



Republic v Officer Commanding Parliament Police Station & 3 others; Atho & 2 others (Interested Parties); Odero (Ex parte Applicant) (Judicial Review E018 of 2023) [2024] KEHC 1661 (KLR) (Judicial Review) (23 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1661 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW E018 OF 2023
JM CHIGITI, J
FEBRUARY 23, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

THE OFFICER COMMANDING PARLIAMENT POLICE STATION 1ST RESPONDENT

THE NATIONAL POLICE OF KENYA 2ND RESPONDENT

THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION 3RD RESPONDENT

THE CHIEF MAGISTRATES COURT MILIMANI LAW COURTS, CRIMINAL DIVISION 4TH RESPONDENT

AND

LILIAN AWUOR ATHO INTERESTED PARTY

REALTIME COMPANY LIMITED INTERESTED PARTY

ALEX LOIS OMONDI AMOLLO INTERESTED PARTY

AND

ALBERT OWUOR ODERO EX PARTE APPLICANT



JUDGMENT

1. Pursuant to leave of court granted on 15th February, 2023 the *ex-parte* Applicant filed a Notice of Motion dated 1st March, 2023 said to be brought under Order 53 Rules 1, 2, and 3 of the [Civil Procedure Rules](#) Chapter 21 Laws of Kenya; and Sections 8 and 9 of the [Law Reform Act](#) Chapter 26 Laws of Kenya. The Application is seeking for the following orders:
 - a. An order of *Certiorari* do issue to bring into this Court and quash the proceedings of Nairobi Chief Magistrate Court Criminal case Number E3695 of 2020: Formerly *Lilian Awuor Atho & Albert Owuor Odera* Now *R v Albert Owuor Odera*.
 - b. An order of Prohibition do issue restraining the Respondent from hearing and or determining Nairobi Chief Magistrate Court Criminal Case Number E3695 of 2020: Formerly *Lilian Awuor Atho & Albert Owuor Odera* Now *R v Albert Owuor Odera*.
 - c. The cost of this application be borne by the respondents and interested parties.
2. The Application is based on the grounds on its face. It is also based on the grounds in the Statutory Statement, and on the Verifying Affidavit sworn by Albert Owuor Odera both dated 8th February, 2023.
3. The Applicant's case is that on 24th June, 2020 he witnessed the signing of a loan agreement between Alex Lois Omondi Amollo [the 3rd Interested Party] and Realtime Company Limited [the 2nd Interested Party] in which the 3rd Interested Party advanced to the 2nd Interested Party a sum of Kes 3,500,000/=; and that he received no money from the amount advanced.
4. On or about 4th November, 2020 the 1st Respondent summoned the *ex-parte* Applicant to appear before him at the Parliament Police Station and the *ex-parte* Applicant appeared as summoned. On appearing at the Parliament Police Station, the *ex-parte* Applicant was immediately placed under arrest and later on that morning presented before the Chief Magistrate's Court at Milimani on charges of obtaining money by false pretenses contrary to section 313 of [Penal Code](#) in Nairobi Chief Magistrate Court Criminal case number E3695 of 2020.
5. It is contended that from the particulars of the charge sheet, the money subject matter of the charge above referenced was a loan facility granted to RealTime Company Limited, a company in which the *ex-parte* Applicant's is a Director.
6. That the charges *ex-parte* Applicant is facing in Nairobi Chief Magistrate Court Criminal Case Number E3695 of 2020 are subject matter in Nairobi HCCC No. E175 of 2020 [Real Time Company versus Equity Ground Foundation](#) which is pending determination.
7. The loan facility was for the procurement of Personal Protective Equipment (PPE) for onward supply to the Equity Group Foundation in conjunction with the Kenya Covid Fund under the aegis of Real Time Company Limited, which was done as contracted and witnessed by the Applicant.
8. That prior to instigating the Charge against the *ex-parte* Applicant, and the 1st Interested Party, the 1st Respondent had written to the Equity Group Foundation and obtained confirmation that the contract for the supply of PPE to the Fund in conjunction with the Kenya Covid-19 Fund was legitimate even though the parties were having some challenges with its implementation and had purportedly cancelled the contract.



