therefore, involves construing the statutory or regulatory framework under which a public authority operates and ensuring that it has acted within its limits; and that the Courts, in enforcing this principle, serve both as upholders of the rule of law and as guardians of Parliament's intent.

47. The applicant acknowledges that judicial review is an extraordinary remedy, exercised sparingly and only in exceptional cases where illegality, irrationality, or procedural impropriety has been demonstrated. He submits that his case meets this threshold due to the manifest bad faith and impropriety characterizing the criminal investigations instituted against him.

48. He argues in reiteration to his depositions that the transaction giving rise to the criminal charges was a simple loan, supported by securities still in the possession of the 1st Interested Party. Further, that the transaction did not involve any misrepresentation as to an existing fact and did not constitute false pretence within the meaning of the *Penal Code*. He contends that courts should not lightly extend criminal law to matters that properly belong in civil jurisdiction, particularly where adequate civil remedies exist.

49. The applicant further asserts that public decision-making must be free of improper motives such as fraud, dishonesty, malice, or personal self-interest. That decisions tainted by such motives are made for an improper purpose and fall outside the scope of lawful authority.

50. He submits that irrationality and unreasonableness are valid grounds for judicial review, as recognized under section 7(2)(i) and (k) of the *Fair Administrative Action Act*. That a decision is irrational if it lacks a rational connection to the purpose for which the power was conferred, the empowering legal provision, the evidence before the administrator, or the reasons provided for the decision.

51. He relies on the test of Wednesbury unreasonableness, where a decision is so implausible and lacking in justification that no reasonable authority could have reached it. He maintains that, in his case, no reasonable person, properly directing themselves to the facts and the law, could have made the decision to prosecute. He argues that even where a statute is silent on reasonableness, it must be implied that public power be exercised reasonably.

52. The applicant sets out that legal unreasonableness may be inferred from specific errors in relevance or purpose, illogical or irrational reasoning, absence of justification, or a disproportionate weighting of irrelevant over relevant factors. In his case, he contends, these criteria are satisfied.

53. He asserts that judicial intervention is justified where decisions are arbitrary, capricious, or motivated by improper purpose, or where the decision-maker fails to apply their mind or considers irrelevant matters while ignoring relevant ones. He further argues that a decision is procedurally improper where it fails to follow statutory procedures or violates the rules of natural justice.

54. Procedural impropriety, he explains, encompasses both procedural ultra vires (failure to follow statutory procedures) and breaches of common law principles of fairness. According to the applicant, the two pillars of natural justice- impartiality and the right to be heard were not observed in his case. He emphasizes that Article 47 of *the Constitution* codifies the right to fair administrative action and to receive reasons for adverse decisions, which were denied to him.

55. He concludes that administrative fairness is now constitutionally protected and that judicial review no longer relies solely on common law but on *the Constitution* itself. That this constitutionalizing of administrative justice means that legislation cannot oust or restrict the right to review administrative action for legality, fairness, or reasonableness.

56. The applicant argues that a challenge to the lawfulness, procedural fairness, or reasonableness of an administrative decision involves the direct application of *the Constitution*, particularly Article 47, as well as the *Fair Administrative Action Act*. He maintains that the impugned decision was procedurally unfair, having been made without affording him an opportunity to be heard. He reiterates that procedural fairness entails a minimum requirement that a person be given a chance to present their case before a decision affecting their rights is made, which did not occur in his situation.

57. He submits that judicial review remedies, such as certiorari and prohibition are discretionary and grounded in the policy that inferior bodies must operate within their legal bounds. That certiorari is meant to bring decisions of inferior tribunals into the High Court for scrutiny and, if found lacking in legality or fairness, to have them declared invalid. In his view, the court, therefore, has jurisdiction to grant the reliefs sought.

58. In support of his argument on illegality, the applicant relies on Halsbury's Laws of England, which provides that the court's concern in judicial review is to determine whether a decision-maker exceeded their powers, committed an error of law, breached rules of natural justice or arrived at a decision which no reasonable authority could have reached. He cites Republic v National Hospital Insurance Fund Board of Management & Another Ex parte Law Society of Kenya, where the court held that acting beyond conferred powers is the most obvious form of illegality.

59. He emphasizes that public bodies must act only within the powers granted by law, and that the principle of legality is central to the rule of law in Kenya's constitutional framework. He cites the case of AAA Investments (Pty) Ltd v Micro Finance Regulatory Council, which affirmed that public power can only be validly exercised if it has a lawful source. The safeguarding of legality, he argues, is the foundational objective of judicial review. He argues that therefore, to lawfully exercise power, public decision-makers must adhere to legally conferred powers and observe prescribed procedures, which he accuses the respondents of having failed to do in this instance.

