Republic v Office of the Director of Public Prosecution & 2 others; Siwa (Ex parte); Mungai (Interested Party) (Miscellaneous Judicial Review E002 of 2025) [2025] KEHC 11884 (KLR) (11 August 2025) (Ruling)

Neutral citation: [2025] KEHC 11884 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS JUDICIAL REVIEW E002 OF 2025

RN NYAKUNDI, J

AUGUST 11, 2025

BETWEEN

REPUBLIC .... APPLICANT

AND

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION .. 1ST RESPONDENT

THE DIRECTORATE OF CRIMINAL INVESTIGATIONS .... 2ND RESPONDENT

THE HONORABLE ATTORNEY GENERAL .... 3RD RESPONDENT

AND

MARTIN CHEMONGES SIWA .... EX PARTE

AND

MARK MUNGAI .... INTERESTED PARTY

RULING

1. What is pending before this court for determination is a Notice of Motion Application dated 6th March 2025 brought under Articles 25(c), 47, 48, 50, 157, 159(2)(d) and 165(6) of *the Constitution* of Kenya 2010; Order 53 Rule 3(1) of the Civil Procedure Rules 2010 and section 7 and 9 of the *Fair Administrative Action Act* where the Ex-parte Applicant is seeking the following orders;

   a. That an order do issue to bring to this Honorable Court the decision of the first respondent dated and/or issued on 18/11/2024 and to quash the said decision barring, preventing and/or prohibiting the second respondent from arresting the interested party and further having him charged with conspiracy to defraud and abuse of office.

b. That the Honorable court be pleased to issue further orders of prohibition to the second respondent barring the second respondent from implementing the decision of the first respondent dated and/or issued on 18/11/2024 for being unlawful.

c. That cost of this application be provided for.

2. The Application is made on the following grounds and upon the statement of facts and the verifying affidavit attached herein among others;

a. That the first respondent on the 18/11/2024 issued a decision which in effect barred the second respondent from arresting the interested party and having him charged with the offence of conspiracy to defraud and abuse of office.

b. That this was contrary to the earlier position and/or decision taken by the first respondent that the interested party ought to be charged alongside the two accused persons in Eldoret Criminal Case No. 1572 of 2021 with the offence of conspiracy to defraud and abuse of office

c. That the first respondent had strongly defended the decision to institute in Eldoret criminal case No. 1572 of 2021 and further having the interested party charged thereon by opposing the application and petition lodged by the accused persons and the interested party challenging the legality of those proceedings.

d. That the interested party and the two accused persons in Eldoret Criminal Case No.1572of 2021 are accused of committing an offence arising from the same set of facts and/or transactions.

e. That the interested party upon learning of the warrant of arrest against him in relation to Eldoret Magistrate Court Criminal Case No. 1572 of 2021 had lodged an application to have the same set aside.

f. That the application by the interested party to have the warrants against him set aside was dismissed.

g. That further, the accused persons in Eldoret Magistrate Court Criminal Case No. 1572 of 2021 had lodged Eldoret High Court Constitutional Petition 59 of 2021 to challenge the legality of Eldoret Magistrate Court Criminal Case No.1572 of 2021 against them and the interested party.

h. That Eldoret High Court Constitutional Petition 59 of 2021 which challenged the legality of Eldoret Magistrate Court Criminal Case No. 1572 of 2021 was defended by the 1st respondent and which culminated into the same being dismissed.

i. That as a result, the interested party and the accused persons in Eldoret Magistrate Court Criminal Case No. 1572 of 2021 were thus to face trial in the matter.

j. That the interested party and the two other accused persons in Eldoret Criminal Case No.1572 of 2021 are accused of facts arising from the same set of transactions.

k. That the decision by the Is respondent not to continue with the prosecution of the interested party in Eldoret Criminal Case No. 1572 of 2021 is thus irrational, unreasonable, and improper, made in bad faith and is designed to make the case fail.

l. That the decision made by the 1st respondent barring the 2nd respondent from arresting and having the interested party charged in Eldoret Criminal Case No. 1572 of 2021 thus beats logic and the acceptable moral and legal standards.

m. That further, the first respondent did not give proper and valid reason as to why the interested party should not be charged in Eldoret Criminal Case No. 1572 of 2021 alongside the other perpetrators of the offence.

n. That the decision by the first respondent was thus taken arbitrarily and contrary to the earlier stance taken by the first respondent on the matter.

o. That the first respondent did not tender reasonable, proper and sufficient reason for change in their decision not to charge the interested party as an accused in Eldoret Criminal case No. 1572 of 2021.

p. That the decision made by the first respondent issued on the 18/11/2024 not to charge the interested party in Eldoret Criminal Case No. 1572 of 2021 was thus ultra vires, unreasonable, unprocedural, tainted with illegalities and should thus be quashed.

