



Republic v Office of Director of Public Prosecutions & 2 others; Kikuvi (Ex parte Applicant); Doumbouya (Interested Party) (Judicial Review Miscellaneous Application E133 of 2025) [2025] KEHC 12167 (KLR) (Judicial Review) (25 August 2025) (Judgment)

Neutral citation: [2025] KEHC 12167 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E133 OF 2025
RE ABURILI, J
AUGUST 25, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

THE OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

THE CHIEF MAGISTRATE’S COURT AT MILIMANI 2ND RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS 3RD RESPONDENT

AND

GEORGE NDETI KIKUVI EX PARTE APPLICANT

AND

MIRIAM MAMAKONDE DOUMBOUYA INTERESTED PARTY

JUDGMENT

1. Pursuant to leave granted on 29th April 2025 vide Judicial Review Misc. Application No. E014 of 2025, the exparte applicant filed the substantive Notice of Motion dated 15th May 2025. The application is brought under Order 53 Rules 3 and 4 of the Civil Procedure Rules, 2010 and Sections 8 and 9 of the [Law Reform Act](#).
2. The applicant seeks the following orders:
 - a. That an Order Of Certiorari be issued to remove into this court the decision of the 1st, 2nd and 3rd Respondents to charge and prosecute the Ex-parte Applicant in Criminal case no. E1082



of 2023 (as consolidated with Criminal case No. E 1332 of 2024) and any other case thereof as per on the facts contained in the OB-Report and contents of the charge sheet for purposes of the same being quashed.

- b. That an Order Of Prohibition be issued to prohibit the Respondents from charging the Ex-parte Applicant with the impugned offence(s) before the Chief Magistrates Court at Milimani or any other Court in the Republic or to register any charge sheet of a similar offence or from same transaction before any Court in the Republic or to sustain any proceedings thereto.
 - c. That an Order Of Mandamus be issued compelling the 2nd Respondent and 3rd Respondent to release Motor Vehicle Registration number KCN 787M, Toyota Landcruiser to effect the judgment issued in Milimani COMMSU E027 OF 2024.
 - d. That the costs of this application be provided for.
3. The application is verified by the affidavit of George Ndeti Kikuvi, the applicant herein, sworn on 6th February 2025 and a statutory statement of even date.
 4. The Applicant's case is that he advanced USD 25,000 to Jagger Jacque Limited under a Loan Agreement dated 8th July 2022, repayable by 8th August 2022 with agreed monthly interest of USD 3,750 for each month of default. The loan was secured by personal guarantees from the company's directors, Willis Oyugi Mbogo, Stompei Seipei Odul and Alvin Theuri and also by the Interested Party, who surrendered to the applicant, the logbook and physical possession of motor vehicle KCN 787M, a Toyota Landcruiser, as collateral.
 5. That on 12th July 2022, the Interested Party signed a release agreement granting the Applicant possession of the said motor vehicle to hold until repayment of the advanced loan in full, with authority to sell the said motor vehicle in case of default by the company. That except for a payment of KES 150,000 made on 25th August 2022, the company defaulted and the Applicant, pursuant to the agreement caused the transfer of the said motor vehicle into his own name.
 6. To the utter surprise of the applicant, the Interested Party is said to have reported the vehicle as stolen, leading to the Applicant's arrest and being charged before Milimani Chief Magistrate's Court vide Criminal Case No. E1082 of 2023. The Applicant states that after he took plea and secured bail, he filed Civil Suit COMMSU E027 of 2024 seeking to enforce the Loan and Release Agreement against the company, its directors and the Interested Party herein.
 7. The applicant states that Judgment was entered in his favour, in the said civil suit, authorising him to sell the aforesaid motor vehicle if repayment was not made within thirty days. He avers that the Civil Court's judgment confirmed the validity and enforceability of the agreement, hence he could not be guilty of theft or fraud.
 8. He further states that his advocate wrote to the DCI and the ODPP requesting withdrawal of charges, citing abatement of the substratum of the case. Further, he states that a Senior Assistant Director of the ODPP, in a memo dated 14th November 2024, recommended withdrawal of the criminal charges against him on the grounds that the matter was civil in nature and its prosecution would embarrass the ODPP and open them to malicious prosecution proceedings, but that the advice was never heeded by the ODPP.
 9. The Applicant asserts that, one of the guarantors and directors, Willis Oyugi, was separately charged in Criminal Case No. 1332 of 2024 for the offence of Conspiracy to Commit a felony. That the two matters (Criminal Case No. E1082 of 2023 and Criminal Case No. 1332 of 2024) were later



consolidated on 16th January 2025 with new charges being brought against the Applicant, which matter was due for pre-trial on 10th February 2025.