60. Illegality, the applicant submits, includes not only acting outside conferred powers but also taking decisions for improper purposes, misdirecting oneself in law, or considering irrelevant factors. He further argues that even if a power is legally conferred, a public authority may act unlawfully if it exceeds the scope or misapplies that power or adopts a rigid policy in disregard of the duty to exercise discretion properly. He asserts that the respondents misinterpreted and misapplied the relevant law.

61. The applicant maintains that the impugned decision was infected by improper motives, including fraud, dishonesty, malice, and personal animosity, thereby taking it outside the lawful bounds of

administrative discretion. He argues that power is exercised fraudulently when the decision-maker uses it to achieve a hidden objective, and maliciously when motivated by personal ill-will, both of which apply to his case.

62. On the question of reasonableness, the applicant repeatedly adopts the view that rationality and proportionality are key elements of reasonable administrative action. He refers to Pillay and Hoexter, who explain that rationality requires a decision to be supported by evidence and logic, while proportionality entails balancing competing interests fairly. He cites section 7(2)(i) of the *Fair Administrative Action Act*, which allows for review where a decision is not rationally connected to its purpose, the law, the information before the administrator or the reasons given.

63. The applicant also refers to the test of rationality laid down in Pharmaceutical Manufacturers Association of South Africa v President of the Republic of South Africa, where the court held that the question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. He submits that the decision to charge him lacks such connection, is legally unfounded, and was therefore aberrant.

64. He also relies on section 7(2)(k) of the *Fair Administrative Action Act*, which provides that a decision can be reviewed if it is so unreasonable that no reasonable person could have made it. The applicant invokes Lord Diplock's famous articulation of Wednesbury unreasonableness as conduct which no sensible authority acting responsibly would adopt. He argues that, viewed objectively, the decision to charge him lacks any plausible justification.

65. According to the applicant, judicial review of reasonableness concerns both the process and outcome of the decision-making. That the reviewing court must assess whether the decision is transparent, justified, and falls within a range of acceptable outcomes under the law and facts. He outlines a series of propositions about unreasonableness, including that, it arises where a decision falls outside the range of options reasonably open to the decision-maker, lacks intelligible justification, is based on irrelevant considerations, or gives disproportionate weight to certain factors while ignoring others.

66. The applicant endlessly submits that procedural impropriety, as one of the three principal grounds of judicial review alongside illegality and irrationality, arises where a public authority commits a serious procedural error. He cites Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 at 401D, where Lord Diplock recognized that a failure to observe statutory procedures or natural justice even without express denial of hearing may constitute procedural impropriety.

67. He observes that the evolution of the common law has broadened the obligation on public authorities to observe fairness, now framed in terms of "natural justice" and "procedural decency." He argues that the decision in his case was procedurally unfair because he was not given a proper opportunity to present his case. He emphasizes that Article 47 of *the Constitution* codifies the right to administrative action that is expeditious, lawful, reasonable and procedurally fair, including the right to be given reasons for decisions that adversely affect a person.

68. The applicant cites Local Government Board v Arlidge, where Viscount Haldane held that those making administrative decisions must act judicially and ensure impartiality and adequate opportunity for affected persons to present their case. He reiterates that, under the 2010 Constitution, judicial review is no longer grounded solely in common law but has been constitutionalized under the Bill of Rights. As such, that legislation cannot limit or oust this review power, since a challenge to administrative action now directly invokes constitutional principles.

69. He reinforces the argument with a quotation from De Smith's Judicial Review, noting that fairness is not just procedural but also a substantive principle. The applicant asserts that the 2010 Constitution

revolutionized the administrative law landscape, including the scope of judicial review and remedies available under it. That under judicial review, one can now also seek declaratory and compensatory remedies, as confirmed in Meshack Agengo Omondi v Eldoret Municipal Council (2012) eKLR and Professor Elijah Biama v University of Eldoret (2014) eKLR.

70. It is further submitted that in n Cortec Mining Kenya Ltd v Ministry of Mining (2017) eKLR, the Court of Appeal held that for a judicial review application to succeed, the applicant must show the decision is tainted by illegality, irrationality, or procedural impropriety. That the Court explained that illegality involves acting outside the law or jurisdiction, irrationality involves decisions that no reasonable authority would reach and procedural impropriety refers to a failure to adhere to fair procedures or natural justice.

71. He further cites Republic v Public Procurement Administrative Review Board & Another Ex parte Rongo University, where the court reaffirmed that judicial review is concerned with the legality of decision-making processes not their merits. It is his case that the role of the judicial review court is supervisory and not appellate, with a focus on ensuring that public bodies act within the four corners of their legal mandates.