q. That in as much as the decision to institute or not to institute criminal proceedings vests in the first respondent, the same should be exercised reasonably, judiciously, without bias and in an accountable manner

r. That the first respondent by instituting charges against the other two accused persons in Eldoret Criminal Case No. 1572 of 2021 and excluding the interested party who was a party and conduit to the transaction thus acted unreasonably, improperly and in an ultra vires manner.

s. That further, the decision to do so is unreasonable, unprocedural and tainted with illegalities.

t. That it is thus proper and in the interest of justice that this court do issues and order to bring this court the directive by the 1st respondent issued on 18/11/2024 and addressed to the 2nd respondent for purposes of being quashed.

u. That no prejudice shall be suffered by the respondent and the interested party if the orders sought are granted as they shall at all times be heard on the trial of the criminal matter.

v. That on the other hand, the applicant who is the victim in Eldoret Criminal case No.1572 of 2021 stands to suffer substantial loss and harm if the decision by the first respondent on the 18/11/2024 is not discharged as he shall be denied an opportunity to get justice in the matter.

w. That the same will hamper the applicant's right of access to justice and fair hearing.

x. That it is thus proper that the decision by the first respondent issued on 18/11/2024 be quashed and/or removed from this court.

y. That the court is vested with powers to grant the orders sought.

z. That the application has been lodged expeditiously and without delay.

3. The application is supported by the annexed verifying affidavit sworn by the Ex-parte Applicant who avers as follows: -

a. That I am the ex parte applicant herein hence duly authorized and competent to swear this affidavit.

b. That I have read and understood the contents of the Notice of Motion lodged herein and the statement of facts and whose contents have been verily explained to me by my advocates on record whose advise I verily believe to be true and I do wish to depone as hereunder;

c. That on the 25/7/2017, I had entered into a sale of land agreement with James Wangira & Johannes Boy Okoba for sale of a portion of land measuring 28 acres from land parcel number Uasin Gishu/moiben/ Scheme 3 at a consideration of Shilling Fourteen Million (Ksh 14,000,000/).

d. That at the execution of the agreement I had paid the said vendors James Wangira & Johannes Boy Okoba a sum of Ksh 7,000,000/=.

e. That consequently, the vendors had allowed me to take absolute possession and occupation of the portion of land measuring 28 acres from land parcel number Uasin Gishu/moiben/scheme 3 for my own use on condition that I was to pay the balance of the purchase price in due course and which I duly did.

f. That the vendors of the said land parcel on their part had surrendered to the interested party who was the then land registrar for Uasin Gishu County the title deed for land parcel number Uasin Gishu/moiben/ Scheme 3 to facilitate the transfer of the parcel of land disposed of onto my name.

g. That I had on several occasions followed up with the interested party to have the said land I purchased transferred onto my name without success.

h. That the interested party had often directed me to avail the vendors to sign the transfer forms before he could have the board consent to the said land transaction and eventually have the land purchased registered in my name.

i. That I had thus tried in vain to have the vendors sign the transfer forms to have the portion of land that they had disposed of to me be registered in my name.

j. That being frustrated by the vendors refusal to transfer the land they had disposed to me, I had thus lodged Eldoret Chief Magistrate Land Case No. 73 of 2020 against the vendors seeking for orders of specific performance against them so they could transfer to me the 28 acres out of land parcel number Uasin Gishu/moiben/scheme 3 that I had purchased from them.

k. That during the pendency of those proceedings, the interested party had conspired with the vendors James Wangira & Johannes Boy Okoba to release to them the title for land parcel number Uasin Gishu/moiben/ Scheme 3 without my knowledge and to my own detriment.

l. That I had tried to follow up on the title deed with the interested party and the vendors who indicated that the title for land parcel number Uasin Gishu/moiben/scheme 3 was lost.

m. That however, no proof was tendered to the effect.

n. That I through the first respondent had thus lodged Eldoret Magistrate Court Criminal Case No. 1572 of 2021 to have James Wangira, Johannes Boy Okoba, Mark Wandera Muigai and one Peter Taracha for conspiracy to defraud and which matter is still pending in court.

o. That in addition to filing the said suit, the first respondent had lodged Eldoret Miscellaneous Application no. E549 OF 2022 to have the interested party and one Johanes Boy Okoba arrested and charged alongside the accused persons in Eldoret Criminal Case No. 1572 of 2021 as they could not be found.

p. That the court in Eldoret Miscellaneous Application No E549 of 2022 had issued orders for the arrest of the interested party and Johanes Boy Okoba and to have them charged in Eldoret Criminal Case No. 1572 of 2021 alongside the accused persons thereon with the offence of conspiracy to defraud and abuse of office.

q. That the interested party had consequently lodged an application in Eldoret Miscellaneous Application no. E549 OF 2022 to challenge the warrants of arrest issued against him in the matter.

