



**Rono v Director of Public Prosecution & 2 others; Sawe
(Interested Party) (Judicial Review Application E020 of 2024)
[2024] KEHC 15072 (KLR) (Judicial Review) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15072 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E020 OF 2024
JM CHIGITI, J
NOVEMBER 28, 2024**

BETWEEN

DR EDWIN KIPNG'ENO RONO APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

THE MAGISTRATE'S COURT AT NGONG 3RD RESPONDENT

AND

LEAH CHELANGAT SAWE INTERESTED PARTY

JUDGMENT

Background;

1. The Application before this Court is the Applicant's Notice of Motion application dated 6th February, 2024 brought under Sections 8 & 9 of the Law Reforms Action, Sections 7, 9, 10 & 11 of the Fair Administration Actions Act, 2015, Order 53 Rules 1 & 2 of the Civil Procedure Rules and all other enabling provisions of the Laws of Kenya.
2. The application seeks the following orders;
 - a. An Order of Certiorari to bring before the High Court and quash the charge sheet and subsequent proceedings in Ngong Criminal Case Number E021 of 2024, Republic versus Dr. Edwin Kipng'eno Rono.



- b. An Order of Prohibition to bring before the High Court and prohibit the Respondents from charging, arraigning and proceeding with any criminal trial against the Applicant in relation to the offence of forgery in Ngong Criminal Case Number E021 of 2024, Republic versus Dr. Edwin Kipng'eno Rono.
- c. An Order of Mandamus to bring before the High Court and compel the Respondents to stop the commencement and proceedings to try the Applicant in Ngong Criminal Case Number E021 of 2024, Republic versus Dr. Edwin Kipng'eno Rono.
 - 1. The Application is supported by a Statutory Statement dated 29th January, 2024 and Verifying Affidavit and Supplementary Affidavit sworn by Dr Eric Kipng'eno Rono on 29th January, 2024 and 1st June, 2024 respectively.
 - 2. The Applicant deponed that he is a medical doctor currently engaged with different hospitals including Kenyatta National Hospital, Nairobi Hospital and Aga Khan Hospital and also a director of Leawin Limited.
 - 3. He further deponed that he is known to the Interested Party herein with whom he had an intimate relationship since 2006 and together entered into sale agreements to invest in some properties. (Plot No. 832A, Plot No. 403B(II) and Plot No. 276/Business) properties which they both procured after he secured loan facilities.

6. It is his case that unbeknown to him, the Interested party registered Leawin Limited and she allocated herself 90% shareholding and 10% shareholding to him and thereafter the disputed properties were thereafter transferred to the Leawin Limited without his authority and neither did he receive payment for the sale of the said properties to Leawin Limited.

7. He further argues the illegal transfer lead him to challenge the same through Nairobi Environment & Land Court Case No. 498 of 2016; Dr. Edwin Rono vs. Leawin Limited & Another.

8. The Applicant avers that he filed another case in the High Court Commercial and Tax Division Petition No. E029 of 2018, Dr. Edwin K. Ronoh vs. Leawin Limited & Leah Chelangat where he sought among other orders winding up of Leawin Limited for illegally being formed. The case was heard and determined and the court granted orders as follows:

“54. I find that the claim of forgery and fraud, in the scale that has been alleged by the Petitioner are matters that fall within the purview of criminal investigations by the relevant government agencies and not an inspector appointed by this court.

...

55. Moreover, the 2nd Respondent, (Leah Chelangat) did not establish that he had conducted a valuation of the assets and liabilities of the Company so as to enable this court know the financial standing of the company or if buy out would be a viable option for the parties. (Annexed herewith and marked EKR 10 is a copy of the judgment attesting as much)”

9. The Applicant deponed that after this judgment he reported the issue at the Director Criminal Investigations and the same has not been acted upon to date.

10. It is the Applicant's case that vide a Plaintiff dated 30th August, 2023, the Interested Party commenced Kajiado ELC Case No. E022 of 2023 Leawin Limited & Another vs. Edwin K. Rono & Others



(hereinafter “Kajiado ELC Case”), claiming interalia that he had unlawfully transferred title(s) belonging to Leawin Limited to a third party.