72. The Applicant also submits that once a court determines there is no illegality, irrationality, or procedural impropriety, it must decline to intervene, as held in Republic v National Water Conservation and Pipeline Corporation ex parte Roshina Timber Mart (2009) eKLR. The applicant emphasizes that judicial review protects constitutional order by ensuring that agencies remain within the bounds set for them by Parliament. The applicant relies on Jasper Maluki Kitavi v Minister for Lands (2017) eKLR, which cited with approval JSC v Mbalu Mutava, and Rudge v Baldwin 1964 AC, reaffirming that natural justice demands fairness in public decision-making. He concludes that in his case, these principles were not followed, and urges the court to grant the reliefs sought.

73. The Applicant also relies on the case of Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No.363 of 2009 where the court addressed its power to prevent abuse of its process.

The 1st -3rd Respondents' respons

74. The Respondents did not file a replying affidavit despite alluding to one but filed submissions dated 6th May 2025. The replying affidavit sent in word document as requested by the Court is of totally different unrelated parties to these proceedings. In their submissions, they argue that the DPP acted within his powers under Article 157(6) to (11) of *the Constitution* and that Section 193A of the *Criminal Procedure Code* allows concurrent civil and criminal proceedings.

75. The Respondents rely on the case of Kenya National Examination Council v Republic ex parte Geoffrey Gathenji [1997], where the court observed that an order of prohibition lies only where a public body exceeds its jurisdiction or breaches rules of natural justice. They also rely on the case of R *v Inspector General, Director of Public Prosecution & 3 others J.R Application No. 621 of 2017* where the observed that the power to stay or prohibit criminal proceedings is meant to advance the Rule of Law and not to frustrate it.

76. It is submitted that the ex parte applicant has no adduced any evidence that the 1st Respondent acted in contravention of rules of natural justice as alleged. The 1st to 3rd Respondents rely on the case of Raymond Kipchirchir Cheruiyot & another v Republic [2021] KEHC 6790 (KLR) where the court observed that it is not enough to state the existence of a civil dispute of suit but there is need to show how the process of the court is being misused.

77. They rely on the case of Kingori & 4 others vs. Mwangi & another [1994] eKLR 297 where the court observed that jurisdiction to grant judicial review orders must be exercised only in the most exceptional circumstances and will not be granted where the other remedies are available and have not been used.

78. The Respondents also submit that an order of certiorari will only be issued if the decision is made without jurisdiction or where the rules of natural justice are not complied with. The rely on the case of Republic vs *Director Public Prosecutions & 2 others Nairobi Miscellaneous Cr. Application No.20 of 2017* to support this position.

79. Reliance is also placed in the case of Wainaina vs. Attorney General [2008] KLR where the court observed that the Applicant must show that the DDP'S decision was manifestly wrong as to amount to an unreasonable, irregular or improper exercise of his power.

80. It is submitted that the mere existence of a loan agreement does not insulate the accused from criminal liability where there is credible evidence of forgery and obtaining by false pretence. Further that it not for the court to direct the Respondents on how to exercise their constitutional mandate but it should check the abuse of prosecutorial powers where evidence is presented to the court. That the merits of the Respondent's decision are not a concern for the courts. In support of this position reliance is placed in the case of Douglas Maina Mwangi vs. *Kenya Revenue Authority and Another High Court Constitutional Petition No.528 of 2023*.

81. It is submitted that the Applicant has moved the court under Order 53 of the Civil Procedure Rules and has not claimed violation of his rights but is aggrieved by the decision of the 1st Respondent herein to charge him. It is the 1st to 3rd Respondent's case that he can therefore not be heard to claim that this court should be concerned with the merits of the 1st Respondent's action.

The 1st Interested Part's response

82. The 1st Interested Party filed a Replying Affidavit sworn on 30th April 2025 confirming that the ex parte applicant is the 1st accused in Milimani Chief Magistrate's Court Criminal Case No. E746 of 2024, where he faces charges including conspiracy to commit a misdemeanor, obtaining credit and goods by false pretense, forgery and pretending to be an advocate.

83. She states that she was introduced to the ex parte applicant by a mutual friend who introduced him as an advocate who could help her out on a legal issue. That during their interactions, the applicant obtained credit from her in several transactions including Kshs. 220,000 credit for office furniture, Kshs. 100,000 payment to the applicant's brother (2nd Interested Party), Kshs. 1,000,000 loan and a Kshs. 100,000 payment for a KPLC bill and a further Kshs. 200,000 paid to the 2nd Interested Party.

