



**Mutura v Director of Criminal Investigations & 3 others (Petition E167 of 2022)
[2023] KEHC 491 (KLR) (Constitutional and Human Rights) (27 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 491 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E167 OF 2022

M THANDE, J

JANUARY 27, 2023

BETWEEN

BENSON MUTURA PETITIONER

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. In a petition dated April 20, 2022, the petitioner sought the following orders:
 - a. A declaration that the arrest and detention of the petitioner is not only baseless but is also arbitrary and illegal and in blatant violation of his constitutional rights.
 - b. A permanent injunction restraining the respondents by themselves, their officers, servants and assigns or anyone acting on their behalf or instructions from arresting, charging or prosecuting the petitioner herein on account of the issues raised in this petition.
 - c. General damages.
 - d. Costs of the suit.
 - e. Such further reliefs that this honourable court may deem just and fit to grant in the interest of justice.



2. The petitioner filed an application of even date seeking relief pending the hearing and determination of the application and petition. Interim orders were granted and what remains is the following prayers for conservatory orders, pending the hearing and determination of the petition:
 1. That pending the hearing and determination of the petition filed herewith, this honourable court be pleased to issue orders restraining the respondents whether by themselves, their officers, servants, agents or anyone acting on their behalf from arresting, detaining, pursuing, confining or in any other way interfering with the liberty of the petitioner/applicant herein in connection with the complaint or allegations giving rise to the petition
 2. That pending the hearing and determination of the petition filed herewith, this honourable court be pleased to issue orders restraining the 3rd respondent herein, his officers, servants, agents or anyone acting on his behalf from instituting, charging or prosecuting of the petitioner/applicant herein in respect of or connection with the complaint or allegations giving rise to the petition.
 3. That pending the hearing and determination of this petition filed herewith, this honourable court be pleased to issue orders directing for the immediate release of the petitioner in the event that he is indeed detained.
 4. That this honourable court be pleased to issue orders it may seem just, fit and expedient to award in the interests of justice.
 5. That the costs of this application be provided for.
3. The grounds upon which this application is premised as set out in his affidavit of even date are that the petitioner is the speaker of the Nairobi County Assembly, having been elected under the Jubilee Alliance Party. However, on April 7, 2022 he made an announcement that he had joined the United Democratic Party. He alleges that this did not sit well with quite a number of people or certain entities. He alleges that he was on April 20, 2022 arrested by the 1st and 2nd respondents in his offices without being informed of the reason for his arrest thereby contravening his rights under article 49 and 36 of the Constitution of Kenya. He attributed the arrest to his choice of political party. He contended that he is entitled under article 27 of the Constitution to equal protection and benefit of the law and is apprehensive that unless this court issues the orders sought, the respondents will eventually utilize the criminal justice system to illegally detain him thereby rendering the petition he has filed herein, otiose. Further that no prejudice will be suffered by the respondents, if the prayers sought herein are granted.
4. The application is opposed by the 1st, 2nd and 3rd respondent *vide* a replying affidavit sworn by No 237080 chief inspector Felix Karisa Banzi (C I Banzi), a police officer attached to the serious crime unit at the Director of Criminal Investigations (DCI). He averred that *vide* an anonymous letter dated April 6, 2022, the DCI received a request for investigations into abuse of office and misuse of public funds by the petitioner. In execution of its mandate under section 35 of the National Police Service Act, the DCI commenced investigations. It was established that the petitioner had used his position to confer upon himself imposts to attend official engagements abroad which he did not attend. In other cases, he attended for fewer days than indicated and failed to surrender the impost as required by the Public Finance Management Act. Between February 1, 2021 and March 30, 2022, the petitioner had defrauded the County Assembly of Kshs 5,348,984/= in unsurrendered imposts for overseas trips. The petitioner was thus charged in Milimani CM's Criminal Case No 436 of 2022 on April 22, 2022 with charges of stealing by servant contrary to section 281 of the Penal Code.



