



**Mainya & another v Attorney General & 2 others (Judicial Review
E010 of 2023) [2024] KEHC 3200 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3200 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
JUDICIAL REVIEW E010 OF 2023
WA OKWANY, J
MARCH 14, 2024**

BETWEEN

ROBERT MAINYA 1ST APPLICANT

JAMES NDEMO NYANGAI 2ND APPLICANT

AND

THE HON THE ATTORNEY GENERAL 1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

RULING

1. This ruling is in respect to the ex-parte Chamber Summons Application dated 13th June 2023. The application is brought under Articles 23 (3) (c) of *the Constitution*, Order 53 Rules 1 and 2 of the *Civil Procedure Rules*, Sections 7, 8, 9 and 11 of the *Fair Administration Action Act* and Sections 8 and 9 of the *Law Reform Act*.
2. The Applicants seek the following Orders: -
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 2. That the Honourable Court be pleased to grant leave for the Applicant to file for Orders of prohibition against the 3rd Respondent, their servants and/or agents or any other persons acting under their authority prohibiting them from instituting, prosecuting or in any other manner proceeding with intended institution of Conspiracy to Defraud charges with regards to the Applicants, pending the full hearing and determination of the instant matter.
 3. That the Honourable Court be pleased to grant leave for the Applicant to file for Orders of *Certiorari* directed to the 2nd and 3rd Respondent herein to bring before this Court for the



purposes of being quashed their decision to charge the Applicants with Conspiracy to Defraud charges.

4. That the grant of leave for the filing of the above relief does operate as stay of any instituting of charges by the 3rd Respondent against the Applicants.
3. The Application is supported by the Affidavit of the 1st Applicant, Robert Mainya, and is premised on the following grounds: -
 - a. That the 2nd Respondent has caused the 3rd Respondent to render a decision to charge the Applicants with a charge of Conspiracy to Defraud contrary to Section 317 of the Penal Code.
 - b. That the subject matter and/or the basis of the complainant is alleged failure to honour a civil claim arising from sale and purchase of 10 acres of land through a tender where the complainant did not meet the tender conditions in 1997.
 - c. That the charges laid out are not intended to achieve the ends of justice but rather to harass, intimidate and coerce the Applicants into settling or recording consent favourable to the complainant/Plaintiff in Nyamira ELC No. 1 of 2021.
 - d. That it is unfair and against natural justice to expose the Applicants herein to sudden and unexplained arbitrary decision to charge and violate their constitutional rights to fair administration action.
 - e. That having regard to the given circumstances of the case, if the Respondents are not checked, they would cause untold suffering to Applicants.
4. Mr. Chirchir, learned counsel for the Respondents conceded to the Application through his Replying Affidavit dated 3rd August 2023. He averred that the Applicants were arrested on various dates and released on cash bail, on the advice of the ODPP, and that he noted that there is an active civil case being Nyamira ELC No. 1 of 2021 in which orders relating to the complaints lodged before the DCIO were sought.
5. Parties were directed to canvass the application by way of written submissions but they opted to rely on their respective affidavits.
6. The main issue for determination is whether this Application has merit.

Analysis and Determination

7. The crux of this Application is the challenge on the decision, by the Office of the Director of Criminal Investigations and Office of the Director of Public Prosecutions, to arrest and charge the Applicants with the offence of Conspiracy to Defraud while there is a pending civil suit in Nyamira ELC 1 of 2021.
8. Judicial Review as a mechanism for legal redress is now entrenched in our Constitution as an avenue for challenging the legality of the decisions made by public bodies. In *Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others*, 2000 (2) SA 674 (CC) at 33, the court in South Africa held thus: -

“The common law principles that previously provided the grounds for Judicial Review of public power have been subsumed under *the Constitution* and, insofar as they might continue to be relevant to Judicial Review, they gain their force from *the Constitution*. In the Judicial Review of public power, the two are intertwined and do not constitute separate concepts.”



(See also the decision in *Republic vs Commissioner of Customs Services Ex- parte Imperial Bank Limited* {2015} eKLR).

9. Article 47 of *the Constitution* provides for the right to a fair administrative action as follows: -
47. Fair administrative action
- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
 - (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - (b) promote efficient administration.
10. Parliament enacted the *Fair Administrative Action Act* Cap 7L, Act No. 4 of 2015 to give effect to Article 47. It provides for the application of judicial review under section 7 as follows: -
7. Institution of proceedings
- (1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to—
 - (a) a court in accordance with section 8; or
 - (b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.
 - (2) A court or tribunal under subsection (1) may review an administrative action or decision, if—
 - (a) the person who made the decision—
 - (i) was not authorized to do so by the empowering provision;
 - (ii) acted in excess of jurisdiction or power conferred under any written law;
 - (iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;
 - (iv) was biased or may reasonably be suspected of bias; or
 - (v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;
 - (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
 - (c) the action or decision was procedurally unfair;



- (d) the action or decision was materially influenced by an error of law;
 - (e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;
 - (f) the administrator failed to take into account relevant considerations;
 - (g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;
 - (h) the administrative action or decision was made in bad faith;
 - (i) the administrative action or decision is not rationally connected to–
 - (i) the purpose for which it was taken;
 - (ii) the purpose of the empowering provision;
 - (iii) the information before the administrator; or
 - (iv) the reasons given for it by the administrator;
 - (j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;
 - (k) the administrative action or decision is unreasonable;
 - (l) the administrative action or decision is not proportionate to the interests or rights affected;
 - (m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;
 - (n) the administrative action or decision is unfair; or
 - (o) the administrative action or decision is taken or made in abuse of power.
- (3) The court or tribunal shall not consider an application for the review of an administrative action or decision premised on the ground of unreasonable delay unless the court is satisfied that–
- (a) the administrator is under duty to act in relation to the matter in issue;
 - (b) the action is required to be undertaken within a period specified under such law;
 - (c) the administrator has refused, failed or neglected to take action within the prescribed period.