84. According to the 1st Interested Party, on 2nd March 2021, a loan agreement in the name of Kwengu and Company Advocates was prepared by the ex parte applicant which they both signed, showing a total debt of Kshs. 2,900,000, allegedly secured by post-dated cheques, a court decree, and motor vehicles KBW 299K and KCZ 929C. She claims these vehicles were not registered in the applicant's name but in the name of the 2nd Interested Party, and the securities were therefore misleading.

85. She disputes the applicant's claim that he repaid Kshs. 1,000,000 in cash, stating that no proof has been offered. She further denies instructing Neptune Credit Management to collect a debt and asserts that the applicant drafted a demand letter using the name of Kwengu & Company Advocates, falsely claiming it was his law firm. She annexes supporting evidence, including emails and statements from a third party, Bernard Mulwa, who confirms being asked by the applicant to send the demand letter.

86. She asserts that Mr. Appel Kwengu, the advocate named in the alleged firm, denied authoring the demand letter or preparing the loan agreement in a statement recorded with the DCI. She disputes the credibility of the affidavit attributed to Mr. Kwengu annexed by the applicant, as it was not filed in this case and lacks direct acknowledgment of authorship of the disputed documents.

87. The 1st Interested Party deposes that the offences were committed between 9th and 26th February 2021, as the applicant obtained credit during this period. She states that the cheques issued were not post-dated for 5th March 2021 and were meant as security, not payment. Therefore, that the charge under section 316(a) of the *Penal Code* is proper and not based on post-dated cheques. She adds that section 316A(21) of the *Penal Code*, relied on by the applicant, does not exist.

88. The 1st interested Party deposes that the civil nature of the transaction does not bar criminal proceedings under section 193A of the *Criminal Procedure Code*. She maintains that the applicant used vehicles not registered in his name as security, thereby misrepresenting ownership with intent to defraud.

89. The 1st Interested Party's further deposition is that following unanswered calls to the applicant, she reported the matter to the DCI, who investigated, recorded statements, conducted forensic document analysis and confirmed that the applicant is not an advocate. That the DCI forwarded its findings to the DPP, who independently decided to prosecute based on the evidence gathered.

90. The 1st Interested Party affirms that the DCI and DPP acted within their constitutional and statutory mandates, independently and without influence, as provided under *the Constitution*, the *National Police Service Act* and Article 157. She stresses that the DPP considered public interest and sufficiency of evidence before instituting charges.

91. She submits that no abuse of power or jurisdiction by the DPP has been demonstrated. That the applicant's claims raise evidentiary and factual issues that fall within the purview of the trial court, not the judicial review court. She relies on the Supreme Court's decisions in Saisi & 7 Others v DPP and Dande & 2 Others (Petition 39 & 40 of 2019) (consolidated [2023] KESC 6 (KLR), to assert that judicial review under Order 53 is limited to assessing the decision-making process and not the merits of the decision as the nature of evidence in judicial review proceedings was based on affidavit evidence that could not be best suited to form evidence for a court to try disputed facts of issues and the pronounce itself on the merits or demerits of a case.

92. It is her case that in the Dande case refered to by the Applicant, the court observed that the Court can only carry out a merit review of a case where a party has approached a court under the provisions of *the Constitution*. It is asserted that the Applicant has moved the court under Order 53 and that he has not claimed any violation of his rights but is aggrieved by the 1st Respondent's decision to charge him.

93. In conclusion, she urges the Court to reject the application as unmerited, founded on a misapprehension of the law and an abuse of the judicial review process. She maintains that the criminal trial court is the proper forum for the applicant to challenge the evidence and defend against the charges.

94. The 1st Interested Party also filed written submissions dated 2nd May 2025 in which she defines what judicial review is from Black's Law Dictionary and Michael Fordham's Judicial Review Handbook, which both affirm that judicial review is the court's tool for ensuring that public authorities act within the confines of the law and remain accountable to legal standards.

95. She submits that the powers of the Director of Public Prosecutions (DPP) are constitutionally guaranteed under Article 157(10) of *the Constitution*, which grants the DPP independence from

direction or control by any person or authority. However, she acknowledges that this power is not absolute; and that under Article 157(11), the DPP must consider public interest, the interests of justice, and the need to avoid abuse of the legal process when making prosecutorial decisions.

96. Citing the Supreme Court decision in Cyrus Shakhalanga Khwa Jirongo v Soy Developers Ltd & 9 Others [2021] eKLR, she outlines the limited circumstances under which a court may interfere with the DPP's discretion. These include when prosecution amounts to abuse of court process, where a legal bar to prosecution exists, where the alleged facts do not constitute an offence, or where there is no evidence supporting the charge.