10. The Applicant views the timing of the consolidation of the charges as deliberate, pointing out that Willis had defaulted on his undertaking to settle the decretal sum in the civil suit and that the Interested Party had unsuccessfully sought review of the judgment. He asserts that the new charges were instigated to frustrate his recovery efforts and to deprive him of the collateral vehicle.
11. The Applicant also filed written submissions dated 16th June 2025 in which he maintains that the criminal process is being abused for ulterior motives, citing the ODPP's own internal memo admitting the matter was civil, the Interested Party's failed attempts in civil court followed by escalation to criminal proceedings, the consolidation of cases more than a year after the initial charge, introducing new theories of conspiracy and fraud and the civil court ruling of 19th December 2024 that suspended his right to sell the vehicle "as long as the criminal orders remain in force," effectively tying his hands.
12. The Applicant argues that the prosecution mounted against him is unreasonable, oppressive and violative of his rights under Article 50 of *the Constitution*, submitting that criminal law is being misused to enforce a civil debt contrary to established principles. He relies on Article 157(11) of *the Constitution* and Section 4 of the ODPP Act, which require the ODPP to act in the public interest, uphold justice and prevent abuse of the legal process.
13. He also relies on several decisions including Republic vs. Attorney General & 4 Others ex parte Diamond Hashim Lalji & Ahmed Hasham Lalji [2014] eKLR where the court is said to have held that judicial review concerns the legality of process, Peter George Anthony D'Costa v Attorney General & Another, Nairobi Petition No.83 of 2010 where the court is said to have affirmed the duty of courts to stop abuse of the criminal process.
14. Reliance is further placed on the cases of Republic v Attorney General ex parte Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001 where the court is said to have established that criminal process cannot be used to settle civil debts or personal disputes, Republic v Chief Magistrate's Court Mombasa ex parte Ganjee & Another [2002] 2 KLR 703 where the court is said to have observed that criminal law cannot be applied to enforce civil remedies and Francis Kirima M'ikunyua & Others v DPP Petition No.461 of 2012 where according to the Applicant, the court condemned the misuse of criminal process in civil dispute.
15. The Applicant similarly relies on the cases of Cyrus Shakhlanga Khwa Jirongo v Soy Developers Ltd & 9 Others [2021] eKLR which he argues, emphasized the need to restrain prejudicial prosecutorial tactics, Commissioner of Police & DCI v KCB & 4 Others [2013] eKLR where the Court is said to have held that the 1st and 3rd Respondents ought to undertake their functions in accordance and compliance with the law and Republic v Director Public Prosecution & 2 Others Ex parte Zablon Agwata Mabea [2017] eKLR and Jane Nyaboke Njagi v Inspector General of the National Police Service & 3 others; Steve Mwendwa & another (Interested Parties) [2021] eKLR, where the court it is said to have held that the court ought to stop actual or contemplated criminal proceedings if they are oppressive, vexatious or amount to an abuse of the Court process and a breach of fundamental rights and freedoms.
16. The Applicant asserts that maintaining the prosecution despite the civil judgment in his favour undermines judicial authority, risks contradictory outcomes and offends principles of fair trial and justice. He therefore urges this Court to issue orders of certiorari to quash the charge sheet and prohibition restraining the Respondents from prosecuting him further, asserting that the criminal process has been hijacked for collateral advantage.



