



**Ceva Interfreight Kenya Limited v Kenya Power & Lighting Company & 2 others
(Petition E037 of 2023) [2024] KEHC 10972 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 10972 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E037 OF 2023
OA SEWE, J
JULY 26, 2024
IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF CONTRAVENTION OF ARTICLES 2, 3, 10,
19, 20, 21, 22, 23, 29, 31, 47, 50, 157(11), 163 AND 259 OF
THE CONSTITUTION
AND
IN THE MATTER OF SECTION 4 OF THE FAIR
ADMINISTRATIVE ACTION ACT, 2015
AND
IN THE MATTER OF RULES 4, 10, 11, 13, 20 AND 23 OF THE
CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE
RULES, 2013**

BETWEEN

CEVA INTERFREIGHT KENYA LIMITED PETITIONER

AND

KENYA POWER & LIGHTING COMPANY 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

INSPECTOR GENERAL, NATIONAL POLICE SERVICE 3RD RESPONDENT



JUDGMENT

- [1] The petitioner, Ceva Interfreight Kenya Limited is a limited liability company duly incorporated in Kenya under the *Companies Act*, 2015. It is in the business of customs clearance, freight management and logistics. It is a tenant of the interested party, Amanzee Investments Kenya Limited. The petitioner pleaded that its terminal yard is enclosed by a perimeter wall; and that adjacent to it is a wayleave trace granted to the 1st respondent, Kenya Power & Lighting Company. The petitioner further explained that the respondent had erected a pylon tower on the wayleave trace with two of the anchoring legs sitting inside its terminal yard, while two were placed on the wayleave.
- [2] The petitioner averred that on the 2nd July 2023, the 1st respondent's pylon tower fell and damaged part of its perimeter wall; and that the damage affected third party property including trucks parked in the terminal yard. In addition, there occurred an explosion of fire sparks that caused damage to the electrical wires in the premises.
- [3] The petitioner was not only unhappy that the 1st respondent destroyed part of its perimeter wall and property in its yard, but also that it persisted in pursuing its claim to rights over part of the yard. The petitioner therefore averred that, after the incident, the 1st respondent commenced acts of harassment against its officers by causing them to be summoned by the Directorate of Criminal Investigations (the 2nd respondent) for interrogation. As a result, the petitioner's directors were under apprehension of imminent violation of their constitutional rights.
- [4] The petitioner cited Articles 2, 27, 28, 29, 47, 49, 50 and 51 of the Constitution, among other provisions, and sought the intervention of the Court to forestall the threatened and continued violation of the rights and fundamental freedoms of the its directors. In particular, the petitioner averred that the 2nd respondent had demonstrated malicious intent and a clear disregard for the rule of law and due process by summoning its directors for interrogation without first complying with Section 52(1) of the *National Police Service Act*, 2011.
- [5] It was therefore the contention of the petitioner that the 2nd respondent acted in contravention of Article 10(1) and (2) of the Constitution which enjoins it to act in such a manner as would uphold the national values and principles, which include the rule of law, democracy, human dignity, equity, social justice, equality, human rights and non-discrimination. Accordingly, the petitioner prayed for the following reliefs:
- (a) A declaration that his constitutional rights as set out under Articles 27(1) & (2), 28, 29, 47 and 50 of *the Constitution* as read with Section 4(1) of the Fair Administrative Actions Act have been violated by the respondents.
 - (b) A declaration that the actions of summoning the petitioner's directors herein without following the due process as outlined under Section 52(1) of the *National Police Service Act*, 2011 is a violation of their constitutional rights.
 - (c) A permanent injunction be issued to restrain the respondents, their servants, agents, junior officers and/or anybody from arresting, charging, harassing or otherwise howsoever interfering with the petitioner.
 - (d) A permanent injunction be issued to restrain the 1st respondent, their servants, agents, junior officers and/or anybody from interfering with the running of the day to day business/affairs of the petitioner.