97. The 1st Interested Party also relies on Republic v Chief Magistrate Milimani Commercial Court & 2 Others Ex-Parte Violet Ndanu Mutinda & 5 Others [2014] eKLR, where Odunga J (as he then was) adopted the finding in the Ugandan case Pastoli v Kabale District Local Government Council [2008] 2 EA 300. That case reaffirmed that judicial review is available where a decision is tainted by illegality, irrationality or procedural impropriety.

98. According to the 1st Interested Party, the ex parte applicant bears the burden of proving that the DPP's decision to prosecute was infected with any of these three vices. She asserts that the applicant has not discharged that burden.

99. In response to the applicant's claim that false pretence cannot be founded on future promises, she cites the High Court decision in Ekoit v Republic [2024] KEHC 3835 (KLR), where the court held that a representation involving both a future promise and false statements about past or existing facts does amount to false pretense.

100. She argues that challenges to whether the facts satisfy the elements of the alleged offences go to the merits of the case, not the process and are therefore for the trial court, not the judicial review court, to determine. She relies on the Supreme Court decision in Saisi & 7 Others v DPP & 2 Others [2023] KESC 6 (KLR), where it was held that while *the Constitution* and the *Fair Administrative Action Act* allow a broader scope for judicial review, it does not convert judicial review into a full trial on the merits or an appeal. Further, that Affidavit evidence is insufficient for the court to resolve contested factual and legal issues that are better left to the trial process.

101. She further relies on the Supreme Court case in Hussein Khalid & 16 Others v AG & 2 Others [2019] eKLR, where the court emphasized that determining the existence of the elements of an offence is a factual issue best left to the trial court, since the presumption of innocence remains intact and only the trial court can weigh the evidence to determine guilt.

102. The 1st Interested Party maintains that the applicant has not shown that the DPP acted illegally, irrationally, or improperly. She argues that the offences with which the applicant is charged are known in law and supported by sufficient evidence gathered through proper investigations. Accordingly, no abuse of power by the DPP has been demonstrated.

103. On the applicant's claim that the matter is purely civil, she invokes Section 193A of the *Criminal Procedure Code*, which provides that the existence of parallel civil proceedings is not a bar to criminal prosecution. That civil and criminal processes may proceed concurrently unless one is being abused to defeat the other. In this case, she notes that there are no pending civil proceedings and that the criminal charges are based on conduct with elements of criminality.

104. The 1st Interested Party further supports her position by citing Republic v OCPD Nairobi County Police Headquarters & 7 Others Ex-Parte Mary Gathoni Ndungu [2015] eKLR, where the court emphasized that allegations involving false pretence and criminal conduct should be subjected to criminal trial, even where a civil dimension exists.

105. In conclusion, the 1st Interested Party submits that the application lacks merit, that the DCI and DPP acted lawfully and within their constitutional and statutory mandates. That the evidence disclosed criminal conduct and the decision to prosecute was independent, justified and untainted by illegality or bad faith. She urges the Court to allow the criminal justice process to run its course and to refrain from intruding into matters that should be determined at the criminal trial.

Analysis and Determination

106. This Court has carefully considered the pleadings, affidavits, written submissions, authorities cited by the parties and the applicable legal frameworks. The main issue for determination is whether the Applicant is entitled to the judicial review reliefs sought.

107. The ex parte Applicant, Samwel Bryan Yongo Otumba, seeks judicial review orders of certiorari to quash his prosecution in Milimani Criminal Case No. E746 of 2024 and prohibition to restrain the Respondents from proceeding further with the said case. He claims that the charges stem from a civil loan dispute with the 1st Interested Party and that the invocation of the criminal process is an abuse of power, irrational, and actuated by bad faith.

108. It is his case that the impugned criminal proceedings arise from events between February and March 2021, when he is alleged to have obtained monies, furniture and other benefits from the 1st Interested Party under false pretenses and issued securities including cheques and vehicle logbooks. It is alleged that he misrepresented himself as an advocate and used documents falsely indicating professional authority.

109. The Applicant avers that the transaction was a consensual loan backed by valid security. He denies impersonation, asserting that the demand letter in question was authored by a qualified advocate, Mr. Kwengu and denies authorship of any legal documents. He claims that the complaint was fabricated after their romantic and business relationship with the 1st Interested Party ended. He claims that the charges have been framed to intimidate him into repaying a debt.

110. The Applicant invokes the doctrines of illegality, irrationality and procedural impropriety and contends that Article 47 of *the Constitution* and section 7 of the *Fair Administrative Action Act* were violated. He alleges that the DPP acted beyond jurisdiction, failed to consider relevant facts and that the decision to prosecute is unreasonable and lacking in evidential foundation.