11. The Interested Party in the instant suit filed an application under certificate of urgency seeking various interim reliefs including that a mandatory injunction be issued as against the defendants in the Kajiado ELC case.
12. The Applicant deponed that he filed his response to the application and the entire Kajiado ELC suit seeking it to be struck out as it does not disclose any reasonable cause of action.
13. The Applicant posits that the issues for determination in the Kajiado ELC case are:
 - i. Whether Leawin Limited had any title to any land that grants it any interest to complain.
 - ii. Whether I being a director of Leawin Limited had capacity to transfer any parcel of land belonging to Leawin Limited.
 - iii. Whether at the alleged time of transfer of properties Leah Chelangat Sawe was a director of Leawin Limited and her consent was required prior to any transfer of property.
14. The Applicant argues that the Interested Party instigated the commencement of criminal charges against him on the allegation that he had allegedly forged an affidavit in her name to allegedly cause a transfer of presumed Leawin Properties, which allegation is also a live issue in the Kajiado ELC Case as hearing of the matter is yet to be concluded.
15. The Applicant avers that while attending to a Patient in hospital, he was arrested and whisked away to Ngong Police Station, leaving the Patient, who required urgent medical attention to chance and grace, endangering the patient’s life.
16. The Applicant argues that he has been denied bail by the Director of Criminal Investigations (DCI) at Ngong without any cause and or reason, despite it being his constitutional right.
17. The Applicant avers that he was arraigned in Ngong and charged under matter number Ngong Magistrate’s Court Criminal Case No. E021 OF 2024 Republic vs Edwin Kipng’eno Rono (hereinafter “Ngong Criminal Case”) and he states that the alleged charges for the Ngong Criminal case are the same charges that investigations by DCI, Ongata Rongai, which had been conducted and he was found not culpable.
18. It is the Applicant’s case that the plea taking in the Ngong Criminal Case was deferred to 30th January, 2024 and the arraignment in relation to the trumped-up charges in the Ngong Criminal Case would have been in breach of his rights as enshrined under Articles 48, 27(1) and 29(d) of the Constitution of Kenya.
19. The Applicant filed written submissions dated 3rd June, 2024 in which he highlighted four issues for determination by this Honourable court:
 - i. Whether the Court has jurisdiction to review the prosecutorial powers and what guidelines does it follow in reviewing.
 - ii. Whether the decision to investigate, arrest and charge the Ex parte Applicants and the ensuing criminal proceedings were improper and an abuse of the court process
 - iii. Whether the prayers sought by the Ex parte Applicant are merited.



20. The Applicant makes reliance in the case of Supreme Court Case of Jirongo vs. Soy Developers Ltd & 9 Others, [2021] KESC 32 KLR which makes the bedrock of his case. In this case the court held as follows:

“We respectfully agree and adopt this position in this case but must add that where it is obvious to a court, as it is to us and was to the learned judge of the High Court, that a prosecution is being mounted to aid proof of matters before a civil court or where the hand of a suspect is being forced by the sword of criminal proceedings to compromise pending civil proceedings, then Section 193A of the Criminal Procedure Code cannot be invoked to aid that unlawful course of action. Criminal proceedings, whether accompanied by civil proceedings or not, cannot and should never be used in the manner that the 2nd and 3rd Respondents have done. It is indeed advisable for parties to pursue civil proceedings initially and with firm findings by the civil court on any alleged fraud, proceed to institute criminal proceedings to bring any culprit to book.” (Emphasis ours)

21. The Applicant on the 1st issue of whether the Court has jurisdiction to review prosecutorial powers and what guidelines does it follow in such review argues that Article 165(6) of *the Constitution* of Kenya stipulates as follows:

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

22. It is the Applicant’s case that this court has jurisdiction to review the prosecutorial powers and investigations by the Director of Public prosecution and the guideline on the said supervisory powers is in the case of Saisi & 7 Others vs. DPP & 2 Others [2023] KESC 6 KLR and Jirongo vs. Soy Developers Ltd & 9 Others, [2021] KESC 32 KLR, the Supreme court was categorical thus:

“The Supreme Court of India in RP Kapur v. State of Punjab AIR 1960 SC 866 laid down guidelines to be considered by the court when the High Court may review prosecutorial powers. They are as follows:

- i. Where the institution/continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would ensure the ends of justice; or
- ii. Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceedings e.g. want of sanction
- iii. Were the allegations in the first information report or complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged or
- iv. Where the allegations constitute an offence alleged but there is either no legal evidence adduce or evidence adduced clearly or manifestly fails to prove the charge.

23. On the second issue on whether the decision to investigate, arrest and charge the Applicant and the ensuing criminal proceedings were improper and an abuse of the court process, the Applicant argues that the investigations, his arrest and prosecution was meant to advance an ulterior and or collateral motive, that is, to salvage the Interested Party claim, whilst, at the same time, undermining his case



in Kajiado ELC Case No. E022 of 2023, Leawin Limited & Leah Chelangat Sawe vs. Dr. Edwin Kipng'eno Rono & 3 Others.

24. The Applicant makes reliance on the case of Republic vs. Chief Magistrates' Court at Mombasa ex parte Ganijee & Another [2002] eKLR where the court held as follows:

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute...when a prosecution is not impartial or when it is being used to further a civil case, the court must put to a halt the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of court, oppressive or vexatious, prohibition and or certiorari will issue and go forth.”

25. The Applicant further argues that the matter before this Honourable court is an abuse of the court process as the Kajiado ELC case is yet to be heard to its conclusion.

26. It is the Applicant's case that evidence must be availed to show that he made a false document to this effect as is defined under Section 345 of the Penal Code.

27. Further the criminal proceedings instituted by the Interested Party is an ulterior motive to boost the Interested Party's claim. The charge of forgery, that of making a false document has not been established and therefore the criminal case is not prosecutable.