- (e) An order of prohibition be issued to the respondents restraining them from taking any action against the petitioner on the basis of the incident that happened on 2nd July 2023.
 - (f) Compensation amounting to Kshs. 5,000,000/= for destruction of the petitioner's perimeter wall.
 - (g) Any other order the Court will be pleased to issue in the circumstances.
 - (h) Costs be in favour of the petitioner.
- [6] The Petition was supported by the affidavits of James Otwoli Mokaya, Crescent Job Fumbi, David Muthiani alias David Katiso and Lazarus Karangi.
- [7] The Petition was also supported by the affidavit of Jagjit Liddar, sworn on 19th January 2024 on behalf of the interested party. He explained that the interested party is a subsidiary of Amanzee Investments Limited, a private limited liability company and the registered owner of all that parcel of land situated at Mikindani, Mombasa, known as Plot 571, Section, MN Mombasa (the suit property). He explained that the property was previously owned by one Mr. Ajit Bhogal until 8th May 2012 when it was purchased by Amanzee Investments Limited.
- [8] Mr. Liddar further confirmed that the petitioner is a tenant in the suit property and uses it as a terminal yard. He also confirmed that there is an ongoing dispute over the 1st respondent's wayleave easement. According to the interested party, the 1st respondent has no valid easement over the property. Hence, Mr. Liddar made reference to the dispute between Mr. Ajit Bhogal and the 1st respondent in ELC No. 276 of 2006: *Ajit Bhogal Singh v Kenya Power & Lighting Company Limited* and the decision of Hon. Yano, J. in that matter by which the 1st respondent was declared a trespasser.
- [9] Mr. Liddar's version is that the 1st respondent's electricity pylons collapsed and occasioned damage and eventual collapse of the perimeter wall of the suit property. He further averred that the 1st respondent's employees, servants and/or agents then went to the suit premises under the escort of police officers and proceeded to demolish and bring down another section of the boundary wall and to mark other bits for demolition, alleging that the suit premises had encroached on its wayleave trace. Mr. Liddar deposed that the demolition was done in total disregard of the existing court orders in ELC No. 276 of 2006.
- [10] Mr. Liddar averred that, as an officer of the interested party, he was also summonsed by the 2nd respondent at the behest of the 1st respondent under the pretext that they were carrying out investigations into the collapsed pylons and wall. He was apprehensive that the real intention of the respondents was to arrest him. He accordingly filed an application for anticipatory bail. He therefore supported the Petition and urged for the grant of the prayers sought by the petitioner.
- [11] The 1st respondent opposed the Petition. It filed a Replying Affidavit sworn on its behalf by Eng. Paul Mungai, who was then in charge of the its Network Management Department. He explained that his duties include transmission line inspections, audit and maintenance, as well as network expansion works. He confirmed that an incident took place in July 2023 in which the perimeter wall of the petitioner collapsed. He however contended that it was the petitioner's wall that destroyed the 1st respondent's electricity pylons erected within its wayleave trace.
- [12] Eng. Mungai averred that upon investigations, it was established from eye-witness accounts that a section of the perimeter wall erected by the petitioner had fallen on one of the transmission pylon number T1568 thereby causing it to go down; and that as a result, another transmission tower number T1567 also went down due to the tension of the conductors. Eng. Mungai denied the petitioner's