111. The 1st Interested Party, however, paints a different picture. She asserts that the Applicant, whom she was introduced to by a mutual friend, as an advocate, solicited and obtained multiple sums of money from her on the promise of repayment, backed by cheques and logbooks of vehicles not registered in his name. She denies receiving any repayment and denies instructing Neptune Credit Management, stating, instead, that the Applicant falsely authored and dispatched a legal demand letter claiming to be from his law firm.

112. Her affidavit is supported by documentary evidence including emails, statements from a third party and a forensic report from the DCI. The said report concluded that the impugned demand letter and loan agreement were not authored by Mr. Kwengu. She confirms that she made a formal complaint to the DCI, which conducted investigations and forwarded its findings to the DPP, who in turn exercised independent discretion in preferring charges.

113. The Respondents' affidavit could not be traced from the CTS but filed submissions which are not evidence. They are dated 6th May 2025, which are basically on points of law on the threshold for granting judicial review orders in cases as this. They argue that the Applicant has not demonstrated that the DPP's powers under Article 157 were exercised unlawfully. They submit that judicial review

does not lie to challenge the merits of a decision to charge, and that the prosecution in this case is based on evidence and was initiated independently after proper investigations

Determination

114. The law on the scope of judicial review is well settled. The court in the case of Kapa Oil Refineries v Kenya Revenue Authority [2019] eKLR stated that:

> "Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision-making process. See the Commissioner of Lands –versus Hotel Kunste [1997] eKLR. The purpose of JR is to ensure that the individual is given fair treatment by the Authority to which he has been subjected. JR as a remedy is available, in appropriate cases, even where there are alternative legal or equitable remedies. See David Mugo t/a Manyatta Auctioneers –versus Republic – Civil Appeal No. 265 of 1997 (UR). JR being a discretionary remedy, it demands that whoever seeks to avail itself/himself/herself of this remedy has to act with candour or virtue and temperance. See Zakayo Michubu Kibwange –versus Lydia Kagina Japheth and 2 others [2014] eKLR. JR as a remedy may also be invoked where the issues in controversy as between the parties are contested. See Zakayo Michubu Kibwange case (Supra). The remedy of judicial review is only available where an issue of a public law nature is involved. Further, that a person seeking mandamus must show that he has a legal right to the performance of a legal duty by a party against whom the mandamus order is sought or alternatively, that he has a substantially personal interest and that the duty must not be permissive but imperative and must be of a public nature rather than of a private nature. See Prabhulal Gulabuland Shah –versus Attorney General & Erastus Gathoni Mlano, Civil Appeal No. 24 of (1985) (UR). Following the promulgation of the Kenya Constitution, 2010, judicial review is available as a relief to a claim of violation of the rights and fundamental freedoms guaranteed in *the Constitution* of Kenya 2010. See Child Welfare Society of Kenya –versus- Republic and 2 others, Exparte Child in Family Forces Kenya [2017] eKLR."

115. It is evident from the foregoing that the Court's mandate is to oversee the exercise of public authority to ensure that it complies with the law, is reasonable and follows fair procedures. This principle was similarly affirmed by the court in Republic v Director of Pensions, the Pensions Department, the National Treasury of the Republic of Kenya; Gewa & another (Ex parte); Ouma (Interested Party) [2024] KEHC 7652 (KLR).

116. In the instant case, the applicant has invoked this court's supervisory jurisdiction under Article 165(6) of *the Constitution*. It is trite that judicial review is concerned with the decision-making process, not the merits of the decision itself, except in those instances stated in the Saisi case (supra) by the Supreme Court. The traditional grounds upon which a judicial review court may intervene to disturb decisions by administrative bodies, tribunals or subordinate courts were enunciated in Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410. In this case Lord Diplock outlined three heads which he referred to as "the grounds upon which administrative action is subject to control by judicial review".

117. These grounds are illegality, irrationality and procedural impropriety which the learned judge defined as follows:

> "My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without

reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

118. However, the grounds have over time been enlarged to include legitimate expectation and the fact that judicial review remedies are now embedded in *the Constitution* and more grounds legislated via the *Fair Administrative Action Act*, 2015, which implements Article 47 of *the Constitution*.