r. That upon being heard, the application to set aside the warrants of arrest issued against the interested party was dismissed.

s. That the interested party and Johanes Boy Okoba were thus supposed to be arrested, arraigned in court and charged with the offences of conspiracy to defraud and abuse of office alongside the other accused persons in Eldoret Criminal Case No. 1572 of 2021.

t. That I am further aware that the two accused persons in Eldoret Criminal Case No.1572 of 2021 had also lodged Eldoret High Court Constitutional petition No.59 of 2021 to challenge the commencement of the said criminal proceedings against accused persons and the legality thereof.

u. That the said petition was strongly defended and opposed by the 1st respondent and which culminated into the same being dismissed on the 8/3/2022.

v. That in other words, the judge held that Eldoret Magistrate Court Criminal Case No.1572 of 2021 for conspiracy to defraud should proceed to its logical conclusion.

w. That on the 4/12/2024, I was following up with the second respondent to have the interested party arrested and charged in Eldoret Criminal Case No. 1572 of 2021 when I was informed by the officer in Eldoret Central Police Station handling the matter that there was a decision made by the first respondent that the second respondent should no longer arrest the interested party and have him charged in Eldoret Criminal Case No. 1572 of 2021 with the charge of conspiracy to defraud and abuse of office as there was insufficient evidence.

x. That the investigating officer further indicated that he could thus not affect the warrants of arrest in force against the interested party in light of the directions issued to him by the first respondent on the 18/11/2024

y. That the decision by the first respondent issued on the 18/11/2024 and addressed to the second respondent was thus contrary to the earlier decisions taken by the first respondent in the matter that the interested party be arrested and charged with conspiracy to defraud and abuse of office alongside the other accused persons in Eldoret Criminal Case No.1572 of 2021.

z. That decision by the first respondent issued on 18/11/2024 was thus improper, unreasonable, irrational and made in bad faith as it had all along defended the decision to prefer charges against the interested party for conspiracy to defraud and abuse of office.

    aa. That no sufficient and reasonable explanation was given by the first respondent for change of decision not to have the interested party arrested and charged with the offence of conspiracy to defraud and abuse of office in Eldoret Criminal Case No.1572 of 2021 despite the parties having committed the offences arising from same set of facts and transaction.

ab. That he decision by the first respondent issued on 18/11/2024 to the second respondent barring, preventing and/or prohibiting the second respondent from arresting the interested party and further having him charged with conspiracy to defraud and abuse of office was thus ultra vires, unreasonable, unlawful and made in bad faith.

ac. That it was the interested party who being the then land registrar for Uasin Gishu County who was given and/or had custody of the title for land parcel number Uasin Gishu/moiben/scheme 3 which is claimed to have been stolen under his custody.

ad. That the interested party and the other accused persons in Eldoret Criminal Case No.1572 of 2021 conspired to get the title from the custody of the interested party in order to defeat the ex parte applicant rights to land parcel number Uasin Gishu/moiben/scheme 3.

ae. That the decision not to prosecute the interested party in Eldoret Criminal Case No.1572 of 2021 is thus irrational, unreasonable, and improper, made in bad faith.

af. That I therefore pray that this Honorable court sets aside, quash and/or discharge the said decision issued by the first respondent on the 18/11/2024 for being unlawful.

4. The Application is opposed by Mark Mungai; the Interested Party herein vide his Replying Affidavit where he deponed on oath as follows;

a. That I am the interested Party herein.

b. That I aver that the instant application is actuated by malice and it's an attempt by the Ex-parte Applicant to settle scores between myself and him since there was another Civil Suit involving Subject Matter UASIN Gishu/moiben Scheme/3 I.e. Misc. Elc Case No. 73 Of 2020, Martin Chemonges Siwa & Another Vs Mary Nabwire Bwire & 5 others which my watch as the then Land Registrar Uasin Gishu County, declined to transfer to the Exparte Applicant for want of statutory requirements and/or defective documentations to warrant transfer thereof.

c. That I aver that the dispute involving the parties in the civil suit arose on or about 1st February 2021 when I was serving as the then Land Registrar at Uasin Gishu County. The bitterness of the Exparte Applicant against me emanates from the time, he brought the title deed of the said property UASIN Gishu/moiben Schemes/3 Which Was Then Registered Jointly In The Names Of One James Wafula Wangira And Mary Nabwire Bwire to lands offices for transfer of the entire parcel of land into his names.

d. That I aver that the Exparte Applicant gave the alleged documents for transfer of the entire parcel of land Uasin Gishu/moiben Schemes/3 which was then registered/owned jointly in the names of one James Wafula Wangira And Mary Nabwire Bwire to one of the clerks at Eldoret Land Offices and when the said Clerk brought the documents to me and upon looking at the said documents, I advised the clerks that the said documents did not meet statutory requirements to effect transfer in favour of the Ex Parte Applicant as a result, the said documents for transfer were never booked and lodged officially at the Eldoret Land Offices, i.e. no payments and/or receipts were issued, but rather returned over counter.