5. C I Banzi further averred that that the petitioner was informed of the reason for his arrest when recording the charge and cautionary statement before chief inspector Phillip Bii at the DCI headquarters. He stated that the petitioner is not prejudiced in any way as his presumption of innocence and protection of his fundamental rights and freedoms as guaranteed by the Constitution do not vanish by virtue of his prosecution before a competent court of law. He urged that the orders of February 21, 2022 be vacated and the petitioner be ordered to take plea as the application does not insulate him from being charged. Further that prayer 2 has been overtaken by events as the petitioner has already been arrested and arraigned in court. It is the respondents' contention that the petitioner has not demonstrated how his rights have been violated and that the application is an abuse of the court process. He urged that the application be dismissed with costs and that the criminal trial process be allowed to proceed to its logical conclusion.
6. The 1st, 2nd and 3rd respondents also filed grounds of opposition dated May 4, 2022 in which the averments in the replying affidavit have been reiterated. The grounds are that that the 3rd respondent under article 157(6) of the Constitution exercises state powers of prosecution and is empowered to institute and undertake criminal proceedings against any person before any court (other than a Court Martial) in respect of any offence alleged to have been committed. Clause 10 of the said article, safeguards the independence of the 3rd respondent who 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. Further, that the 1st and 2nd respondents have a duty to investigate any complaint made to them. The petitioner has not demonstrated how the respondents have acted *ultra vires* their mandate to warrant the intervention of this court, and only seeks to curtail the mandate of the criminal justice system actors, to circumvent a foreseeable trial process against him without justifiable reason. Moreover, that the accuracy and correctness of evidence gathered in support of the charges against the petitioner in the criminal case can only be assessed and tested by the trial court.
7. In a rejoinder *vide* his supplementary affidavit sworn on June 9, 2022, the petitioner reiterated his earlier averments and in particular that his arrest and prosecution was politically instigated intimidation. He stated that in the 2 weeks between the date of the letter of complaint and of his arrest, he was never summoned by the 1st respondent. He further stated that holding a public office does not bar him from joining a political party of his choice and that opposing the extension of the term of the Nairobi Metropolitan Services (NMS) was within his mandate as speaker of the assembly. It is the petitioner's case that the letter of complaint was instigated by malice as the issues raised relate to events dating as far back as February 2021 and were brought up after his declaration of his political stand and that on the extension of the NMS term. According to the petitioner, the 3rd respondent's decision to prosecute was made before conclusive investigations into the matter.
8. The 4th respondent though served, did not file any response to the application. Accordingly, any reference to respondents herein will mean the 1st, 2nd and 3rd respondents.
9. The only issue for determination herein is whether the conservatory orders sought herein should be granted.
10. It is now well settled that a court faced with an application for conservatory orders in a constitutional petition need only be satisfied first, that the applicant has made out a *prima facie* case and second, that denial of conservatory orders will occasion prejudice to the applicant. As such, the court is not required to engage in a detailed analysis of the facts and the law or to make a definitive finding thereon.



11. In the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR, the Supreme Court set out the tenor, import and scope of a conservatory order in a matter alleging violation of the Constitution as follows:

(86) “conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the applicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

12. And in the case of *Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General* [2011] eKLR, Musinga, J (as he then was) spoke to the issue and stated:

It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the petitioner’s application and not the petition. I will not therefore delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.

13. Similarly, in the case of *Platinum Distillers Limited v Kenya Revenue Authority* [2019] eKLR, Korir, J (as he then was) had occasion to consider an application for conservatory orders. The learned judge stated:

The guiding principles upon which Kenyan courts make findings on interlocutory applications for conservatory orders within the framework of article 23 of the Constitution are settled. The law, as I understand it, is that in considering an application for conservatory orders, the court is not called upon and is indeed not required to make any definitive finding either of fact or law as that is the province of the court that will ultimately hear the petition. The jurisdiction of the court at this point is limited to examining and evaluating the material placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of conservatory orders. The court is also required to evaluate the pleadings and determine whether denial of conservatory orders will prejudice the applicant.

14. It can be easily discerned from the cited authorities that in petitions alleging violations of rights and fundamental freedoms or violation of the Constitution, the prospects of irreparable harm occurring during the pendency of a case and high probability of success are the key considerations in an application for conservatory orders. While considering the inherent merit of a case, the court must also bear consider in mind the public interest, constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.
15. In the present case, the petitioner, submitted that he has made out a case for the grant of conservatory orders. In particular, he contended that the respondents arrested him for his political stand thereby violating his right to freedom of association under article 39 and further that he was not informed



- of the reason for his arrest contrary to his rights as guaranteed under article 49. He further accused the respondents of violating his rights under article 47(1), to fair administrative action. The petitioner contended that the actions of the 1st and 2nd respondents are punctuated with malice and intimidation amounting to abuse of power. Further that if the respondents believe that they have a valid case against him, then they should prosecute him through appropriate channels and not through harassment and intimidation.
16. On their part, the respondents argued that the petitioner has not demonstrated how his rights under articles 27, 36 and 49 of the Constitution have been violated by the respondents. They submitted that the petitioner is entitled to and shall enjoy the right to equal protection of the law in any court of law and fair administrative process. Further that the criminal justice process has safeguards that ensure that an accused person is afforded a fair trial as envisaged under article 50 of the Constitution.
 17. The petitioner contends that he has made out a *prima facie* case. His submissions in this regard are that the actions of the respondents in arresting and charging him were punctuated by intimidation and malice and amount to abuse of the powers bestowed upon them. Further, that the said actions are a gross violation of his constitutional right to be informed of the reason for his arrest and freedom of association. The respondents denied this and asserted that the petitioner was indeed informed of the reason for his arrest when recording the charge and cautionary statement before chief inspector Phillip Bii. They further denied having abused the legal process in a manner that warrants this court's intervention.
 18. At this interlocutory stage, the court will not delve into the merits of the case to avoid the risk of prejudging it, before it is heard on merit. The court need only be satisfied that a *prima facie* case with a likelihood of success has been established and that prejudice will be suffered if orders sought are not granted.
 19. As stated by Korir, J (as he then was) in the *Platinum Distillers Limited case* (supra):