9. That the loan facility, the subject matter of the Charge in question was only Procured under contract from the complainant by the 2nd Interested Party upon executing the Loan Agreement dated the 24th June 2020 together with the Addendum to the Loan Agreement having shown to the complainant as the Lender of the loan the requisite Contract with the Equity Group Foundation.
10. To the Applicant, there is neither a criminal element to be determined before the criminal Courts nor any false pretenses on his part to warrant even the charge be brought against the him herein as a complete abuse of the Court process.
11. It is maintained that there was a valid and legal tender certificate at the time of obtaining a loan facility to Real Time Company limited. Therefore, the Respondents have acted in utter abuse of their office and ultra vires their mandate by instigating and prosecuting a civil dispute before Criminal Courts. The impugned decision was arrived at by taking into consideration ulterior motives and or purposed to prejudice legal rights as a business man in the Country.
12. The impugned decision is said to be irrational and not proportionate as *ex-parte* Applicants responses were not taken into consideration in crafting the Charge Sheet against him. That the action of charging the *ex-parte* Applicant in a criminal court amounts to an abuse of power and authority donated to the Respondents by statute and by the applicable laws.
13. It is averred that the 1st Interested Party herein who was the co-accused with the *ex-parte* Applicant in Milimani CMCC Criminal case no E3695 of 2020 filed Nairobi HCCJR Number E1130 of 2020 in which the case against her based on the charge sheet and evidence as the *ex-parte* Applicant herein was quashed by the High Court and at attempt to present the decree in Nairobi HCCJR Number E1130 of 2020 before the Magistrate's Court in Milimani CMCC Criminal Case No E3695 of 2020 to assist the trial Court in determining the matter fairly and justly the criminal case was rejected by the 4th Respondent.
14. Therefore, that the Respondents action are unlawful, illegal, wrongful, malicious, unconstitutional, and mala fide; and the same has caused the applicant a lot of anguish and suffering in compelling him to attend to a case that is purely civil in the criminal Court.
15. In response to, and opposing the Application, the 1st and 4th Respondent's filed their Grounds of Opposition dated 10th July, 2023 on the following grounds:
 1. That the Application herein is unmerited and therefore an abuse of the due process of the Court.
 2. That the Application is intended to curtail the statutory obligations and duties of the 4th Respondent herein.
 3. That the Application is frivolous, vexatious and an abuse of court process since it does not disclose how the 1st Respondent acted outside their mandate as provided in law.
 4. That the Application does not disclose any single act of illegality, irrationality or procedural impropriety on the part of the 1st & 4th Respondent.
 5. That, if granted, the orders sought in the application will undermine the investigatory functions of the 1st Respondent provided for under Section 24(e) of the *National Police Service Act*, No. 11A of 2011, thereby crippling the criminal justice system.



6. That the prerogative orders of *Certiorari* and prohibition sought are of serious nature hence should not be granted lightly save where there is abuse of the law which has not been disclosed in the present application.
 7. That this Honorable Court would be usurping the statutory mandate of the 4th Respondent if it were to take up that role as proposed by the *ex-parte* Applicant.
 8. That the Applicant in essence, seeks that this honorable Court directs Public officers to exercise or not to exercise his/her statutory discretion in a particular manner hence usurp the said officer's authority.
 9. That the Applicant is inviting this court to trespass into the arena specifically reserved for the criminal trial process and ought not to usurp the constitutional or statutory mandate of the 4th Respondent.
 10. That the charges in Nairobi CMCC E3695 of 2020 were brought without any ulterior motive on the part of the 1st Respondent nor is there any procedural impropriety on the part of the 4th Respondent.
 11. That the charges against the *ex-parte* applicant in Nairobi CMCC E3695 of 2020 are of serious criminal nature hence ought to be substantively tried and determined by the 4th Respondent in the interest of justice.
 12. That the Applicant has failed to show how the acts complained and the proceedings in Nairobi CMCC E3695 2020 are tainted with illegality, irrationality and procedural impropriety hence the judicial review orders sought should not be granted and as such the application herein should be dismissed with Costs to the *ex-parte* Applicant.
16. To buttress their cases, the following parties filed their respective written submissions. The *ex-parte* Applicant's submissions are dated 27th September, 2023; While the 1st and 4th Respondent's Written Submissions are dated 11th December, 2023. I have payed due regard to the submissions by learned counsel for the respective parties, and have considered the authorities cited therein.
 17. After a careful consideration of the material before court I find the following issue crystalizes for determination: Whether the Application is merited to grant the prerogative orders sought.