Responses

17. The 1st and 3rd Respondents filed grounds of opposition dated 4th June 2025. In the said grounds, they contend that due process was followed in preferring charges against the Applicant. They state that a formal complaint was lodged with the 3rd Respondent, who fully informed the Applicant of the complaint before forwarding the file to the 1st Respondent.
18. That upon perusal, and in exercise of his powers under Article 157(6) of *the Constitution*, the 1st Respondent preferred charges against the applicant, based on the evidence available. They emphasize that under Article 157(10) of *the Constitution* and Section 6 of the *Office of the Director of Public Prosecutions Act* (2013), the 1st Respondent does not require consent from any person or authority to commence criminal proceedings and that in exercising his powers or functions, he is not under the direction or control of any person or authority.
19. They further rely on Section 24 of the *National Police Service Act*, which mandates the police to investigate any complaint brought to their attention to determine whether a criminal offence has been committed and argue that the Applicant has not adduced reasonable evidence to show that the criminal proceedings are mounted for an ulterior purpose
20. The Respondents further argue that the present application is frivolous and vexatious, designed only to derail the hearing of the preferred charges. They argue that there exist adequate safeguards within *the Constitution* and the Criminal Procedure Code to ensure that the Applicant's fundamental rights and freedoms are upheld.
21. It is their contention that the Applicant must demonstrate that substantial injustice would otherwise result if the criminal proceedings proceed. They maintain that cases are determined on their merits and that it is in the public interest that complaints made to the police are investigated and perpetrators prosecuted. In their view, neither Article 47, Article 48, nor Article 50 of *the Constitution* was offended, since the Applicant's side of the story was considered before the decision to charge him was reached.
22. Further, they contend that the Applicant was involved throughout the process, from the time the complaint was lodged with the police to the point when charges were preferred and presented in court. Accordingly, they argue that the application amounts to an abuse of court process, as it fails to appreciate that matters averred by the Applicant largely form what should be his defence in the criminal charges and thus it should be dismissed with costs.
23. The Respondents filed written submissions dated 20th June 2025 addressing various issues. On whether the Applicant's arraignment was lawful, they rely on Article 157(6) of *the Constitution* regarding the powers of the DPP as well as the cases of Pauline Raget Adhiambo Agot v DPP & 5 Others (2010) Petition No. 446 of 2015, which case it is submitted, affirmed the independence of the DPP.
24. They also rely on the case of Republic v Commissioner of Police & Director of Public Prosecutions ex parte Michael Monari & Another, Misc. Application No. 68 of 2011 (Nairobi), where the Court is said to have elaborated the statutory and constitutional powers of the Respondents. They argue that the Applicant has failed to demonstrate how the DPP acted contrary to public interest, to the interest of the administration of justice or failed to prevent abuse of process.
25. While acknowledging that an Applicant has the right not to be subjected to unlawful criminal proceedings, the Respondents emphasize that the DPP has a public duty to ensure that offences are prosecuted and culpable persons attend to justice as required by law. That balance, they argue, is the one created by the law and the one this Court is called upon to respect. They rely on the case of Maina & 4 Others v Director of Public Prosecutions & 4 Others; Constitutional Petition E106 & 160 of



2021 (Consolidated) [2022] KEHC 15 (KLR) (27 January 2022), which according to them, affirms this balance.

26. The 1st and 3rd Respondents further submit that the Applicant has not shown that in making the decision to charge him, the DPP abrogated any constitutional provision, written law or rules nor that he breached the rules of natural justice or acted without or in excess of jurisdiction. They caution that for this Court to delve into the sufficiency or insufficiency of evidence sustaining the charges would amount to usurping the mandate of the trial court, which is outside the scope of judicial review.
27. Additionally, they state that it has not been demonstrated that the DPP's actions were irrational, an abuse of office or actuated by malice. They insist that there is no evidence of unlawful conduct, excess authority, harassment, intimidation or manipulation of process that would undermine the Applicant's right to a fair trial under Article 50 of *the Constitution*.
28. The Respondents rely on the case of *Kuria & 3 Others v Attorney General* [2002] 2 KLR 69, where according to them, the Court held that an order of prohibition will only issue if there is evidence of abuse of process or a real threat to the accused's right to a fair trial. They submit that the Applicant is merely inviting the Court to weigh evidence and conclude whether there is a case against him, a role that lies with the trial court. That the decision to charge, they reiterate, was informed by sufficiency of evidence and public interest, not any other considerations.
29. They further submit that there is no evidence showing that the 3rd Respondent exceeded jurisdiction, breached natural justice, considered extraneous matters or acted with malice in undertaking investigations against the Applicant. They conclude that the Applicant has not demonstrated any capricious conduct on the part of the 3rd Respondent or that there is abuse of process, and that in any event, he remains presumed innocent until proven guilty before the trial court.