e. That subsequently, the Exparte Applicant together with the Agent of one James Wafula Wangira (who had power of attorney) Mr. Boi came to my office and upon explaining to them the statutory requirements for transfer and the reasons for my decision to decline transferring the said parcels of land to the Exparte Applicant, I returned the documents to Mr Boi Agent

of one James Wafula Wangira in presence of the Exparte Applicant for their further action forthwith.

f. That upon the failure of the Exparte Applicant to effect the transfer of the entire parcel in his names, subsequently, he instituted the said civil suit Misc. Elc Case No. 73 of 2020, Martin Chemonges Siwa & Another Vs Mary Nabwire Bwire & 5 others and sued the registered owners of parcel of land i.e. James Wafula Wangira And Mary Nabwire Bwire alongside others.

g. That the said civil suit was concluded and the decree issued. Notably, the court awarded the Exparte Applicant 28 Acres out of 48 Acres and the remainder reverted back to the owners one James Wafula Wangira And Mary Nabwire Bwire against the intentions of the Exparte Applicant who wanted to fraudulently transfer the entire parcel of land to himself.

h. That it turned that there was another fraud involving the Exparte Applicant, this was involving another different parcel of land known as Eldoret Municipality Block 8/527 where the Exparte Applicant was accused of forgeries of transfer documents and Officers from Directorate of Crime Investigations (DCI) from the DCI Headquarters, at Mazingira House Nairobi came to my office and interrogated me about the same and I later recorded a statement at the DCI headquarters Nairobi.

   i. That I aver upon recording my statements at DCI Headquarters Nairobi on the said fraudulent acts against the Exparte Applicant, he was charged in Eldoret Magistrate Criminal Case No E3469/2022, R Vs Martin Chemonges Siwa For Obtaining Land By False Pretense C/sec 320 Of the Penal Code.

j. That I aver that it is on the basis of the entire fraud and forgeries Criminal Case against the Exparte Applicant where I am the state witness and upon discharging my duties professional while serving as the Land Registrar at Uasin Gishu County by declining to transfer the title deed to the Exparte Applicant, hence defeating the fraud by the Exparte Applicant against the registered owners and upon the 1st Respondent having exonerated me from any criminal liability by withdrawing the charges against me in the Eldoret CM's Court Criminal Case No 1572 of 2021 that the Exparte Applicant is bitter and now intends to drag me to this Honourable Court to settle score for self-interest.

5. The Application is also opposed by the 1st Respondent through their Counsel Mrs. Sidi Kirenge vide the Grounds of opposition dated 19th March 2025 which can be summarized as follows;

   1. The power to institute, undertake, continue and discontinue criminal proceedings against any person before any Court in respect of any offence alleged to have been committed is a mandate of the 1st Respondent as entailed in Article 157(6)(a) of *the Constitution* of Kenya 2010.

   2. The 1st Respondent exercised its decision not to charge the interested party as was communicated in the letter dated 18th November 2024 referenced ODPP/UG/ADV/70 (attached to the Application) is in accordance with *the Constitution*, Section 5(4) (e) of the ODPP Act and clause 1.4 of the Decisions to Charge Guidelines of 2019.

   3. That the decision was arrived at on the basis of insufficient evidence against the interested party, having applied the evidential test as is stated in clause 3.2.1 of the Decision to Charge guidelines.

   4. The same directives by the 1st Respondent noted that there was sufficient evidence to charge the 1st Petitioner and the 2nd Petitioner (as listed in Constitutional Petition No. 59 of 2021) with the offences of Conspiracy to Defraud and Obtaining Money by False Pretences hence

considering the Ex-Parte Applicant's Complaint under section 89 of the Criminal Procedure Code.

5. The 1st Respondent is legally mandated to exercise this function and to clarify on the position of the Interested Party, given that he(the Interested Party) was not a party in Constitutional Petition no 59/2021 that addresses similar issues and was determined before this Honorable Court, is not and has never been charged in Criminal Case No. E1572/2021 and no warrant of arrest exists against him in E1572/21 either.

6. That in any event, pursuant to Article 157(10) of *the Constitution* and sections 6(a) and (b) of the ODPP Act, the 1st Respondent does not require the consent of any person or authority for the commencement of criminal proceedings and is not to be under the direction or control of any person or authority in the exercise of his or her powers or functions under *the Constitution* of Kenya.

7. That in accordance with Article 27 (1) of *the Constitution* of Kenya the 1st Respondent has the authority to charge as it deems fit to ensure that each parties have equal protection and equal benefit of the Law, to which it has so acted.

8. The 1st Respondent acted procedurally, reasonably and within the scope of its mandate and the Law in issuing the directive dated 18th November 2024.