119. That said, the issue of the court's discretion to terminate criminal proceedings is not novel as the Courts have considered this same issue in multiple decisions, post 2010 and post 2015 following the enactment of the *FAIR Administrative Action Act*. In Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 Others [2018] eKLR, the Court of Appeal referred to the State of Maharashtra & Others v Arun Gulab & Others, Criminal Appeal No. 590 of 2007, a decision by the Supreme Court of India, where the court expressed its view on the matter as follows:

> " The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations

made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction to the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings. The provisions of Articles 226, 227 of *the Constitution* of India and Section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as "Cr.P.C.") are a device to advance justice and not to frustrate it. The power of judicial review is discretionary; however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of power of the Court, but the more the power, the more due care and caution is to be exercised in invoking these powers." [emphasis added]

120. In Bernard Mwikya Mulinge v Director of Public Prosecutions & 3 others [2019] eKLR, Odunga J (as he then was) expressed himself as follows: -

> "As has been held time and time again, the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions (DPP) to investigate and undertake prosecution in the exercise of the discretion conferred upon that once under Article 157 of *the Constitution*. The mere fact therefore that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not ipso facto a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. An applicant who alleges that he or she has a good defence in the criminal process ought to ventilate that defence before the trial court and ought not to invoke the same to seek the halting of criminal proceedings undertaken bona fides since judicial review court is not the correct forum where the defences available in a criminal case ought to be minutely examined and a determination made thereon..."

121. In Kipoki Oreu Tasur vs. Inspector General of Police & 5 Others [2014] eKLR the Court stated that:

> "The criminal justice system is a critical pillar of our society. It is underpinned by *the Constitution*, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated..."

122. In Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR , the court observed thus:

> "... the police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court...As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene...."

123. The above decisions reiterate 1st Respondent's duty to charge the person accused of an offence only upon investigations by the Director of Criminal Investigations.

124. In this case, a complaint was raised by the 1st Interested party as deposed in her affidavit and it was the duty of the DCI to investigate that complainant and forward the file to the DPP for directions on whether the investigations disclose any criminal offence. That is exactly what transpired in this case.

125. It is this court's humble opinion that the 1st Respondent's in reaching the decision to charge the applicant was within the mandate provided for under *the Constitution* and the law.

126. The courts have in numerous decisions held, and rightly so, that they should not interfere with the constitutional responsibility of the 1st Respondent to initiate criminal proceedings, as long as these actions are carried out in a lawful and justifiable manner. This position was adopted in the case of Michael Monari & Another vs Commissioner of Police & 3 Others, Misc. Application No. 68 of 2011.

127. The 1st Respondent being independent and an office established under *the Constitution*, the Court can only interfere with or interrogate its actions or those of its officers where there is evidence of threatened or actual violation of rights and freedoms guaranteed by *the Constitution* or contravention of *the Constitution* or apparent abuse of power or that the prosecution is mounted to achieve ulterior motives.

128. In Paul Ng'ang'a Nyaga vs Attorney General & 3 Others [2013] eKLR, it was held that:

> " ... this court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they have acted in contravention of *the Constitution*."

129. The applicant alleges that the charges levelled against him and the 2nd Interested Party are unlawful as the dispute which is the subject of the said charges is of a civil nature, yet no civil suit has been lodged by any of the parties and even if there was a civil suit that had been filed, this is not a bar to criminal proceedings. This position is clearly spelt out under section 193A of the *Criminal Procedure Code*. The court in the case of Oloo v Director of Public Prosecutions [2022] KEHC 14841 (KLR) observed as follows:

> " Under section 193A of the *Criminal Procedure Code*, a civil suit is not a bar to criminal proceedings. In James Mutisya & 5 others v Alphayo Chimwanga Munala & 2 others [2021] eKLR it was held that:
>
> > "Firstly, that the fact that there exist civil proceedings emanating from the same subject matter is not a bar to institution and continuation of criminal proceedings. This is the dictate of section 193 A of the *Criminal Procedure Code* (Cap 75) Laws of Kenya it provides thus:
> >
> > > "Notwithstanding the provisions of any other written law the fact that any matter in issue in any criminal proceedings is also directly and substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings..."
>
> As rightly submitted by the claimants criminal and civil proceedings can run concurrently. We agree with the Holding of the court in the case of Alfred Lumiti Lusiba -vs- Pethad Pank Shantilal & 2 others[2010] eKLR that:
>
> > "....The conclusion that one can draw from section 193 A of the Civil Procedure Code together with the decisions of the learned Judges in the aforementioned cases is that both civil and criminal jurisdiction 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 the due process of the court in whatever manner..

"We could not agree more with the holding of the court in the Alfred Lumiti Lasiba case above. These are civil proceedings governed by civil procedure rules and also different evidential and legal standards. On the other hand, Criminal Case No. 2066/18 is governed by the *Criminal Procedure Code* with a different set of evidential standard and outcome. While the central component of both cases is guarantorship, the legal burden of proof is totality different in both cases. It cannot this be said that these proceedings a sub-judice the criminal proceedings. We thus do not find merit in the notice of preliminary objection and the application dated January 23, 2020."