28. He cites the case of Commissioner of Police & Another vs. Kenya Commercial Bank ltd & 4 Others [2013] eKLR, where the Court of Appeal held as follows:

“...It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (...) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score settling or vilification. The Court has power to interfere with such investigation or prosecution process.”

29. The Applicant posits that the Respondents fell short of the Constitutional expectation of independence, impartiality and objectivity as neither of them is supposed to take directions from or act at the behest of any third party in the discharge of their respective obligations. However, they fell short of this requirement by acting at the behest of the Interested Party notwithstanding the simultaneous challenges before the Environment and Land court as to the authenticity of the alleged and impugned Affidavit.

30. It is the Applicant's case that the Interested Party was not arrested despite the forensic report indicating that the Applicant's signature was also forged. This is in violation of various constitutional principles and values by the Respondents while exercising their powers. This reeks of bias as against the basic tenets of non-discrimination, equity and equality and social justice, and an abuse of the court process.



31. On the third issue of whether the prayers sought are merited, the Applicant argues that the Saisi case held that: -

“... The remedies in judicial review were three, namely; Certiorari, prohibition and mandamus. The grounds upon which one could base an application of judicial review were under the heads of illegality, irrationality, procedural impropriety and proportionality.”

He cites the case of Republic Vs. Director of Public Prosecution & 2 others ex-parte Azim Jiwa Rajwani & another [2022] eKLR elaborated on these grounds in the following terms:

“The ex-parte applicant was therefore required to establish the prosecution acted illegally, irrationally, or that there was procedural impropriety in arriving at its decision. In the Ugandan case of Pastoli V. Kabale District Local Government Council & Others (2008) 2 EA 300 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 in law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, contrary to the provisions of a law or its principles are instances of illegality....

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 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 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 an authority exercises jurisdiction to make a decision...”

32. The Applicant contends that he has demonstrated the grounds of illegality, irrationality and procedural impropriety as follows: -

- i. Illegality: the 1st and 2nd Respondents' decisions and actions fell way short of the constitutional parameters that govern the exercise of their respective state powers of investigation, arrest and prosecution. The Respondents' abused their state power and thus acted ultra vires; that is while the authenticity of the documents held by both the Interested Party and the Applicant is being questioned in the Kajiado ELC case, only the Applicant was subjected to the criminal process and not the Interested Party.
- ii. Irrationality: only the Applicant was subjected to criminal proceedings regardless of the fact that even those documents held by the Interested Party were also subject to scrutiny and challenge. Not subjecting the Interested Party to investigation, arrest and prosecution in the same way the Applicant was unreasonable in the circumstances.



iii. Impropriety: The Applicant's arrest and prosecution during the pendency of a civil case proportionate in the circumstances because it constitutes an interference with a legitimate civil proceeding.

1st and 2nd Respondents' case;

33. In opposition to the Applicants' Application, the 1st and 2nd Respondents filed a Replying Affidavit dated 22nd February, 2024 sworn by Criminal Investigations Officer Millicent Ochuka SSP, police officer and the In-Charge of Criminal Investigation Kajiado North Sub-County, and written submissions dated 13th August, 2024.

34. It is the 1st and 2nd Respondents case that the Interested Party herein had reported at Rongai Police Station vide OB No.60/19/01/2022 that properties/Plots owned by her company being Plot No.L.R 403 B,276 C, 832 A all within Ongata Rongai Trading Centre, Kajiado County had been fraudulently been transferred to the applicant and a Company associated with him.

35. They posit that upon the Interested Party recording her statement, they called the Applicant whom they interrogated and recorded his statement under inquiry. From their investigations they established that Interested Party and the Applicant had cohabited and later separated, during the subsistence of their cohabitation they had jointly registered a company known as Leawin Co. Ltd. which owned the aforesaid Plots.

36. Further, the holding of shares in the said company was 90:10 in favour of the Interested Party however, the Applicant challenged that position in the High Court vide Petition No. E029 of 2018 and the court had rendered its decision on 5th November,2019 reaffirming the sharing of the said company as 90:10 in favour of the Interested Party.

37. The Respondents contend that they established that the Interested Party's shares in the said company had been interfered with and fraudulently transferred by the Applicant to himself and later the same were transferred to two other parties named Rose Chepkoech and Gedion Kipngeno (Director of Jengomall).

38. The Respondents aver that on 11th February, 2022 the Director of Criminal Investigations Rongai had written a letter Ref: DCI/O/Rongai/SEC.POL./4/7/VOL.XII/14 to the County government of Kajiado to enquire on the status of the plots and they responded vide their unreferenced letter dated 22nd February, 2022, confirming that the Interested Party/said company's properties had been transferred through a fraudulent manner/process.

39. They further aver that in their investigations they wrote to the Registrar of companies and obtained the relevant documents and information regarding the registration particulars of the said Company whereby it was confirmed that the Applicant had obtained all the 100 percent shares.