- allegations that the ground was wet and the pylon structure was unstable. Several photographs were exhibited to support the 1st respondent's averments.
- [13] The 1st respondent also relied on the Replying Affidavit sworn by its Chief Wayleaves Officer, Bishar I. Amin. He explained that, as a retail supplier of electricity, the 1st respondent regularly enters into Wayleave Agreements with private land owners for the purpose of gaining their consent to have the easement to erect, lay, place, alter, use, maintain, repair, renew, remove and inspect an electric line either overhead or underground across certain lands belonging to the owner.
- [14] Mr. Amin confirmed that the 1st respondent entered into a Wayleave Agreement with the owners of land parcel L.R No. 89/V/MN and an easement caveat registered on 25th November 1982. He further confirmed that the 1st respondent thereafter constructed four 132KV transmission lines between Kipevu and Rabai running parallel and alongside each other in the 1st respondent's wayleave trace, and that the lines are numbered consecutively from 1 to 4. He explained that Transmission Line 2 runs within the Wayleaves trace situated in the suit property and is supported by a two-legged pylon 1568.
- [15] It was therefore the contention of the 1st respondent that, contrary to Clause 3 of the Wayleave Agreement, the petitioner and the interested party unlawfully interfered with and encroached on the wayleave trace by erecting a stonewall under the transmission line and in between the two legs of tower/pylon No. 1568. The 1st respondent further averred that the perimeter wall within the 1st respondent's wayleaves trace had been marked for demotion sometimes in 2022 because it was hazardous and dangerous not only to the occupants of the yard but also the infrastructure of the 1st respondent. According to the 1st respondent, the petitioner is wholly liable for the damage and loss occasioned by the fall of its pylon towers.
- [16] Mr. Amin further averred that he got to learn from their Chief Security Officer, Anthony Mganda, that the encroaching perimeter wall belonging to the petitioner and the interested party collapsed on the 1st respondent's electricity transmission tower No. 1568 and caused the collapse of both towers No. 1568 and 1567 on account of the high tension. Mr. Amin also confirmed that the incident was reported to Makindani Police Station vide OB No. 32/2/7/2023 and investigations initiated. In the meantime, efforts were made to lift the affected pylons and restore power supply.
- [17] Thus, Mr. Amin averred that the Petition does not raise any constitutional issue against the 1st respondent; and that at best the dispute is a criminal or civil/commercial matter concerning encroachment on the 1st respondent's wayleave trace and damage to its transmission lines as a result of the said encroachment. According to the 1st respondent the jurisdiction of this Court was erroneously invoked in the circumstances.
- [18] On behalf of the 2nd and 3rd respondents, a Replying Affidavit was sworn by Sgt. Lenny Ekidor on 10th November 2023 in which he averred that a complaint was reported to Mikindani Police Station on the 7th July 2023 vide OB No. 24/4/7/2023 involving the collapse of a perimeter wall constructed by the petitioner which damaged the 1st respondent's pylons No. 1567 and 1568. He confirmed that police officers visited the site and confirmed the damage; and that preliminary investigations established that the 1st respondent had acquired and registered a 220 feet wayleave trace running through the suit property.
- [19] Sgt. Ekidor further averred that the officers representing the 2nd and 3rd respondents had the mandate to visit the site and to compel the attendance of witnesses at the police station for questioning. He added that such witnesses need not be summoned in writing. He therefore averred that the 2nd and 3rd respondents followed due process and issued notices through P52 forms requiring attendance of persons who they believed had information that could assist in the investigations, including Lazarus



Karangi. Ultimately, they came to the conclusion that an offence of damaging of energy infrastructure and encroachment of KPLC wayleaves contrary to Sections 168(4)(b), 169(1)(a) and (d) and 185 of the *Energy Act*, 2019, had been committed. They accordingly compiled the file and forwarded the same to the 4th respondent for consideration and further action.