The Interested Party's response

30. The Interested Party filed a replying affidavit sworn on 4th June 2025 and written submissions dated 24th June 2025. The Interested Party, who is the complainant in Milimani Criminal Case No. E1082 of 2023, opposes the application and affirms that the criminal proceedings were lawfully initiated following her complaint lodged on 18th October 2023. She asserts that she had reported that her motor vehicle, registration number KCN 787M had been unlawfully transferred into the Applicant's name on the NTSA TIMS system without her knowledge, consent, or authorization.
31. She deposes that investigations by the DCI revealed that the Applicant had purported to effected this transfer using a forged motor vehicle sale agreement dated 15th February 2017, a fake affidavit sworn on 31st January 2023 and a forged tape lift dated 28th January 2023. According to the Interested Party, forensic examination confirmed that the documents were indeed false and the Applicant was consequently charged on 6th December 2023 with multiple offences, including conspiracy to commit a felony, stealing a motor vehicle, forgery, obtaining registration by false pretenses and making a document without authority.
32. It is the interested party's contention that the investigations also implicated one Jackson Muindi, a broker conversant with the NTSA Tims system, who assisted the Applicant in the fraudulent transfer of the said motor vehicle. Muindi is said to have pleaded guilty in Milimani Criminal Case No. E105 of 2024 and was convicted, thereby corroborating the charges against the Applicant. Later, that Willis Oyugi Mbogo, a director of Jagger Jacque Ltd, was also arrested and charged with conspiring with others not before the court to defraud the Interested Party.



33. The Interested Party states that Milimani Criminal Case No. E1332 of 2024 was consolidated with the Applicant's criminal case on 16th January 2025. The Interested Party points out that the DPP, upon review of the file at the Applicant's own request, reaffirmed on 19th February 2025 that there was sufficient evidence to sustain the charges and that the matter should proceed to its logical conclusion.
34. She maintains that due process was followed at every stage and denies that the charges were instigated because she lost the civil suit in Milimani COMMSU E027 of 2024. In her view, the two matters are distinct in that while the civil case concerned a loan agreement, the criminal case arises from the Applicant's use of forged documents to fraudulently transfer her vehicle into his name.
35. The Interested Party underscores that section 193A of the Criminal Procedure Code permits parallel civil and criminal proceedings. She further questions why, if the loan agreement were valid, the Applicant resorted to false documents to transfer the vehicle, an action that is criminal in nature.
36. She stresses that the criminal process is not a waste of resources but a lawful response to the Applicant's conduct. She relies on several cases including Republic vs Commissioner of Police and Another ex Parte Michael Monari & Another (2012) eKLR, Muli v Inspector General of National Police Service & 3 others; Director of Public Prosecutions (Interested Party) (Constitutional Petition E003 of 2023) [2024] KEHC 6881 (KLR) (7 June 2024) (Judgment), and Republic v Ongomo & 2 others (Criminal Case E025 of 2023) [2024] KEHC 13727 (KLR) (7 November 2024) (Ruling) to argue that the 1st and 3rd Respondents acted within their constitutional mandate and that consolidation of charges was proper and not the creation of fresh charges.
37. The Interested Party also highlights that the civil decree has since been settled, with the Applicant being paid the decretal sum of USD 25,000, which payment the Applicant has not denied. Consequently, she argues, the prayer for mandamus compelling release of the vehicle has been overtaken by events.
38. She submits that judicial review is concerned with the legality of the process, not the merits of the decision. In support of this position, she relies on the case of Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd Civil Appeal No 186 of 2001 and the case of Meixner & Another vs Attorney General (2005)2KLR 189. She also argues that the Applicant has not shown any illegality, irrationality or procedural impropriety in the Respondents' conduct.
39. In her view, the application amounts to an abuse of court process as it seeks to shield the Applicant from facing trial for serious criminal offences. She therefore urges this court to dismiss the application with costs, reiterating that the criminal proceedings were lawfully instituted, the civil decree has been satisfied and that the orders of certiorari, prohibition, or mandamus are unwarranted.

Analysis and Determination

40. I have considered the Notice of motion, the verifying affidavit, statutory statement and annexures. I have also considered the grounds of opposition and replying affidavit as filed and annexures together with the respective parties' written submissions and judicial authorities as well as the constitutional and statutory provisions cited. In my view, the issues arising for determination are:
 - i. Whether the institution and continuation of Milimani CMCCR No. E1082 of 2023 against the Applicant is unlawful, tainted with bad faith, or for an ulterior purpose so as to warrant certiorari and/or prohibition.
 - ii. Whether the existence and outcome of Milimani COMMSU No. E027 of 2024 bars or renders the criminal case an abuse of process, contrary to *the Constitution* and statute.