6. The Exparte Applicant also filed a further affidavit dated 6th April 2025 where he deponed as follows;

   a. That in response to paragraph 1, 2, 3, 4, 5, 6, 7 and 8 of the Grounds of opposition, I wish to state in as much as the first respondent has the discretion whether or not to prefer criminal charges against an accused, the same must be exercised judiciously and reasonably.

   b. That the discretion whether or not to prefer criminal charges against an accused person should not be exercised capriciously and whimsically with the goal of defeating the complainant's right to a fair hearing.

   c. That in this matter, the interested party and the accused person in Eldoret Magistrate Court Criminal Case No. 1572 of 2021 are accused of having committed an offence arising from same set of transaction and similar evidence applies to all of the accused therein.

   d. That the allegation that there is insufficient evidence to warrant the arrest of the interested party and have him charged in Eldoret Magistrate Court Criminal Case No. 1572 of 2021 alongside the accused therein are thus unfounded and baseless.

   e. That the first respondent wants to shield and protect the interested party from the criminal prosecution simply because he is a senior public officer.

   f. That further, the first respondent has not moved the court to set aside the warrants of arrest against the interested party in Eldoret Magistrate Court Misc. Application No 549 of 2022.

   g. That the decision by the 1st Respondent not to charge the interested party alongside the accused persons in Eldoret Magistrate Court Criminal Case No. 1572 of 2021 is thus irrational, unreasonable, capricious and whimsical.

   h. That I thus pray that the directive issued by the 1st Respondent on the 18/11/2024 directing the 2nd Respondent not to arrest the interested party for purposes of him being charged in Eldoret Magistrate Criminal Case No. 1572 of 2021 be brought into this court for purposes of being quashed.

i. That no prejudice shall be suffered by the interested party if he is charged alongside the accused persons in Eldoret Magistrate Court Criminal Case No 1572 of 2021.

j. That criminal law has sufficient safeguards to protect the interested party rights to fair hearing during trial.

Analysis and Determination

7. The hearing before this court by way of written submissions and summary of evidence is for the remedy on the prerogative writs of certiorari and prohibition as against the respondent by ex parte applicant. In addition to the evidence presented before me at the interim relief hearing, the ex parte applicant relies on annexed documentary evidence in the form of a charge sheet and other related evidential material filed in the CM's Court.

8. In addressing the issues raised in the notice of motion I must in the first instance state that judicial review remedies under Article 23 of *the Constitution* of Kenya 2010 also ride on a protocol of the maxim or doctrine of exhaustion. This is consistent with the position of the court in England, upon which our judicial review litigation is fashioned, being a common law system of administration of justice. The court in R (Watch Tower Bible & Tract Society of Britain & Others) v Charity Commission [2016] EWCA Civ 154, [2016] 1 WLR 2625 was on point that:

> " If other means of redress are 'conveniently and effectively' available to a party, they ought ordinarily to be used before resort to judicial review: per Lord Bingham of Cornhill in Kay v Lambeth London Borough Council [2006] 2 AC 465, para 30. It is only in a most exceptional case that a court will entertain an application for judicial review if other means of redress are conveniently and effectively available. This principle applies with particular force where Parliament has enacted a statutory scheme that enables persons against whom decisions are made and actions taken to refer the matter to a specialist tribunal.... To allow a claim for judicial review to proceed in circumstances where there is a statutory procedure for contesting the decision risks undermining the will of Parliament."

9. In this proceedings one of the core grievances touches on the decision by the DPP to charge James Wangira Wafula, Peter Taracha Wafula for the offence of conspiracy to defraud contrary to section 317 of the penal code. The brief facts that being on diverse dates between 18th August 2017 & 11th August 2020 at unknown place within the Republic of Kenya, jointly conspired with intent to defraud Martin Siwa Chemonges by making sale agreement with him for a parcel of land no. Uasin Gishu/Moiben Scheme/3 dated 18th August 2018 and fraudulently defrauded the said Martin Siwa Chemonges of Kshs. 8,137,700 knowing that the said parcel of land had earlier been sold.

10. Incidentally, the complainant in the criminal trial is the ex parte applicant in these proceedings. The reason judicial trial is important to him is set out in his verifying affidavit, which outlines issues traceable to the sale agreement involving LR Moiben Scheme 3. He now seeks an order of prohibition against the criminal proceedings in Case No. 1572 of 2021. The point of contention is that an application has been made in Misc. E549 of 2022 for orders of arrest against the ex parte applicant to face charges of conspiracy. The court in KNEC v Gathenji & Others [1996] KLR 483 CAK observed inter alia that an order of prohibition will issue from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not herein lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. That is why

it is said prohibition looks to the future so that if a tribunal were to arrange in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made…an order of prohibition would not be efficacious against the decision made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision.