- [20] The Petition was canvassed by way of written submissions, pursuant to the directions given herein on 23rd October 2023. Accordingly, the petitioner relied on its written submissions dated 20th January 2024 filed by Danstan Omari & Associates Advocates. The petitioner proposed the following issues for determination:
- (a) Whether the petitioner's rights and the petitioner's employees' rights under Articles 27, 28, 29, 47 and 50 of *the Constitution* as read with Section 4 of the *Fair Administrative Action Act* had been violated.
 - (b) Whether the petitioner is entitled to a permanent injunction restraining the respondents from arresting, harassing, or otherwise interfering with the petitioner, the petitioner's employees and the day to day business affairs of the petitioner.
- [21] The petitioner submitted that its employees were arrested, not for any offence under the law, but in a bid to intimidate them and transfer the blame for the collapsed pylon tower to the petitioner. It was therefore the submission of the petitioner that the rights of its employees under Article 29 were violated by reason of their arrest and detention without lawful cause.
- [22] The petitioner also relied on Article 47 of the Constitution and submitted that the petitioner had the right to fair administrative action, which it was not accorded. In this regard, reliance was placed on *James Willy Kingori v Chairman Extra Ordinary Meeting of Michimikuru Factory Limited & 2 others; Maurice Kobia Dickson (Interested Party)* [2022] eKLR to support the submission that the respondents violated the rights of the petitioner under Article 47 by interfering with the petitioner's business operations without sufficient cause; and only in a bid to intimidate and harass the petitioner and its employees.
- [23] On whether the petitioner is entitled to a permanent injunction as prayed, the petitioner submitted that it has established all the three conditions to warrant the grant of a permanent injunction. In particular, the petitioner submitted that it has demonstrated malicious intent by the respondents against it and its employees.
- [24] The interested party filed written submissions dated 4th February 2024 by M/s Aroka & Company Advocates. The interested party proposed one issue for determination, namely, whether the electricity pylons subject matter of the Petition are the same pylons the subject matter of Civil Appeal No. E017 of 2021: *KPLC v Ajit Bhogal Singh* (being an appeal from ELC Case No. 276 of 2006: *Ajit Bhogal Singh v Kenya Power and Lighting Company Limited*) which is still active and pending before the Court of Appeal.
- [25] Counsel recounted the circumstances that led to the judgment dated 23rd November 2020 in ELC No. 276 of 2006 and the filing of Civil Appeal No. E017 of 2021, and endeavoured to dispel the allegation that the interested party had encroached on the 1st respondent's wayleave trace. She accordingly submitted that, as at 2nd July when the 1st respondent's electricity pylons collapsed and damaged the interested party's perimeter wall, the 1st respondent was and still is a trespasser to the suit property. Counsel pointed out that the decision in ELC No. 276 of 2006 is yet to be varied, set aside, overruled or vacated. She accordingly urged that the Petition be allowed and the orders sought therein granted.



- [26] The written submissions of the 1st respondent dated 30th January 2024 were filed herein by Ms. Owano, Advocate. She reiterated the background of the dispute and underscored the 1st respondent's averment that it owns a 220 feet wayleaves trace which runs through several plots including the suit property, Plot No. MN/V/571; a subdivision of Plot known as LR No. 89/V/MN located in Mikindani. She reiterated the assertion that, on the 2nd July 2023, the petitioner's perimeter wall fell on the 1st respondent's electricity pylon T1568, causing it and the adjacent pylon No. T1567 to collapse.
- [27] Ms. Owano further highlighted the fact that the incident was reported to Mikindani Police Station vide OB No. 32/2/7/2023 and that the investigations were ongoing as at the time the submissions were made. Accordingly, counsel proposed two issues for determination, namely, whether the petitioner is entitled to the reliefs sought by it and who should bear the costs of the Petition. Counsel referred to *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 and *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR among other authorities to support her submission that none of the critical elements of prima facie case, irreparable injury and balance of convenience have been established by the petitioner. She accordingly urged the Court to dismiss the Petition with costs.
- [28] I have given careful consideration to the Petition, the averments set out in the Supporting Affidavits and their annexures, as well as the affidavits filed in response to the Petition. I have likewise considered the written submissions filed on behalf of the parties by their counsel. There is no dispute that the petitioner carries out its business of customs clearance, freight management and logistics as a tenant of the interested party, Amanzee Investments Kenya Limited. The parties are in agreement that the interested party is the owner of all that piece of land known as Plot No. MN/V/571. The petitioner explained, and there appears to be no dispute that the plot is a subdivision of Plot LR No. 89/V/MN located in Mikindani.
- [29] It is also common ground that, on the 2nd July 2023, the perimeter wall fencing off the suit property got damaged. While the petitioner contended that the 1st respondent's pylons fell on the perimeter wall, the 1st respondent insisted that the wall was the first to collapse; and that it then fell on the 1st respondent's pylons No. T1567 and T1568. The incident was reported to the police at Mikindani Police Station and investigations instituted by the 2nd and 3rd respondents. According to the 2nd and 3rd respondents, the investigations were done to conclusion and the file forwarded to the 4th respondent for perusal and a decision on whether a prosecution ought to be mounted or not.
- [30] The parties expended substantial efforts and copious submissions to articulate their respective positions with regard to ownership of the suit property and whether or not the 1st respondent has a valid wayleaves trace through the suit property. Although the petitioner relied on the decision of Hon. Yano, J. dated 23rd November 2020 in Mombasa ELC No. 276 of 2006 in which the 1st respondent was declared a trespasser, it was conceded that the decision had been appealed vide Mombasa Civil Appeal No. E017 of 2021. Hence, counsel for the 1st respondent brought it to the attention of the Court that the appeal was determined on 23rd February 2024 and the decision of Hon. Yano, J. overturned. She supplied a copy of the decision of the Court of Appeal vide her letter to the Deputy Registrar dated 26th February 2024.
- [31] In the light of the foregoing, the 1st respondent raised a technical objection to the jurisdiction of the Court. It submitted that the Petition does not raise any constitutional issue against the 1st respondent; and that at best the dispute is a criminal or civil/commercial matter concerning encroachment on the 1st respondent's wayleave trace and damage to its transmission lines as a result of the said encroachment. Hence, the 1st respondent submitted that the jurisdiction of this Court was erroneously invoked in the circumstances.