Analysis and Determination

18. It is important at this stage to set out the applicable principles and circumstances under which the Court will grant order prohibiting the commencement or continuation of a criminal trial process. In this respect, the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The merits of the case, and particularly whether the criminal proceedings have a likelihood of success, or that the Applicant has a good defense is also not a ground for halting criminal proceedings by way of judicial review, in light of the purpose and limits of judicial review.
19. However, if an Applicant demonstrates that the criminal proceedings constitute an illegality or abuse of process, this Court will not hesitate in putting a halt to such proceedings, as that fall squarely within its mandate as a judicial review Court. The cases of *Peter Ngunjiri Maina v DPP & 2 Others* (2017) eKLR, and *R v DPP & 2 Others Ex parte Nomoni Saisi* (2016) eKLR identified various scenarios that



would require interrogation to warrant a review of the unfettered discretion of the Director of Public Prosecutions as follows:

- “ a. Where there is an abuse of discretion;
- b. Where the decision-maker exercises discretion for an improper purpose;
- c. Whether decision-maker is in breach of the duty to act fairly;
- d. Whether decision-maker has failed to exercise statutory discretion reasonably;
- e. Where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;
- f. Where the decision-maker fetters the discretion given;
- g. Where the decision-maker fails to exercise discretion;
- h. Where the decision-maker is irrational and unreasonable.”

20. In this regard, the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court as recognized by section 193A of the [Criminal Procedure Code](#), unless the commencement of the criminal proceedings is meant to force the Applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognized aim.

21. These principles have been restated in various judicial decisions. The role of the different players in the criminal process was recognized in [Republic vs Commissioner of Police and Another ex parte Michael Monari & Another](#), [2012] eKLR where it was held 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. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. 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”.

22. In [Joram Mwenda Guantai vs The Chief Magistrate](#), [2007] 2 EA 170, the Court of Appeal explained the applicable principles as follows:

“ It is trite that an Order of Prohibition is an order 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 in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings... Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the inherent power and the duty to secure fair treatment for all



persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”

23. The Court of Appeal in *Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others*, [2013] eKLR also held as follows on concurrent criminal a civil proceeding on the same issues:

“While the law (section 193A of the *Criminal Procedure Code*) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings” It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court. This is case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations”

24. The circumstances when a Court can intervene in a criminal prosecution was also the subject of the decision in *R vs. Attorney General Exp Kipngeno Arap Ngeny*, High Court Civil Application No. 406 of 2001 wherein it was held that:

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.

25. The question that therefore need to be answered by this Court is whether the criminal proceedings against the *ex-parte* Applicants were brought in abuse of the Respondent’s powers, were unreasonable, or were motivated by improper motives. In this respect, it is not disputed that there were contractual dealings between the *ex-parte* Applicant and the Interested Parties, over the subject matter of the prosecution, which is the loan advanced in light of the performance of the contract and payment thereof.

26. It is also notable that the Respondent brought NO evidence of the basis of their prosecution of the *ex-parte* Applicants. It is thus proper and justified in the circumstances to conclude that the prosecution of the *ex-parte* Applicant was NOT made with basis, and was thus an abuse of prosecutorial powers and also unreasonable.

27. The *ex-parte* Applicants have sought orders of *Certiorari* and prohibition. The Court of Appeal held in *Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge* Civil Appeal No. 266 of 1996 *inter alia* as follows as regards the nature of the two judicial review orders:

“Prohibition looks to the future so that if a tribunal were to announce 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, whether in excess or lack of jurisdiction or whether in violation



of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order 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, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings... Only an order of *Certiorari* can quash a decision already made and an order of *Certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

28. The prosecution of the *ex-parte* Applicants by the Respondent has been found by this Court to be in abuse of the process of Court, unreasonable, and for improper purposes and ulterior motives. The order sought of *Certiorari* to quash the said prosecution is thus merited. Consequently, an order of prohibition stopping any further prosecution of the *ex-parte* Applicants in the said criminal case is also merited, to ensure that this Court does not act in vain.

Disposition

29. In the premises, I find that the *ex-parte* Applicants’ Notice of Motion dated 1st March, 2023 is merited, and the same is allowed.

Order

30.

- a. An Order of *Certiorari* be and is hereby granted to remove into the High Court and quash the proceedings of Nairobi Chief Magistrate Court Criminal case number E3695 of 2020: Formerly *Lilian Awuor Atho & Albert Owuor Odero* Now *R v Albert Owuor Odero*.
- b. An Order of Prohibition be and is hereby granted restraining the Respondent from hearing and or determining Nairobi Chief Magistrate Court Criminal case number E3695 of 2020: Formerly *Lilian Awuor Atho & Albert Owuor Odero* Now *R v Albert Owuor Odero*.
- c. The Applicant to have the cost of this suit.

It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 23RD FEBRUARY, 2024

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CHIGITI J (SC)

JUDGE