11. In addition to establishing an arguable case on the merits, the applicant in this application is required to show sufficient interest in the matter to which the application relates. Broadly speaking, there are three basic approaches a court takes when determining the standing of a litigant seeking writs under judicial review: first, where the applicant's rights are affected; second, where the applicant has been adversely affected; and third, the citizen's cause-of-action approach. It is also a threshold issue that, in exercising its discretion under the scope of judicial review jurisdiction, the court should not restrain a public body, authority, or person from exercising a constitutional mandate and acting within the enabling statute by granting interim conservatory orders to prevent the enforcement of an apparently valid law, unless it is satisfied that the challenge to the law is so firmly grounded as to justify the exceptional course sought by the applicant.

12. For the applicant to succeed from a claim under judicial review he must satisfy the test outlined in Pastoli v Kabale District Local Government Council & others (2008) 2 EA 303 where the court held as follows:

> "In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety…Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission…Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards…Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

13. It is fitting to state that, in the so-called land transactions, Martin Chemonges Siwa was the victim as against the accused person in the criminal case before the CM's Court at Eldoret. He lodged a complaint with the National Police Service and, in executing its mandate under Articles 244 and 245 of *the Constitution*, an investigation was carried out, culminating in the indictment of the accused person by the DPP within the express provisions of Articles 157(6) and 157(7) of *the Constitution*. There was therefore a procedural and legitimate expectation on the part of the applicant that the decision to investigate and recommend indictment would not, in turn, give rise to an adverse infringement or violation of his fundamental rights and freedoms. This inquiry as undertaken by the court in R v Anti counterfeit Agency & ex parte applicants JR 36 of 2017 is on point to the facts of this case in adjudicating legitimate expectation claims, the court follows a two-step approach. First, it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved

party. Second, if the answer to this question is in affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation, and enforce the legitimate expectation. The first step in the analysis has both an objective and a subjective dimension. First, it is asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. This requirement also implies that individuals are required to know what the law is and consequently when a representation is lawful or not and hence can be relied upon or not. Once a reasonable expectation exists, the administrator is required to act in accordance with that expectation, except if there are public interest considerations, which outweighs the individual's expectation.

14. The legitimate expectation in the wider legal sense as explained by the learned authors H.W.R. Wade & C.F. Forsyth Administrative law Oxford University Press 2000 states thus:

> " It is not enough that an expectation should exist; it must in addition be legitimate.... First of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation....Second, clear statutory words, of course, override an expectation howsoever founded....Third, the notification of a relevant change of policy destroys any expectation founded upon the earlier policy...."

> "An expectation whose fulfillment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice." (Emphasis added)

15. The obvious remedy for a breach of legitimate expectation is for the court to require the body, authority, or person to give the applicant what he or she was promised. Thus, according to the ex parte applicant, the DPP acting on the recommendations of the National Police Service to charge the accused person with the offence of conspiracy to defraud him in the land transaction fulfilled his legitimate expectation. In reality, there was never a time he could have imagined that, in the future, an adverse decision would be made requiring him to face such criminal proceedings. What remedy should the court provide? The applicant must discharge the standard and burden of proof, evidentially, under Sections 107(1), 108, and 109 of the *Evidence Act*, by showing that the respondent made a promise of such a nature, but that the subsequent decision was detrimental to his rights and fundamental freedoms.

16. The extent of the protection offered by the doctrine of legitimate expectation was further articulated in R (Bibi and Nash) v Newham London Borough Council [2001] EWCA Civ 607, where it was stated that, although detrimental reliance on a promise would normally be required for legal enforcement of a substantive expectation, this was not an absolute rule. In appropriate circumstances fairness could render an assurance binding on an authority despite the absence of such reliance.

17. In the Applicant's petition there must be evidence on the rule against bias both subjective and actual on the part of the Respondents who are mandated by *the Constitution* to investigate crime and arrive at a decision to charge any suspect with a criminal offence. This involves for one to demonstrate that the decision maker in arriving at the decision to investigate the Applicant for that matter was guilty of bias or he/she had a direct interest in the matter outside the ambit of public interest. The reviewing court must therefore ascertain the relevant circumstances as to whether the impugned decision does show a real denture or bias on the part of the Respondent in question. This is the standard and burden

of proof which the Applicant or Petitioner must discharge for the prerogative writs of prohibition, certiorari and mandamus to be granted by this court.