[32] It is imperative therefore that the issue of jurisdiction be determined first. Indeed, in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* (supra) it was held:

...Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...”

[33] Similarly, in *Kalpana H Rawal & 2 Others v Judicial Service Commission & 2 Others* (supra) the Supreme Court quoted with approval the decision of the Supreme Court of Nigeria in Case No. 11 of 2012: *Ocheja Emmanuel Dangana v Hon. Atai Aidoko Aliusman & 4 Others* thus:

...It is settled that jurisdiction is the lifeblood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity – dead – and of no legal effect whatsoever, that is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost...”

[34] Needless to say that jurisdiction is conferred either by *the Constitution* or a statute. In *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, the Supreme Court held:

A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...Where *the Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power on Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

[35] The 1st respondent’s objection was to the effect that the Petition does not raise any constitutional issue in so far as what is sought is compensation for the damaged perimeter wall. In effect, the 1st respondent relied on the doctrine of avoidance and urged for the striking out of the Petition.

[36] The doctrine of avoidance was well-discussed by the Supreme Court in *Petition 14, 14A, 14B & 14C of 2014 (Consolidated) Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR (29th September 2014) (Judgment) thus:

(256) The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa,



in *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

(257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936)).

(258) From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents’ claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court...”

[37] In the case of *K K B v S C M & 5 others (Constitutional Petition 014 of 2020)* [2022] KEHC 289 (KLR) (22 April 2022) (Ruling), Hon. Mativo, J. (as he then was) also expressed himself on the doctrine as hereunder:

In summation, the doctrines of ripeness and constitutional avoidance shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he seeks. In other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks. Both constitutional avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant’s cause...”

[38] Further in the case of *Faraj & 3 others v Police & 2 others (Constitutional Petition 165 of 2020)* [2022] KEHC 287 (KLR) (27 April 2022) (Judgment) it was held:

27. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In that regard, the Supreme Court stated in *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others* (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis.

...

29. The doctrine of ripeness and constitutional avoidance gives credence to the concept that *the Constitution* does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable legislation together with other available legal remedies. Where there are alternative remedies the preferred route is to apply such remedies before resorting to *the Constitution*. The possibility of the elevation of any dispute to a constitutional issue is what is sought to be averted by the doctrines of ripeness and constitutional avoidance. It is borne out of a realisation that all legislative or common-law remedies are part of the legal system...”

[39] From the averments and submissions of the parties, it is manifest that the petitioner’s case is inextricably intertwined with the finding by the Environment and Land Court in ELC No. 276 of 2006 that there was no valid wayleave agreement between the 1st respondent and the interested party; and that the 1st



respondent was a trespasser on the suit property. It is noteworthy that the parties had been litigating elsewhere from the year 2006. It is now evident that the said decision which was the fulcrum of the petitioner's case, has been reversed. In the premises, the issue of whether or not the petitioner damaged the 1st respondent's pylon towers or whether the 1st respondent was the party at fault would best be resolved as a civil dispute.