- iii. Whether the consolidation of CMCCR No. E1082 of 2023 with CMCCR No. E1332 of 2024, and the timing thereof, occasioned prejudice or undermined the Applicant's fair-trial rights under Article 50(2).
- iv. Whether an order of mandamus should issue compelling release of motor vehicle KCN 787M to give effect to the civil judgment.
- v. What orders should this Court make including costs of these proceedings, if any?

Whether the institution and continuation of Milimani CMCCR No. E1082 of 2023 against the Applicant is unlawful, tainted with bad faith or for an ulterior purpose so as to warrant certiorari and/or prohibition

- 41. The Applicant alleges that the prosecution is a collateral device to defeat his contractual and proprietary rights under a valid loan and release arrangement. He underscores that he advanced USD 25,000 to Jagger Jacque Ltd on 8th July 2022; the Interested Party surrendered the logbook and possession of motor vehicle registration number KCN 787M under a release agreement of 12th July 2022, authorizing sale upon default; default ensued; and that a civil court's judgment rendered on 25th July 2024 affirmed his right to sell the motor vehicle, absent payment within 30 days.
- 42. The applicant points to an ODPP internal memo of 14th November 2024 advising withdrawal of the criminal charge as the dispute is civil. He characterizes the later decision to press on especially after the Interested Party's civil efforts faltered as oppressive, contrary to Article 157(11) of *the Constitution* and Section 4 of the ODPP Act.
- 43. The 1st and 3rd Respondents on the other hand contend that they acted squarely within their constitutional and statutory mandates: received the complaint from the interested party; investigations conducted under Section 24 *National Police Service Act*, the file was reviewed by the DPP under Article 157(6) and charges preferred based on evidence gathered against the applicant. They emphasize the ODPP's independence as stipulated in Article 157(10) of *the Constitution* and Section 6 of the ODPP Act and contend that the Applicant has not demonstrated evidence of malice, improper purpose or breach of natural justice.
- 44. The Interested Party on her part contends and maintains that her motor vehicle was transferred on the NTSA TIMS using forged instruments which include a sale agreement of 15th Feb 2017, false affidavit sworn of 31st Jan 2023, a forged tape lift dated 28th Jan 2023, all confirmed by forensic examination. She points out that the applicant's co-actor, one Jackson Muindi, pleaded guilty to the charges in Cr E105 of 2024; Willis Oyugi was later charged; and that upon the Applicant's own request, the ODPP, by letter Ref. ODPP/HQ/CAM/2/3728 dated 19th February 2025, determined that there was sufficient evidence to proceed. She states that the internal memo of 14th Nov 2024 did not crystalize into a binding decision to terminate the charges.
- 45. Article 157(6) of *the Constitution* empowers the DPP to institute and undertake prosecutions. Article 157(10) insulates that power from external direction. Article 157(11) confines the discretion of the DPP within the bounds of public interest, administration of justice and avoidance of abuse. Section 4 of the ODPP Act reiterates those guardrails.
- 46. Therefore, Courts only intervene where prosecutorial power is exercised illegally, irrationally or for an improper purpose, or where the process amounts to oppression or abuse. Equally, judicial review does not try the merits or sufficiency of evidence that is before the trial criminal court.



47. On the material presented before this Court and following interpartes hearing, contrary to what the applicant had presented at the leave stage, the impugned charges are anchored on alleged document forgery and fraudulent registration on NTSA TIMS, supported by a forensic document examiner's report and by the guilty plea of a named intermediary of the applicant. Those are essentially criminal allegations distinct from the civil claim loan repayment proceedings.
48. In my humble view, the existence of an internal ODPP memo advising withdrawal in November 2024 does not, by itself, impeach the lawfulness of the later, formal decision of 19th February 2025 maintaining the charges.
49. Additionally, no concrete evidence has been tendered to show that the 1st Respondent acted under external control, ignored relevant matters or pursued an ulterior purpose. At this point, requiring this Court to assess the adequacy of evidence would, as correctly submitted by the interested party, would amount to encroaching on the trial court's mandate.
50. I am therefore unable to find that the institution and continuation of Milimani CMCCR No. E1082 of 2023 against the Applicant is unlawful, tainted with bad faith or that for an ulterior purpose.