11. Section 2 of the [Fair Administrative Action Act](#) defines administrative actions as follows: -

“administrative action” includes–

- (a) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
- (b) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;



12. It is worthy to note that Judicial Review is concerned with the process of making a decision by a public authority as opposed to the merits of the decision itself. In *Republic vs. Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasbam Lalji* (2014) eKLR, it was held thus: -

“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...”

13. In the present case, the issue for determination is whether the decision to arrest and prosecute the Applicants was proper and legal. This Court will therefore limit itself to the context of the decision-making process.
14. It was not disputed that there was a tender to purchase 10 acres of LR No. 7487/2, now referred to as GesimaBlock 1 (Simbauti/167) between Gusii Farmers Coffee Cooperative Union Ltd in which the Applicants were the Chief Executive Officer and Chairman respectively, and one Peter Ondari Omayo (the complainant). It was also not in dispute that the Applicants had been arrested, charged with the offence of Conspiracy to Defraud, but were released on cash bail pending their trial.
15. As I have already stated in this ruling, the criminal proceedings against the Applicants commenced following a recommendation by the 3rd Respondent (DPP). At the time of their arrest, the complainant, one Peter Ondari Omayo had already filed a civil suit being Nyamira ELC No.1 of 2021 as shown in annexure marked ‘RM4’ which is a copy of the Plaint dated 16th December 2021.
16. This Court is aware of the provisions of Section 193A of the *Criminal Procedure Act* Cap 75 which allows for concurrent civil and criminal proceedings. It is not in doubt that nothing stops the office of the DPP from proceeding to institute a criminal case against an individual even where a civil suit already exists, if it deems such a decision necessary. The said section provides as follows:-
- 193A. Concurrent criminal and civil proceedings
- Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.
17. I have already noted that the Respondents conceded to the Application as they were not aware of the existence of the civil suit, which substantively addresses the issues raised in the criminal trial, at the time they recommended the Applicant’s prosecution.
18. The duties and powers of the DPP are provided for under Articles 157 (10) and (11) as follows: -



- (10) 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.
- (11) 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.
19. The above Article requires that the ODPP to act independently and to be diligent in its duties so as to ensure that they consider their decision from the point of fairness, accuracy, good faith. In doing so, the ODPP is expected to uphold the rights of the parties (the accused, victims and public) including the overriding interests of justice before they undertake any decision to prosecute. In this regard, the decision to prosecute cannot be seen to be influenced by any party, not even a court of law. Indeed, Mativo J. (as he then was) in *Republic vs. Chief Magistrate's Court at Milimani Law Courts; Director of Public Prosecutions & 2 others (Interested Parties); Ex-parte Applicant: Pravin Galot* [2020] eKLR quoted DA Bellemare, MSM, QC (*infra*) who stated as follows with respect to the duty of a Prosecution Counsel: -
- “It is not easy to be a prosecutor. It is often a lonely journey. It tests character. It requires inner strength and self-confidence. It requires personal integrity and solid moral compass. It requires humility and willingness, where to appropriate, to recognize mistakes and take appropriate steps to correct them. Prosecutors must be passionate about issues, but compassionate in their approach, always guided by fairness and common sense. (Emphasis added)
20. I have considered this explanation offered by the prosecution counsel, and I find that ODPP was alive to the ever-changing facts and in evaluating the evidence before him, acted in good faith to avoid unjustified prosecution.
21. It is also clear to this Court that a Prosecutor's duty is not to win or lose on behalf of a complainant, but to further the interests of justice. (see *Boucher vs the Queen* [1954] 110 CCC 263, 270). This Court can only interfere with the decision of the ODPP to prosecute or not to prosecute where it has been established that the decision was made for the purpose of advancing some other interest outside the tenets of the law.
22. I find that there is no evidence to show that the ODPP's initial decision to prosecute was based on an unlawful or ulterior motive. I find that the explanation offered by the Prosecution Counsel for electing to prosecute, in the first instance and now, to concede to the instant Application is plausible.
23. It is my finding that disallowing this Application will be tantamount to an abuse of the court's own process by propagating a violation of the independence of the Office of the DPP. Taking that direction would also amount to an infringement of the rights of the Applicants who would be unduly prejudiced by a criminal process that not only offends the Court's sense of justice but also permits the complainant to use the criminal process as a weapon of settling scores.
24. I am guided by the decision in *Republic vs. Chief Magistrate's Court at Mombasa ex-parte Ganjee & Another* [200] 2KLR 703 where it was held that:-
- “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 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 of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use a criminal proceeding to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and or *Certiorari* will issue and go forth.....When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement...If the object of the appellant is to over awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court....In this matter the desire of the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further the ulterior motive and that is when the High Court steps in..."

25. It is my finding that the intended criminal investigations and prosecution of the Applicants would be vexatious in light of the reasons furnished by the ODPP. Having regard to the findings that I have made in this ruling and from my consideration of the Application in its entirety, I find that it is merited and hereby allow it in the following terms: -

- a. An order of prohibition is hereby issued and directed to the 3rd Respondent, their servants and/or agents or any other persons acting under their authority prohibiting them from instituting, prosecuting or in any other manner proceeding with intended institution of Conspiracy to defraud charges with regards to the Applicants.
- b. An order of *Certiorari* is hereby issued against the 2nd and 3rd Respondents herein quashing their decision to charge the Applicants with Conspiracy to defraud charges.
- c. I make no orders as to costs.

26. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS
14TH MARCH 2024.**

W. A. OKWANY

JUDGE