40. It is their case that it was established that the Applicant was able to transfer the Interested Party's shares in the said company by presenting an affidavit sworn on 5th February, 2021 and a letter dated 12th April, 2021 to the Registrar of Companies purporting that the same had been authored by the Interested Party and they were to the effect that the Interested Party had resigned as the Co-Director of Leawin Co. Ltd.

41. It then follows that the Respondents obtained the forged documents for purposes of investigations and verification of signatures. The affidavit was purported to have been witnessed by one Ruth Emanikor advocate who recorded her statement denying that she witnessed the same.



42. The 1st and 2nd Respondent deponed that submitted they forged affidavit and the letter purported to have been signed by the Interested Party to the Document Examiner for verification of the signatures who vide report no Ref: DCI/ORG/8/3/1/545/2022 dated 2nd June, 2022 they found out that the signatures on the subject documents the affidavit and the purported resignation letter were forged.

43. The Respondents aver that on 14th December, 2022, the investigation file was forwarded to ODPP Kajiado office vide DCI Rongai letter Ref: DCI/SEC/KJD/C/4/4/VOL.XIV/170 with findings and recommendations and upon perusal, the DPP vide their letter Ref: ODPP/KJD/05/VOL.1/2023/010 dated 14th February, 2023 indicated that there was evidence of fraudulent transfer of the properties but directed that a few points be covered before the file is returned to his office for further direction and after they covered the raised points they resubmitted to the ODPP vide letter dated 4th December, 2023 reference No. DCI /SEC/4/4/1/VOL.XV/245 or further perusal and advise.

44. It was after perusing the file that on 22nd December, 2023, the ODPP Kajiado vide its letter Ref: ODPP/ KJD/ADV/7/2023/28 directed that the Applicant be arrested and charged for the offences of forgery, giving false information and making a document without authority.

45. The accused was arrested and arraigned in court on 3rd January, 2024 but plea was differed and the Respondents were served an order staying the criminal case proceedings pending the hearing and determination of the instant Judicial Review Application.

46. The Respondents argue that the Application before this Honourable Court is not merited, and does not meet the threshold as provided under the law as it has not been demonstrated that any illegality has been committed or an action that can be said to be irrational or any procedural impropriety or any move that is disproportional or any of the Respondents has acted beyond its powers.

47. It is their case that they have acted within the law and exercised their respective mandates as required for the following reasons;

- A complaint that required investigations had been reported to the police, the same is confirmed by the OB No. availed and the correspondences availed together with the complainant/ Interested Party's statement.
- The applicant was called and interrogated, recorded his statement, his associates also recorded their respective statements.
- Further information was gathered from other government agencies including the registrar of companies, some collected documents were subjected to examination by experts i.e. document examiner.
- It was confirmed that an offence of forgery had been committed and all the evidence was pointing towards the applicant as the perpetrator hence, we made the same recommendation to the DPP.
- The DPP made an independent review of the evidence, assessed and made an evaluation of the same and arrived at the same verdict that a crime had been committed by the applicant herein.
- The applicant was called by the Prosecution's office and was informed about the outcome of the investigations, he was also informed about the outcome of the investigations by the police before he was arraigned in court.

48. The Respondents argue that courts have in several cases pronounced themselves on what is to be considered (principles normally considered) for the grant or denial of the orders being sought under



Judicial Review by dint of Article 47 of *the Constitution* and Section 4 of the *Fair administrative action Act*, 2015.

49. They cite the case of Public Procurement Administrative Review Board & Another Ex parte Intertek Testing Services (EA) PTY Ltd. & Authentix Inc & 2 Others where Justice A.K. Ndungu quoting the case of Pastoli-Versus-Kabale District Local Government Council & Others (2008) 2 EA 300 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-observation 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”.

50. They also make reliance on the case of Municipal Council of Mombasa-Versus-Umoja Consultants Ltd (2002) eKLR where the Court of Appeal where the Court of Appeal had held as follows;

“Judicial review is concerned with the decision making process, not with the merit itself; the court would concern itself with such issue as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters.....The court should not act as a court of appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision”.

51. The Respondents also argue that grant of the orders is subject the discretion of the court and that the existence of a civil dispute cannot prevent the police from investigating and prosecuting a suspect in respect to a related criminal complaint as section 193A of the Criminal Procedure Code Cap.75 Laws of Kenya provides that the existence of a civil dispute or case cannot for itself prevent the police to investigate a criminal aspect related to the civil matter and prosecute the suspect if there are sufficient evidence to do so.

52. It is the Respondents case that their actions are not in violation of Article 27(1), 29(d) and 48 of *the constitution* as claimed by the Applicant. The court handling the Environment and Lands Case is different from the court that is to try the Applicant thus, the claim that the Applicant shall be discriminated against, subjected to torture physically or psychologically or denied justice is unfounded.



53. The Respondent beseech this Honourable court to invoke its discretion to have the said application by the Applicant dismissed with costs to pave way for the hearing and determination of the intended charges against him.