[40] Similarly, as to whether a criminal offence was committed is a matter dependent on the investigations conducted by the 2nd and 3rd respondents. Sgt. Ekidor indicated that they completed their investigations and forwarded their file to the 4th respondent for perusal and further action, confident that there were sufficient grounds for prosecution.

[41] It appears therefore that the petitioner is apprehensive of an intended prosecution. It is now settled however that the best forum for testing the validity of a charge is the trial court itself. For instance, in *Erick Kibiwott & 2 Others v Director of Public Prosecution & 2 Others* [2014] eKLR it was held that:

...In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial court. Dealing with the merits of the application, it is trite that 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 under Article 157 of *the Constitution*. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings..."

[42] It is also premature, granted the provisions of Article 50(1) of the Constitution that:

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

[43] Indeed, *the Constitution* itself recognizes the respective mandates of the respondents. For instance, Article 245 of the Constitution provides that:

(1) There is established the office of the Inspector-General of the National Police Service.

(2) The Inspector-General—

(a) is appointed by the President with the approval of Parliament; and

(b) shall exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.

(3) The Kenya Police Service and the Administration Police Service shall each be headed by a Deputy Inspector-General appointed by the President in accordance with the recommendation of the National Police Service Commission. (4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—

(a) the investigation of any particular offence or offences; (b) the enforcement of the law against any particular person or persons; or



- (c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.
- (5) Any direction given to the Inspector-General by the Cabinet secretary responsible for police services under clause (4), or any direction given to the Inspector-General by the Director of Public Prosecutions under Article 157(4), shall be in writing.
- [44] Needless to mention that the conduct of investigations is the basic mandate of the 3rd respondent and is provided for under Section 24 of the *National Police Service Act*; and therefore it cannot be said that simply because a matter presents itself as a civil claim no criminal investigations ought to be carried out in respect of the same facts with a view of prosecution. Section 193A of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya, is explicit 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.”
- [45] Moreover, in the event of an eventual prosecution, there is no gainsaying that the subordinate courts, being creatures of *the Constitution* pursuant to Article 162 and 169, have the mandate and competence to hear and determine allegations of the nature complained of herein. It is for the trial court to inquire into questions, even at a preliminary stage if need be, whether the intended charge against the petitioner herein is tenable; and resolve issues as to whether the dispute is an entirely civil dispute. It is therefore immaterial at this point that the intended charge is hopeless; or that the intended criminal prosecution is bound to fail.
- [46] Moreover, with regard to compliance with Section 52(1) of the *National Police Service Act*, the provision uses “may” as opposed to “shall” and is therefore permissive. The provision is also explicit that non-compliance can be dealt with during the ensuing proceedings. It states as follows in Subsections (6) and (7):
- (6) Notwithstanding the other provisions of this section, the powers conferred by this section shall be exercised in accordance with the Criminal Procedure Code (Cap. 75), the *Witness Protection Act* (Cap. 79) or any other written law.
- (7) The failure by a police officer to comply with a requirement of this section in relation to the making of a statement shall render the statement inadmissible in any proceedings in which it is sought to have the statement admitted in evidence.
- [47] It is therefore not necessarily a constitutional issue for purposes of Article 47 of the Constitution. In the premises, I entirely agree with position taken in *Michael Sistu Kamau & 12 Others v Ethics and Anti-Corruption Commission & 4 Others* [2016] eKLR, wherein a three-judge bench held that:
- The trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words, unless the Petitioners demonstrate that the circumstances of the impugned process render it impossible for them to have a fair trial, the High Court ought not to interfere with the trial ... “



[48] In the result, it is my conclusion that the Petition was prematurely filed and that the grounds of complaint are not ripe for consideration as constitutional issues. The Petition is accordingly struck out with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 26TH DAY OF JULY 2024.

OLGA SEWE

JUDGE