Whether the existence and outcome of Milimani COMMSU No. E027 of 2024 bars or renders the criminal case an abuse of process, contrary to the Constitution and statute

51. The Applicant argues that the civil judgment validated the loan and release agreements and, that by parity of reasoning, negates any criminal culpability; that pressing on with the criminal case after a civil loss by the Interested Party is oppressive and risks contradictory outcomes.
52. The Respondents and the Interested Party contend that the civil suit concerns the loan and security; the criminal case concerns the making/using of forged documents and obtaining registration by false pretence. They rely on Section 193A of the Criminal Procedure Code which permits concurrent civil and criminal proceedings and state that there is no demonstrated manipulation of the process.
53. Section 193A Criminal Procedure Code provides that:
193A. Concurrent criminal and civil proceedings
Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”
54. The above section explicitly allows civil and criminal proceedings to run concurrently notwithstanding common facts. The line of cases relied on by the Applicant condemns the criminal process only where its predominant purpose is to secure a civil advantage or to settle private scores without a proper criminal substratum. Courts guard against contradictory outcomes but do not halt a prosecution merely because a civil decree exists.
55. Section 193A of the Criminal Procedure Code is clear that the existence of civil proceedings does not bar the institution or continuation of criminal proceedings based on the same facts. In the case of *Oloo v Director of Public Prosecutions* [2022] KEHC 14841 (KLR), the Court 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.”

56. Further in the earlier case of Alfred Lumiti Lusiba v Pethad Ranik Shantilal & 2 others [2016] eKLR, as cited in the above case, it was held that:

“The law is clear that the pendency of a civil suit is not a bar to criminal proceedings; it acknowledges the fact that the trial of the tortfeasor in a criminal prosecution need not be affected by the pending civil action against him. It is implied, therefore, that a civil suit cannot be stayed because of the prosecution of the tortfeasor for the obvious reason that the cause of action is neither rooted in the prosecution of the tortfeasor nor in his subsequent conviction... The conclusion that one can draw from section 193A of the Criminal Procedure Code together with the decisions of the learned judges in aforementioned cases is that both civil and criminal jurisdictions can run parallel to each other and that neither can stand in the way of the other unless either of them is being employed to perpetuate ulterior motives or generally to abuse of the process of the court in whatever manner. The upshot of this discussion is that the learned magistrate misdirected herself on law by staying the civil case against the respondents on the ground that the case was based on a judgment which was a subject of an appeal that was pending for determination. I find merit in the appellant’s appeal and I hereby allow it. The appellant will also have the costs of the appeal.”

57. It is not in contention that the 1st Respondent has the constitutional and statutory mandate to determine whether to prosecute based on the evidence gathered. The mere existence of a civil dispute



or in this case, a court's judgment or decree does not deprive the 1st Respondent of his exercise lawful mandate.

58. The civil suit orders issued on 25th July 2024 permitting sale of the Motor vehicle in the event of non-payment, together with the review ruling of 19th December 2024 suspending that order while criminal proceedings remain pending, exist alongside allegations that, separate from any contractual security, the Applicant allegedly employed forged documents to carry out a transfer on the NTSA TIMS system.
59. The settled legal position is that the criminal case can exist alongside a valid loan agreement and the pendency of civil proceedings or even a decree because a lender may legally hold security for the loan but still commit a separate crime in how they handle registration of the collateral instrument. In such circumstances, there is, in my view, little or no chance of conflict since offences like forgery, false pretenses and making documents without authority are different from the question of whether a contract is valid or not.
60. In the instant case, the applicant has not demonstrated that the criminal charges mounted against him were meant to pressure the loan repayment, particularly since the charges were filed on 6th December 2023, before the 2024 civil case and judgment was rendered, with the applicant being the plaintiff in the civil suit against the interested party.
61. In the premises, I find and hold that the existence of the civil case or a decree does not, in the present case, make the criminal proceedings an abuse of the court process.

Whether the consolidation of CMCCR No. E1082 of 2023 with CMCCR No. E1332 of 2024, and the timing thereof, occasioned prejudice or undermined the Applicant's fair-trial rights under Article 50(2) of *the Constitution*.

62. The Applicant argues that the consolidation of the two criminal cases CMCCR No. E1082 of 2023 with CMCCR No. E1332 of 2024, done on 16th January 2025 over a year after he was first charged separately, introduced new charges, altered the prosecution's case and harmed his defence. He blames the trial court for failing to examine the impact of the consolidation. He relies on Article 50 of *the Constitution* to support his argument on the right to a fair hearing and fair trial.
63. The Respondents and the Interested Party counter the above allegations by the applicant that the consolidation turned on overlapping issues, parties and facts and contend that the consolidation did not create fresh charges but promoted efficiency and consistency, citing Section 135 of the Criminal Procedure Code which permits consolidation of criminal charges. They deny the existence of any prejudice and point out that the trial court retains case management tools to cure any such prejudice as the applicant's constitutional right to a fair trial is guaranteed.
64. Section 135(1) Criminal Procedure Code provides:
 - “ 135. Joinder of counts in a charge or information
 - (1) Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.
65. The section cited above permits joinder/consolidation of charges where offences are founded on the same facts or form a series of similar offences. Courts exercise discretion to consolidate charges in order to advance efficiency, avoid inconsistent verdicts and protect fairness. The yardstick remains



prejudice. Thus, whether consolidation has undermined the accused person’s fair-trial rights and whether directions on disclosure, adjournment or severance can cure any disadvantage.