130. It is trite that in criminal cases, the burden of proof rests on the prosecution, which must prove the accused person's guilt beyond reasonable doubt. This high threshold ensures that no one is convicted unless there is near certainty of guilt. Conversely, in civil cases, the burden is lower, requiring the plaintiff to prove their case on a balance of probabilities. This means that the outcome of a civil case might not necessarily dictate the outcome of related criminal investigations.

131. In the Dande case, the Supreme Court stated as follows concerning the parallel civil and criminal proceedings:

"[104] The conclusion we draw from the above provision 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.

[105] Despite our conclusion above, we are alive to the fact that in the Jirongo case we held as follows:

"We respectfully agree and adopt this position in this case but must add that where it is obvious to a court, as it is to us and was to the learned Judge of the High Court, that 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. Criminal proceedings,whether accompanied by civil proceedings or not, cannot and should never be used in the manner that the 2nd and 3rd respondents have done. It is indeed advisable for parties to pursue civil proceedings initially and with firm findings by the civil court on any alleged fraud, proceed to institute criminal proceedings to bring any culprit to book."

[106] We note that the circumstances in the Jirongo case are different from the current case. In Jirongo, it was proved to our satisfaction that the criminal case was instituted to force the accused person's hand to compromise the civil case between him and the complainant. Such unlawful action should not and could not be tolerated. However, in the present case, we reiterate our earlier finding

that the appellants did not prove that the same was perpetuated for ulterior motives or amounted to an abuse of the court process or office."

132. The applicant has also alluded to violations of his constitutional rights. Such violations must be pleaded with specificity and supported with cogent evidence. In the present case, the applicant has gone to great lengths of writing his own judgment in the criminal case by mounting a defence as to why he should be acquitted. Having a good defence is not the same as your rights being violated or threatened to be violated.

133. This Court is not satisfied that the Applicant has met the threshold envisaged by the Court in the cases of Anarita Karimi Njeru v Republic (No.1) [1979] KLR 154 and Mumo Matemo v Trusted Society of Human Rights Alliance [2014] eKLR.

134. The Supreme Court in Praxedes Saisi & 7 Others v DPP & 2 Others [2023] KESC 6 and Hussein Khalid & 16 Others v AG [2019] eKLR reaffirmed that judicial review proceedings, even when grounded in *the Constitution* and the *Fair Administrative Action Act*, are not designed for merit-based determination of criminal liability. These authorities underscore those questions involving factual disputes and interpretation of criminal elements are best resolved at the trial court.

135. Further, in Cyrus Shakhalanga Khwa Jirongo v Soy Developers Ltd & 9 Others [2021] eKLR, the Supreme Court held that a court may interfere with the DPP's independence if the prosecution amounts to abuse of court process, where a legal bar to prosecution exists, where the alleged facts do not constitute an offence, or where there is no evidence supporting the charge. The Applicant has failed to satisfy any of the above grounds. All that he has sought is for this court to determine the merits of the criminal case which in essence amounts to this court usurping powers and jurisdiction of the Chief Magistrate's Court.

136. On the claim that the charge of obtaining credit by false pretence is defective because the loan was secured by post-dated cheques and therefore it cannot stand, the material on record including that filed by the 1st Interested Party complainant demonstrate that the cheques were given as security and none of them are dated 5th March 2021 as claimed. That said, whether or not the elements of the offence are made out is a matter for the trial court.

137. It is this court's finding that the applicant has not demonstrated that the DPP acted arbitrarily, capriciously or for an improper purpose. There is also no evidence that the DPP or DCI were driven by malice, fraud or personal animosity as alleged. There is evidence that investigations were conducted, statements recorded, forensic reports compiled and the DPP's decision made independently to have the applicant and his brother charged.

138. Another issue raised by the applicant is invocation of selective prosecution and discrimination under Article 27 of *the Constitution*. This allegation has not been supported by any evidence. The Applicant has not shown that any similarly placed individual was treated differently without justification.

139. Ultimately, this court finds and holds that the Applicant seeks to persuade it to delve into the substance of the charges and make findings on their evidential sufficiency. That is beyond the remit of judicial review under Order 53 of the Civil Procedure Rules. The threshold for quashing criminal proceedings in judicial review is a high one. It has not been met here.

140. Accordingly, the application dated 28th August 2024 is found to be devoid of merit and is hereby dismissed.

141. Each party shall bear its own costs.

142. This file is closed.

143. It is so ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF JUNE, 2025

R.E. ABURILI

JUDGE