3rd Respondent's case:

54. In opposition to the Applicants' Application, the 3rd Respondent filed Grounds of Opposition dated 19th February, 2024 stating the following grounds:

1. The Application is premature, incompetent, misplaced and an abuse of the Court process.
2. Judicial Review proceedings are special proceedings and as such this court does not have the jurisdiction to make a determination in this matter. The Ex parte applicants ought to have filed a constitutional petition for infringement of their constitutional rights.
3. The Application is fatally defective as it offends the mandatory provisions of Section 9(2) and (4) of the Fair Administrative Actions Act No. 4 of 2015.
4. The Application offends Article 160(5) of the Constitution as read together with Section 6 of the Judicature Act.
5. The 3rd Respondent acted within the principles of the law.
6. The Judicial Review proceedings cannot be used to restrain or stop statutory bodies or public officers from lawful exercise of power within their statutory mandates.
7. The Application is a fallacy and ought to be dismissed with costs to the 3rd Respondents.

55. The 3rd Respondent also filed written submissions dated 6th June, 2024 where it argues that interested party vide a plaint dated 30th August, 2023 commenced Kajiado ELC Case No. E022 of 2023, Leawin Limited & Another vs. Edwin K. Rono & Others claiming the Applicant had unlawfully transferred title(s) belonging to Leawin Limited where he was a director, to a third party. She also filed a criminal suit (Ngong Criminal case) against the applicant for the offence of forgery of an affidavit purporting to have been sworn by the interested party in effect of transferring Leawin properties to third parties.

56. It is the 3rd Respondents case that it acted within the ambit of his jurisdiction in discharge of his judicial duty and the allegation against him is trivial and frivolous and should be dismissed. Article 160(5) of the Constitution provides for judicial immunity and provides as follows; -

“A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.”

57. Section 6 of the Judicature Act provides that; -

“No judge or magistrate, and no other person acting judicially, shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided that at the time, in good faith believed himself to have jurisdiction to do or order the act complained of; and no officer of a court or other person bound to execute the lawful warrants, orders or other process of a judge or such person shall be liable to be sued in any court for the execution of a warrant, order or process which he would have been bound to execute if within the jurisdiction of the person issuing it.”



58. The 3rd Respondent cites the case of Maina Gitonga versus Catherine Nyawira Maina and Another [2015] Eklr High Court stated as follows;

“It is undoubted that under the established doctrine of judicial immunity, a judicial officer is absolutely immune from a criminal or civil suit arising from acts taken within or even in excess of his jurisdiction.”

59. It also makes reliance on the case of Michael Osundwa Sakwa versus the Chief Justice and the President of the Supreme Court of Kenya and 5 others [2016] eKLR the Court stated that;

“In effect the immunity accorded to the Judiciary by Article 160(5) of the Constitution only remains valid and insurmountable as long as its members are exercising their functions in good faith in the lawful performance of such judicial functions.”

60. The 3rd Respondent argues that judicial review proceedings cannot be used to restrain or stop statutory bodies or public officers from lawful exercise of power within their statutory mandates as the ex-parte applicant seeks to in this matter and that the same lacks merit and the court should not embarrass itself by entertaining this application.

61. The 3rd IP contends that the High Court cannot review administrative decisions unless the applicants have exhausted all remedies available under any written law – including internal mechanisms of review and appeal.

62. Section 9(2) and (4) of The fair administrative Action Act provides for the procedure of the procedure of Judicial Review and states as follows:

9. Procedure for Judicial Review

1.

2, The High court or a subordinate court under Sub section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

3 ...

4. Notwithstanding sub section (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

60. . The 3rd Respondent cites the case of Republic versus Kenya Revenue Authority Ex parte Style Industries Limited [2019] eKLR where the court held as follows;

“A proper construction of Section 9(2) and (3) of the FAA Act leads to the conclusion that they are couched in mandatory terms. The only way out is the exception provided by Section 9(4) which provides that; -

“notwithstanding sub section (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.



Two requirements flow from the above subsection. First, the applicant must demonstrate “exceptional circumstances”.

63. The 3rd Respondent also argues that the Respondents’ have not infringed on the Applicant’s rights and further, the applicant has not demonstrated why the Respondents should be barred from exercising their official duty in this matter as Section 193A of the Criminal Procedure Code provides for concurrent criminal and civil proceedings and cite the case of Kuria & 3 Others vs. AG (2002) 2 KLR where the court held as follows: -

“The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution. A prerogative order should only be granted where there is an abuse of the process of the law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution... It is not enough to state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the Applicant are under serious threat of being undermined by the criminal prosecution. In the absence of concrete grounds...it is not mechanical enough that the existence of a civil suit precluded the institution of criminal proceedings based on the same set of facts. The effect of criminal prosecution on an accused person is adverse but so also are their purpose in the society, which are immense. An order of prohibition cannot also be given without any evidence that there is manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial. (emphasis added).