66. The material placed before me discloses common actors (the Applicant and Willis Oyugi); the same vehicle (KCN 787M); and an overlapping course of conduct around the NTSA TIMS transfer of the above motor vehicle. Consolidation in those circumstances falls within Section 135 Criminal Procedure Code.
67. Whereas the Applicant complains of a “new theory”, he does not demonstrate tangible prejudice that could not be addressed by disclosure, time to prepare for trial or appropriate directions from the trial court. Article 50 (2) of *the Constitution* safeguards are available at all times and therefore this court does not see how the consolidation of the charges will per se prejudice the applicant thereby warranting judicial review intervention.

Whether an order of mandamus should issue compelling release of motor vehicle KCN 787M to give effect to the civil Court judgment

68. The Applicant anchors the prayer for mandamus on the 25th July 2024 civil judgment authorizing sale, if the decretal sum remained unpaid. He alleges that the criminal process has been used to prevent the collateral from execution, to realize the fruits of his lawful judgment.
69. In response, the Interested Party contends that the review ruling of 19th December 2024 set aside the sale authorization so long as the criminal court orders remain in force and to avoid a situation where the court would issue conflicting orders over the same subject matter. Further, that in any event, the decretal sum of USD 25,000 was fully paid on 12th March 2025 (as per Annexure MMD9). Additionally, that the motor vehicle in issue is an exhibit in a pending criminal case, making mandamus inappropriate.
70. Mandamus as a judicial review remedy lies to compel the performance of a clear, specific, unfulfilled public-law duty. It does not enforce private rights where there is an adequate alternative remedy and it will not issue where the matter is moot or no live controversy exists or the matter is overtaken by events. Additionally, mandamus would not issue where it would have the effect of vacating orders which are not subject of challenge in the judicial review application. Such orders are rarely granted to interrupt an ongoing criminal or even a civil case, particularly in relation to the handling of exhibits or custody of the property involved.
71. On the issue of seizure of the said motor vehicle, the case of Republic v OCS, Nairobi Central Police Station & 2 Others; Ex parte Applicant: Sixtus Gitonga Mugo [2020] KEHC 7039 (KLR) is instructive, where the court observed as follows:

“The applicant has not demonstrated that there was no factual basis to justify the seizure of the exhibits. There is nothing to show that the exhibits do not form part of the intended prosecution evidence. As stated earlier, it is not the function of this court to weigh the veracity of the evidence or to assess which exhibits are relevant to the investigations. That would amount to this court descending into the arena of the trial court. An investigation should be commenced or continued if there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by a suspect. It has not been established that the facts presented in this case do not disclose an offence known to the law.”

72. Equally, in the instant case, the Applicant has not demonstrated that there was no factual basis to justify seizure of the motor vehicle which, from the investigations conducted, was allegedly fraudulently transferred to the applicant and that allegation is the gist of the pending criminal charges against



him. Further, there is nothing to show that the motor vehicle does not form part of the intended prosecution's evidence.

73. There are also two main obstacles that defeat the remedy of mandamus as sought in this matter. First, is that, the sale permission was suspended by the review ruling tied to the pendency of orders in the criminal court case and second, the Interested Party's exhibits proof of payment of the contractual / decretal sum on 12th March 2025, a fact the Applicant has not controverted in this matter. What that means is that the applicant cannot have both the collateral and the loan money. Those developments, in my view, overtake the utility of mandamus. Independently, the vehicle's status within the ongoing criminal proceedings places its custody squarely in the criminal trial court's remit and this court cannot interfere.
74. Even at the risk of sounding repetitive, this Court emphasizes that the question of its discretion to quash criminal proceedings has been settled in prior decisions.
75. The Court of Appeal in *Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others* [2018] eKLR citing the Supreme Court of India decision in *State of Maharashtra & Others v. Arun Gulab & Others*, Criminal Appeal No. 590 of 2007 stated 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]

76. Additionally, in *Bernard Mwikya Mulinge v Director of Public Prosecutions & 3 others* [2019] eKLR, the High Court, Odunga J (as he then was) persuasively 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...”