18. With the advent of the new Constitution the Director of Public Prosecution as the Office is expressly created under Article 157 (6) (7) (8) (9) and (10) is independent and takes no instructions from any other organ of *the Constitution* or such persons or as the case may be. This is the what the court remarked in the case of Diamond Hashabam Lalji & Another v A. G. & 4 Others [2018] eKLR thus

> " (34) It is also indubitable that the constitutional prosecutorial power of DPP is reviewable by the High Court as Article 165(2) (d) (ii) of *the Constitution* ordains. However, the doctrine of separation of powers should be respected and the courts should not unjustifiably interfere with the exercise of discretion by DPP unless it is exercised unlawfully by, inter alia, failing to exercise his/her own independent discretion; by acting under the control of direction of another person; failing to take into account public interest or interest of the administration of justice in all their manifestations; abusing the legal process; and by acting in breach of fundamental rights and freedoms of an individual.
>
> The DPP is entitled to make errors within this constitutional jurisdiction and the decision will not be reviewed solely on the ground that it was based misapprehension of facts and the law.
>
> (Matululu and Anor v. DPP [2003] 4 LRC 712). Further, authority show that courts are generally reluctant to interfere with prosecutorial decisions made within jurisdiction.".

19. In the entire petition we have not been told that in the Respondent's decision-making process there in breach of Article 27 (1) and (4) of *the Constitution* on equality before the law which also demands equal protection of the law for every citizen within our borders. *The Constitution* is very clear on equality clauses when it comes to the administration of justice. There is also no evidence that the Applicant/Petitioner has been discriminated by the Respondents lacking objective justification and rendering the decision unreasonable.

20. It follows therefore that the applicant must bring himself within the principles in the case of Council of Civil Service Unions Vs Minister for Civil Service [1985] 1 A.C. 374 (GCHQ) Lord Diplock famously categorized grounds of 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'." In this case Lord Diplock defined illegality in the following:
>
> > "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."
>
> This concept however does not have one element, but can be subdivided into ways a decision-maker may have acted illegally. These are:
>
> a. mistakes of jurisdiction, which include acting outside of their power known as simple ultra vires: misinterpreting their power and so making an error of

law and making factual mistakes or misinterpreting his jurisdiction known as error of fact

b. abuse of discretion, which includes taking into account irrelevant considerations and ignoring relevant ones and acting for an improper purpose:

c. retention of discretion, which includes a failure to exercise discretion by either limiting his decision-making through the making of rigid rules or illegally delegating his discretion to someone else.

d. acting in a way which is incompatible with the rights contained in *the constitution* of Kenya.

21. The classification of illegality as a ground of the judicial review also incorporates the doctrine of ultra vires where the decision-maker has acted outside the powers conferred on him/her by *the Constitution* or a statute. A decision is also regarded as an illegality where it is tainted with errors of law where a public body misinterprets its legal powers. A further basis of the courts review jurisdiction is on a decision making process ground on no evidence. It is also trite that statutory powers conferred upon a public body, authority or person must be used for the express and imply purposes for which they were given and then action contrary to that purpose among the illegality.

22. The 1st Respondent argued that the decision to charge the accused person was in line with the provisions of Article 157(6) (a) of *the Constitution* of Kenya 2010 as read with section 5(4) (e) of the ODPP Act. The other limb which the facts of this case touches on is within the principles elucidated in the case of Suchan Investment Ltd. Vs Ministry of National Heritage & Culture & 3 Others [2016] eKLR where the Court of Appeal had this to say:

> "Article 47 of *the Constitution* as read with the provisions of Section 5 (2) of the *Fair Administrative Action Act* establishes a non-exclusive approach to challenge of administrative action. The section permits bifurcation or a split approach for remedies. One approach is by way of statutory judicial review under the Act; the other is through proceedings for any other remedies as may be available under *the Constitution* or any written law. Subject to Section 9 (2), 3 and (4) of the *Fair Administrative Action Act*, the two approaches are not mutually exclusive. The bifurcated and non-exclusive nature of proceedings for remedies must be read in the context of Article 47 of *the Constitution* and Section 12 of the *Fair Administrative Action Act*. The common law principles of administrative review have now been subsumed under Article 47 Constitution and Section 7 of the *Fair Administrative Action Act*. In this regard, there are no two systems of law regulating administrative action - the common law and *the Constitution* - but only one system grounded in *the Constitution*. The courts' power to statutorily review administrative action no longer flows directly from the common law, but inter alia from the constitutionally mandated *Fair Administrative Action Act* and Article 47 of *the Constitution*. ... The law on judicial review of administrative action is now to be found not exclusively in common law but in the principles of Article 47 of Constitution as read with the *Fair Administrative Action Act* of 2015. The Act establishes statutory judicial review with jurisdictional error in Section 2 (a) as the centre piece of statutory review. The Act provides a constitutionally underpinned irreducible minimum standard of judicial review; the Act is built on the values of expeditious, efficient, lawful, reasonable, impartial, transparent and accountable decision-making process in Articles 47 and 10 (2) (c) of *the Constitution*. The extent to which the common law principles remain relevant to administrative review will have to be developed on a case-by-case basis as the courts interpret

and apply the provisions of the *Fair Administrative Action Act* and *the Constitution*. As correctly stated by the High Court in Martin Nyaga Wambora v Speaker of the Senate [2014] eKLR it is clear that they - Articles 47 and 50(1) - have elevated the rules of natural justice and the duty to act fairly when making administrative, judicial or quasi-judicial decisions into constitutional rights capable of enforcement by an aggrieved party in appropriate cases.