64. The 3rd Respondent argues that it acted within the limits of its jurisdiction and as such the application should be dismissed for lack of merit.

Interested Party’s case;

65. In opposition to the Applicants’ Application, the Interested Party filed a Replying Affidavit dated 21st February, 2024 sworn by Leah Chelagat Sawe and written submissions dated 25th August, 2024.

66. It is the IP’s case that on May 5, 2016, the Applicant filed a suit at the Environment and Land Court (ELC Case No. 498 of 2016, Edwin Kipng’eno Rono v Leawin Limited & Leah Chelagat Sawe), seeking orders that the properties be held in trust by the defendants for the plaintiff and that the defendants transfer the properties to him.

67. The IP argues that the disputed properties are owned by Leawin Limited, where the Applicant and the Interested Party are directors, holding 10% and 90% of the shares, respectively.

68. It is also her case that the matter was referred to arbitration, where the claim was dismissed, and the award was adopted as a court order and being dissatisfied, on December 10, 2018, the Applicant filed another suit Petition No. E29 of 2018, Edwin Kipng’eno Rono v Leawin Limited & Leah Chelagat Sawe in the High Court’s commercial division, seeking various orders, including an injunction to prevent a buyout of his shares and the dissolution of Leawin Limited.

69. The petition was dismissed, and the court upheld the ownership structure of Leawin Limited.



70. It was after failing to legally take over the directorship and shareholding of Leawin Limited, the Applicant resorted to criminal actions and the Applicant submitted a fake affidavit, falsified a letter, and forged minutes, claiming that the Interested Party had resigned as director and surrendered all her shares of Leawin Limited.

71. The IP posits that by using the forged documents, the Applicant caused the Company Registrar to change the records, making him the sole proprietor with 100% ownership of the shares in Leawin Limited.

72. It is her argument that On March 23, 2021, the Applicant falsely reported at Kitengela Police Station that the letters of allotment were lost, knowing the originals were with her and obtained a police abstract and caused the Kajiado Land Registrar to issue illegal replacement allotment letters to third parties, first to Rose Chepkoech, and later to Jengo Mall Limited. (both parties whom are prosecution witnesses in the Ngong Criminal Case.

73. The IP states that on 26th of April 2022, she noted the fraudulent changes at the company registry and immediately reported the same to the company registrar where after an investigation, the Company Registrar confirmed the forgery of the resignation letter, minutes, and affidavit, and reverted ownership to its original state.

74. It is the IPs case that she later on 4th of May 2022 learnt of the fraudulent transfer of Leawin Limited properties to third parties and that she immediately reported to the Directorate of Criminal Investigations.

75. The IP then filed a suit, Kajiado ELC No. E022 of 2023, Leawin Limited & Another v Edwin K. Rono & Others on 30th of August 2023, (Kajiado ELC) seeking to have the County Government of Kajiado reissue allotment letters to Leawin Limited and the court on 14th of March 2024, confirmed that the properties had been fraudulently transferred to Jengo Mall limited and ordered that:

“ Kajiado Country Government do nullify the entries and allotment letters issued to Jengo Mall Limited and to restore/register and issue new allotment letters to Leawin Limited as the sole proprietor of the suit properties.”

76. The IP argues that the 2nd Respondent completed its investigations and the 1st Respondent was satisfied that there was sufficient evidence to charge the Applicant and was subsequently presented to Court in January 2024.

77. The IP further argues that the Applicant is seeking judicial review orders to quash criminal proceedings and prohibit the Respondents from charging and proceeding with any criminal trial against him orders which are radical in nature and she urges the court to be extremely cautious in making its determination so as not to prejudice the intended proceedings or usurp the constitutional and statutory mandates of the Respondents.

78. The IP makes reliance on the Court of Appeal case of Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others [2018] eKLR referred to the Supreme Court of India in State of Maharashtra & others v Arun Gulab & others, Criminal Appeal No 590 of 2007, where the court held 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 FIR/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 “CrPC”) 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.”

79. She also makes reliance on the case of Republic v Grace Wangari Bunyi (Sued as the Administrator of the Estate of the Late Obadiah Kuira Bunyi) & 7 others Ex parte Moses Kirruti & 28 others [2018] eKLR, where the Court held that: -

“It is important to note that the discretion given to the Director of Public Prosecutions to undertake investigation and prosecute criminal offences is not to be taken for granted or lightly interfered with and must be properly exercised. In the same respect, the court ought not to usurp the constitutional and statutory mandate of the Director of Public Prosecutions. The mere fact that their high chance of success as regards the intended or ongoing criminal proceedings does not count, it not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned merits of the case but to address defects in decision making process by a decision-making body. However, the court may only intervene were the said discretion is exercised unlawfully and in bad faith, for instance where it is being abused or being used for achievement of some collateral purpose which are not geared towards the vindication of the commission of a criminal offence and the justice system such as with a view to forcing a party to submit to a concession of a civil dispute, the court will not hesitate to bring such proceedings to a court.”