77. Again, in *Kipoki Oreu Tasur vs. Inspector General of Police & 5 Others* [2014] eKLR, it was 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...”
78. Further, in *Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another* [2012] eKLR the Court stated that:
- “... 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....”
79. The above decisions restate the 1st Respondent’s duty to prefer charges against the person accused of an offence following a complaint and upon investigations being undertaken by the Director of Criminal Investigations. In view of the above, it is this court’s humble opinion that the 1st Respondent is acting within the mandate provided under *the Constitution* and the law and that there is no evidence of abuse of process or an overreach in preferring charges against the applicant.
80. Courts have consistently 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 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.
81. The 1st Respondent being an independent office established under *the Constitution*, the Court can only interfere with or interrogate its actions or those of its officers where there is threatened or actual violation of rights and freedoms guaranteed by *the Constitution* or contravention of *the Constitution*.
82. 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*.”
83. Accordingly, and in view of the above analysis of the existing facts, I find and hold that the applicant has not demonstrated that an order of mandamus should issue compelling release of motor vehicle KCN 787M to give effect to the civil judgment.
84. The Applicant has also raised the issues of constitutional violations. However, this Court is not persuaded that the application meets the threshold envisaged 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.



85. The burden of proof lies on the party who alleges. See section 107 of the *Evidence Act*, Cap 80 Laws of Kenya. In *Leonard Otieno vs Airtel Kenya Limited* [2018] eKLR, the Court rendered itself as follows:

“It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize *the Constitution* and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”

86. Judicial review remedies are discretionary and may be denied even where grounds for their issuance exist if the Applicant’s conduct is improper or if granting the orders would hinder the proper administration of justice. This court in the case of *Republic v Nairobi City County & another Ex parte Hema Virendra Kashyap* [2016] KEHC 1089 (KLR) observed that:

“In *Republic Vs Judicial Service Commission Ex parte Pareno* [2004] 1 KLR 203-209, the court was categorical and I agree that:

“Judicial Review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the court has to weigh one thing against the other and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles...”

Although this court is alive to the fact that Judicial Review remedies are now anchored in *the Constitution* at Article 47 and the provisions of the *Fair Administrative Action Act*, 2015, the court has not been shown how and what specific provisions of *the Constitution* and of the *Fair Administrative Action Act* have been breached in charging the exparte applicant.”

87. In the instant case, the Applicant has not demonstrated that the ongoing criminal prosecution mounted against him are driven by malice, bad faith or ulterior motives. On the contrary, the interested party has demonstrated that the decision to charge the applicant with the criminal offences was supported by evidence gathered during investigations into the complaint lodged by the interested party.

88. In view of the aforesaid circumstances, this court finds that the Applicant has failed to demonstrate that the Respondents’ actions are illegal, irrational or procedurally improper. I further find that there is no evidence of violation of the applicant’s constitutionally guaranteed rights.

What orders should this Court make and who should bear the costs of these proceedings, if any?

89. This Court observes that this is not a public-interest litigation but a targeted challenge to an ongoing prosecution that, on the material on record, was mounted after investigations and later affirmed on review of a civil court judgment obtained by the applicant. The application fails on all issues. Consistent with the general rule, costs follow the event. I find no reason to deny costs to the successful parties. However, as the 1st and 3rd respondents who actively participated in these proceedings are public entities carrying out their prosecutorial and investigative mandates, it is expected that in every criminal charge mounted, they will be challenged for one reason or the other.



90. I find that it is not in the interest of justice to award them costs. I however, order that the interested party shall have costs of these proceedings, to be taxed by the Deputy Registrar to the allowable scale, payable by the exparte applicant.
91. Consequently, the prayers for Certiorari and Prohibition are declined and dismissed. The prayer for mandamus to compel release of motor vehicle KCN 787M is declined. The Notice of Motion dated 15th May 2025 is dismissed with costs to the Interested Party, payable by the exparte applicant.
92. Mention before the Deputy Registrar on 13th October, 2025 to confirm the status of the bill of costs to be filed by the interested party.
93. Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY AT NAIROBI THIS 25TH AUGUST, 2025

R.E. ABURILI

JUDGE