23. This is also the position taken by the same court in Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR where it expressed itself as follows:

> " Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed".

24. *The Constitution* 2010 does vest prosecutorial powers under Article 157 in the office of the Director of Public Prosecutions (DPP). The holder of the office has broad discretion in deciding whether to initiate criminal proceedings against a suspected criminal within the provisions of our penal systems. However, this power is not absolute and can be subject to judicial review by the High Court under Article 165 (2) (b) (d) & (6) of *the constitution*. The Director of Public Prosecution decisions to charge, or discontinue any criminal proceedings can only be reviewed as a last resort if it is proven evidentially that he acted in bad faith, abused his powers or made a decision that is illegal, irrational, unreasonable or not done in the public interest. In Article 157 (10) of *the Constitution* 2010, the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the discretion or control of any person or authority.

25. This court is being asked to issue order of prohibition to the 2nd Respondent to bar the director of that office or its subordinate from implementing the decision of the 1st respondent barring the second respondent from implementing the decision of the first respondent dated and/or issued on 18/11/2024 for being unlawful. In the same petition the court is also invited to quash the said decision. For the court to cede jurisdiction in order to exercise discretion to intervene and review the impugned decision dated 18th November 2024, the applicant must bring himself within the stipulated grounds elsewhere in this ruling which include but not limited to unreasonableness, illegality, impropriety, and all those clusters in section 7 of the Fair Administrative Act 2015. The applicant should not stop there but discharge the standard and the burden of proof as articulated in the case of Meme v Republic & Another (2004) eKLR where the Court stated that, "...the impugned decision is being used for improper purpose or as a means of vexation and oppression, or for ulterior purposes, that is to say, court process is being misused". If this court were to quash the impugned decision, the applicant must demonstrate that the process employed by the decision-makers being the 1st and 2nd respondents is not being used properly, honestly, or legitimately for the purpose of fair administration of justice. It is trite law that persons charged with statutory powers and duty ought to exercise the same reasonably and fairly and that the discretion ought not to be used whimsically, unreasonably and arbitrarily or

against the tenets of natural justice. If the discretion is used arbitrarily and unreasonably, the court may step in to remedy the situation.

26. This court, though clothed with jurisdiction and powers to review the decision-making processes of inferior bodies or tribunals established under *the Constitution* together with the enabling statutes will not exercise its discretion to dictate to those bodies how exactly to conduct their governance protocols so long as they act fairly, reasonably, proportionately, and in accordance with the principles of natural justice as provided under Articles 47 and 50 of *the Constitution*. It is only where there are allegations of a breach of natural justice commonly referred to as the right to a fair hearing that the court would not close its doors or legal forums to the aggrieved parties without examining those allegations.

27. The only avenue available for this court to quash the impugned decision of 18th November 2024 is for the applicant to satisfy the criteria set out in the case of KNEC vs. Republic ex parte Geoffrey Gathenii Njoroge (1997) eKLR in which the court held that:

> "Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue of the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons in the appeal before us the respondents did not apply for an order of certiorari and that is all we want to say on that aspect of the matter."

28. *The Constitution* of Kenya, as the supreme law of the land, provides a system of fundamental laws and institutions for the governance and administration of the Republic. It is defined as the fundamental and paramount law of the nation, committed to nurturing and protecting the well-being of the individual, the family, communities, and the nation. It prescribes the permanent framework of a system of government, assigns to the different departments their respective powers and duties, and establishes certain fixed principles on which the government is founded. For our case, Article 10 is profound and inspirational, as it ordains the national values and principles of governance, which must be observed by every institution, organ, arm of government, body, and person whenever any of them acts or;

    a. Applies or interprets this constitution and

    b. Enacts, applies or interprets any law and makes

        2. The national values and principles of governance include-

            a. patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people:

            b. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;

            c. good governance, integrity, transparency and accountability, and

            d. Sustainable development.

29. It is my considered view that the Applicant's invitation to this court to exercise judicial review under the doctrine of constitutional supremacy for the remedies of judicial review in Article 23 to settle the controversies which gave rise to the impugned decision of 18th November 2024 has not met the criterion illuminated in the various case law set elsewhere in this ruling. If that standard and burden of proof had been discharged as established by law, this is a court that never turns a blind eye to abuses committed by State Officers, independent constitutional bodies, or other branches of government. For

those reasons, the prerogative writs of prohibition and certiorari are not available in the context of this petition to be granted as reliefs to the applicant. Each party shall bear its own costs. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIIL AND CTS AT ELDORET THIS 11TH AUGUST 2025

……………………………………….

R. NYAKUNDI

JUDGE