80. The IP argues that this court should only intervene and grant such orders where the Respondents have acted illegally and beyond their mandate or if the rights of the Applicant have been infringed upon and is guided by the case of Praxidis Namoni Saisi & 7 Others v Director of Public Prosecutions & 2 Others where the court stated that;

“The judicial review court examines various aspects of an act, omission or decision including whether the body or authority whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed.” In Edwin Harold Dayan Dande & 3 Others v The Inspector General, National Police Service & 5 Others, the Court acknowledged that judicial review has been elevated to a constitutional pedestal and the Court can issue Judicial Review Orders if the rights of the Applicants have been violated.”

81. The IP contends that the Applicant avers that the Interested Party instigated criminal proceedings against him and caused the 2nd Respondent to arrest him, which she says are baseless allegations as of Article 243 (1) of *the Constitution* established the National Police Service, and the *National Police Service Act* gives full effect to this Article under Part V of the Act which establishes the Directorate of



Criminal Investigations and among its functions under Section 35 of the Act include to detect and prevent crime, undertake investigations of serious crimes and apprehend offenders.

82. It is the IP's case that the Police also have a duty to receive complaints from the public and undertake their own independent investigation to determine whether a crime has been committed and makes reliance to the case of *Republic v Commissioner of Police and another ex parte Michael Monari & another* [2012] eKLR the court 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...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.”

83. She further argues that the fact that she lodged a complaint against the Applicant does not amount to instigating criminal proceedings as suggested and cites the case of *Philomena Mbete Mwili v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae)* [2019] eKLR where the Court had the following to say regarding investigative agencies:

“In our view, it would be within the mandate of an investigative body to receive complaints and to investigate them. Such bodies or entities cannot be faulted for acting on the complaints as in so doing, they would be acting within their constitutional and statutory duty.”

84. The IP contends that the DCI diligently conducted its investigation by recording statements from all relevant parties and carrying out a forensic examination of the forged documents and what is regrettable is that the investigations took over 3 years.

85. The IP further contends that the Applicant has made spurious and outrageous allegations that the DPP's institution of criminal proceedings amounts to procedural unfairness as there is a pending matter before the Environment and Land Court as Article 157(10) provides that

“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 direction or control of any person or authority.”

86. It is the IP's case that DPP is an independent office which neither the Interested Party nor any other person can control or direct and this court can only review the prosecutorial powers if the DPP acted outside the ambit of Article 157(11) relating to public interest, the administration of justice and the need to prevent and avoid abuse of the legal process.

87. The IP makes reliance on the case of *Jirongo Cyrus Shakhalanga Khwa v Soy Developers Ltd & 9 others* Petition 38 of 2019; [2021] eKLR, the Court cited with approval the Supreme Court of India in *R.P. Kapur v State of Punjab AIR 1960 SC 866* which laid down the following guidelines to be considered by the Court on when the High Court may review prosecutorial powers as follows:

I. Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice; or



- II. Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction; or
- III. Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; or
- IV. Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge

88. The IP argues that the Applicant has not met the threshold for the court to review the DPP's prosecutorial powers for the following reasons:

- I. He has failed to demonstrate how the criminal proceeding is an abuse of court process and neither has he shown that quashing it would secure the ends of justice. The DPP has at all material times acted within its mandate and adhered to the prescribed rules and procedures.
- II. There is no legal bar adduced to challenge institution and continuance of the proceedings.
- III. The Applicant has been charged with forgery which on the face of it is an offence contrary to Section 345 as read with Section 349 of the Penal Code.
- IV. There is sufficient evidence on record, including witnesses' statements and forensic examination of documents to prove commission of the offence.

89. The IP further argues that the Applicant claims that the institution of criminal proceedings has denied him access to justice and equal benefit of the law and would also deny him the chance to defend himself at the ELC matter which allegation is hinged on a misguided notion that his rights have been violated under Article 27(1), 29 and 48 of *the Constitution*.

90. The IP cites the case of *Mumo Matemu v Trusted Society of Human Rights Alliance and others* [2013] eKLR where the Court held that;

“We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims.... Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The Principle in *Anarita Karimi Njeru* (*supra*) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”

91. The IP posits that concurrent civil and criminal proceedings do not amount to an infringement of the right to fair hearing. Such concurrent proceedings have legal foundation under Section 193A of the Criminal Procedure Code which states that;

“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.”



92. The IP makes reliance to the case of Kuria & 3 others v AG (2002) 2 KLR where the court held that:

“The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution... It is not enough to state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In the absence of concrete grounds.... it is not mechanical enough that the existence of a civil suit precluded the institution of criminal proceedings based on the same set of facts”

93. The IP contends that the Applicants' rights have not been violated and the concurrent criminal and civil proceedings will not affect his right to fair hearing and equal protection of the law.