As it has been held in various decisions, a *prima facie* case is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, an applicant has to show that he or she has a case which discloses arguable issues and in a case alleging violation of rights, arguable constitutional issues.
 20. And in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, the Court of Appeal addressed the issue of proof of a *prima facie* case and stated:

The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation.
 21. The petitioner herein claims that the action taken by the respondents has violated his rights under articles 39, 47 and 49 of the Constitution. It is clear that these are issues that can only be determined after the hearing of the petition on merit. Without saying more, i find that the petition herein discloses *prima facie* arguable issues for trial and it cannot be said that the petition is wholly frivolous or unarguable.



22. I now turn to the issue as to whether the petitioner will suffer prejudice if the orders sought are not granted. The petitioner is required to demonstrate to the court that unless the conservatory orders sought are granted there is real danger that he will suffer prejudice. As the court considers the matter, it must be mindful of take into account constitutional values and the public interest and balance the same against the petitioner's interests. In this regard, I take guidance from the *Gitirau Peter Munya case* (supra) where the Supreme Court stated that conservatory orders should be granted on the inherent merit of a case, bearing in mind the public interest. The question that then begs is, is it in the public interest that the orders sought herein be granted?
23. The petitioner submitted that that he will be subjected to unwarranted criminal proceedings which amount to an affront to his constitutional right to fair administrative action under article 47 of the *Constitution*. Further that the court has a duty to protect the constitutional right of every citizen. He thus seeks protection from the court by the grant or the conservatory orders sought herein.
24. The respondents submitted that the petitioner was arrested pursuant to an offence known in law and thus they had reasonable grounds to arrest the petitioner. They argued that no evidence has been adduced to show that the 1st respondent acted without reasonable or probable cause, thereby failing to discharge the onus placed upon him by law, to prove his allegations. The respondents further contended that the petition is intended to prevent the respondents from discharging their constitutional mandate.
25. The grant of conservatory orders is discretionary. It is well settled that the power of this court to grant such orders to stay or stop criminal proceedings should only be exercised in the most exceptional circumstances. In the case of *Godfrey Mutahi Ngunyi v Director of Public Prosecutions & 4 others* [2015] eKLR, Onguto, J stated:
- No *prima facie* evidence, pointing to exceptional circumstances, has been laid before me to warrant a stay of the intended criminal prosecution. The applicant says he will be embarrassed in the public eye and hence prejudiced beyond repair. However, the need to balance the public interest in ensuring that those accused of crimes are tried with the public interest that private interests be protected would dictate otherwise. In the absence of exceptional circumstances and in the absence of *prima facie* revelations that there has been manipulation or abuse and misuse of the criminal justice process to threaten the private citizen's right to a fair trial, I ought not interfere with the criminal justice process now.
26. The petitioner is concerned for his reputation and claims that the continuation of the criminal proceedings against him will bring him into disrepute thereby occasioning him prejudice.
27. The circumstances herein are that the petitioner has already been charged in Milimani CM's Criminal Case No 436 of 2022. he is a public servant and was charged with the offence of stealing by servant contrary to section 281 of the *Penal Code*. The particulars of the offence indicate that the funds allegedly stolen amounting to Kshs 5,348,984/= are the property of the county government of Nairobi. In a word, public funds. Needless to say, loss or theft of public funds is a matter of great public interest which in my view far outweighs the individual and private interests of the petitioner.
28. The greater public interest will be better served by ensuring that those accused of crimes, like the petitioner herein, are prosecuted. The grant of the orders sought would unnecessarily prevent the respondents from discharging their constitutional and statutory mandate which would go against public interest and constitutional values. The petitioner has not demonstrated to the court that the mere fact of his arrest, prosecution and generally, the criminal process contravened any of the constitutional values or is inversely proportional to his rights to a fair trial. Further the petitioner has



not disclosed the existence of any exceptional circumstances to warrant the intervention of this court by way of granting the conservatory orders sought. My view is that the public interest will not be served by granting the conservatory orders.

29. In view of the foregoing, i find no merit in the application dated April 20, 2022 and the same fails in its entirety. The application is hereby dismissed with costs.

DATED AND DELIVERED IN NAIROBI THIS 27TH DAY OF JANUARY, 2023.

M. THANDE

JUDGE

In the presence of: -

..... for the Petitioner

..... for the Respondents

..... Court Assistant