94. The IP thus prays that this Honourable court should dismiss the application before it.

Analysis and determination;

95. Upon perusing the pleadings and the rival submissions of parties alongside the authorities cited, this court finds the following to be the issues for determination:

- i. Whether or not the Applicant is entitled to the orders sought.
- ii. Who will bear the costs of the suit.

Whether or not the Applicant is entitled to the orders sought.

96. In the case of Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300, that:

“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: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also, Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).

Illegality is when the decision-making authority commits an error of law in the process of taking the decision 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....

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: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is 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. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876)."

97. Section 35 of the *National Police Service Act* sets the duties of the Directorate of Criminal Investigations as follows;

"To collect and provide criminal intelligence; undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber-crime among others; maintain law and order; detect and prevent crime; apprehend offenders; maintain criminal records; conduct forensic analysis; execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of *the Constitution*; co-ordinate country Interpol Affairs; investigate any matter that may be referred to it by the Independent Police Oversight Authority; and perform any other function conferred on it by any other written law."

98. In Republic vs Commissioner of Police and Another Ex-parte Michael Monari & Another (2012) eKLR 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. 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".

99. It is not in dispute that Kajiado Environment & land Court Case Number E022 of 2023, Leawin Limited & Another vs. Edwin K. Rono & others and Ngong Magistrate's Court Criminal Case No. E021 OF 2024 Republic vs Edwin Kipngeno Rono are on going cases yet to be determined.

100. It is this court's finding that the Applicant has not proven that commencement of the criminal proceedings herein against him during the subsistence of the civil proceedings in Kajiado is tailored for other ulterior purposes for the purpose of the sanctification of the criminal justice system.

101. Section 193A of the Criminal Procedure Code on this issue provides that:

"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."

102. It is my finding and I do hold that the issues and the evidence brought out by the parties herein are sufficient to form the basis of a criminal trial where witnesses will testify and where parties will produce the documents that they will deem fit within the dictates of the *Evidence Act* and under Article 50 of *The Constitution* before the trial magistrate.

103. The Applicant has not proven how the prosecution is driven by malice or how charging him will highly prejudice his constitutional right to a fair trial.



104. The Court in *Republic v Director of Public Prosecutions & 3 others Ex-parte Bedan Mwangi Nduati & another* [2015] eKLR held as follows;

“In *Kuria & 3 Others vs. Attorney General* [2002] 2 KLR 69, the High Court held:

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society’s senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court’s) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilization is far that which the courts indeed the entire system is constitutionally mandated to administer...It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus, where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the Court from prohibiting further hearings and/or prosecution



of a criminal case, where the decision to charge and/or admit the charges as they were have already been made..."

I also agree with the decision in R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001 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".

It is therefore clear that whereas the discretion given to the 1st Respondent to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence, the Court will not hesitate to bring such proceedings to a halt.

Judicial review applications do not deal with the merits of the case but only with the process. In other words, judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an Applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the Applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the Applicant in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are bona fides and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the Applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.

Therefore, the determination of this case must be seen in light of the foregoing decisions.

Whereas Article 157(10) of the Constitution provides that 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 direction or control of any person or authority, Article 157(11) provides:



In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

Apart from that, section 4 of the Office of Public Prosecutions *Act, No. 2 of 2013* provides:

In fulfilling its mandate, the Office shall be guided by *the Constitution* and the following fundamental principles—

- (a) the diversity of the people of Kenya;
- (b) impartiality and gender equity;
- (c) the rules of natural justice;
- (d) promotion of public confidence in the integrity of the Office;
- (e) the need to discharge the functions of the Office on behalf of the people of Kenya;
- (f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;
- (g) protection of the sovereignty of the people;
- (h) secure the observance of democratic values and principles; and
- (i) promotion of constitutionalism.

It is therefore clear that the terrain under the current prosecutorial regime has changed and that the discretion given to the DPP is not absolute but must be exercised within certain laid down standards provided under *the Constitution* and the *Office of the Director of Public Prosecutions Act*. Where it is alleged that these standards have not been adhered to, it is this Court to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, *the Constitution* itself. I associate myself with the sentiments expressed in Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565 to the effect that:

“the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret *the Constitution* and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system...In interpreting *the Constitution*, the Court must uphold and give effect to the letter and spirit of *the Constitution*, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003* is that interpretation of *the Constitution* has to be progressive and in the words of Prof M V Plyee in his book, Constitution of the World: “The Courts are not to give traditional meaning to the words and phrases of *the Constitution* as they stood at the time *the Constitution* was framed but to give broader connotation to such words and connotation in the context of the changing needs of time..... In our role as “sentinels” of fundamental rights and freedoms of the citizen which are founded on laissez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one-



party state. Even if it be at the risk of appearing intransigent “sentinels” of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right.”

Disposition:

105. It is this court’s finding that the Applicant has failed to prove that the ongoing prosecution in Ngong Criminal Case Number E021 of 2024, Republic versus Dr. Edwin Kipng’eno Rono is an abuse of the court process.

Order;

The Application is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF NOVEMBER 2024

J. CHIGITI (SC)

JUDGE

