



**Cheruiyot v Ethics & Anti-Corruption Commission; Makhanu (Interested Party)  
(Anti-Corruption and Economic Crime Petition 3 of 2022) [2023] KEHC 377 (KLR)  
(Anti-Corruption and Economic Crimes) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 377 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
ANTI-CORRUPTION AND ECONOMIC CRIME PETITION 3 OF 2022**

**EN MAINA, J**

**JANUARY 26, 2023**

**IN THE MATTER OF ARTICLE 20(1), 22(1), 165(3)(D)(II), 259, 25(C) AND 50(4) OF THE  
CONSTITUTION OF KENYA, 2020IN THE MATTER OF ARTICLES 28,31,32,43(1)  
(A), 33, 36 AND 47 (1) OF THE CONSTITUTION OF KENYA, 2010ANDIN THE  
MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND  
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013BETWEEN**

**BETWEEN**

**EVANS K. CHERUIYOT ..... PETITIONER**

**AND**

**ETHICS & ANTI-CORRUPTION COMMISSION ..... RESPONDENT**

**AND**

**TITUS BARASA MAKHANU ..... INTERESTED PARTY**

**RULING**

**Introduction**

1. By the Amended Notice of Motion dated September 26, 2022 filed herein on even date, the Petitioner/  
Applicant seeks a conservatory order in the following terms:-

“4. That pending the hearing and determination of the petition filed herewith an interim order of prohibition does issue prohibiting the respondent from relying and/or from continuing to rely on impugned audio and video recordings (and/or transcripts thereof) of communications between the interested party and the applicant recorded by the respondent and/or the interested party jointly and/or severally at various times between June 1,



2021 and September 17, 2021 for purposes of ongoing investigations and/or making recommendations and/or taking any other/further action on the said video recordings and/or transcripts thereof.”

2. The application is premised on the grounds set on its face, the gist of which is that the impugned audio and video recordings were obtained illegally without a court order; they are a violation of his right to privacy and non-discrimination, are in breach of the Data Protection Act; they are likely to give rise to state entrapment; they do not disclose an offence; they amount to unfair investigations; they are prejudicial and that it shall be an abuse of power by the Respondent to admit the same into evidence for any purpose including the ongoing investigations. Further that it will be an abuse of court process if the applicant is indicted and prosecuted as a result of any recommendations that will arise from investigations based on the same and that granting the order sought will not fetter the Respondent’s ability to continue and complete investigations on the interested party’s complaint.
3. The application is supported by the affidavit of the Petitioner/Applicant sworn on September 26, 2022 in which he reiterates the grounds on the face of the application.
4. The application is vehemently opposed by the Respondent and also by the Interested Party.
5. The Respondent placed reliance on the replying affidavit and further affidavit sworn by John Nyagara, an investigator with the commission, on 16/5/2022 and on 21/10/2022 respectively. John Nyagara deposed that the commission is under Article 252 of the Constitution and Section 13(2) (c) of the Ethics and Anti-Corruption Act mandated to investigate the conduct, of any person and/or body, which in its opinion constitutes acts of corruption, bribery or economic crime; that the investigations entail carrying out covert operations which may include recording conversations and that Section 64 of the National Police Service does not require the Respondent to obtain a warrant or court order in the planning and execution of surveillance/sting/trap operations or taking any steps necessary for its overt operations. Further that entrapment does not lie as the petitioner was not induced or coerced by the Respondent to Commit a crime and neither did the criminal plan originate from the Respondent but rather the Petitioner himself when he solicited for a benefit from the interested party. It is contended that the impugned audio recording was recorded with the Respondent’s gadgets on August 12, 2021 whereupon the Respondent invited the interested party to listen to the audio recording in order to verify its accuracy. It is also alleged that the Respondent also summoned the Petitioner’s supervisor for purposes of voice recognition and that the issues surrounding the recording should be left to the trial court in the event that the petitioner is charged. It is disputed that the audio recording was given to the interested party to disseminate to the petitioner’s employer.
6. The Respondent argues further that the Petitioner/Applicant has not strictly pleaded or proved an infringement of his data by the Respondent; that Section 28(f) of the Data Protection Act permits the collection of data for investigation purposes; that the Petitioner/Applicant was invited to record a statement in line with the principle of natural justice and that the deponent can confirm that the investigation was objective, not biased and neither was it discriminatory; that the evidence will in any event be subjected to an independent evaluation by the Director of Public Prosecutions before any charges are preferred and hence this application and the petition are premature. This court is urged not to grant the application as the same will be tantamount to usurping the Respondent’s constitutional and statutory mandate.
7. On his part, the interested party relied on a Replying Affidavit sworn by himself on October 24, 2022, Grounds of Opposition dated October 24, 2022 and a Preliminary Objection of even date. In summary it is the Interested Party’s case that the Petitioner/Applicant is being less than candid in his allegation of entrapment; that the audio and video recordings were instigated by demands by the Petitioner/



Applicant for a bribe; that the recording was undertaken after the Interested Party made a report to the EACC/Respondent; that the recording was done with a gadget given to him by the EACC/Respondent and with his own gadget, that the EACC/Respondent is not subject to the National Police Service Act and did not therefore require a warrant or court order; that there was no contravention of the Petitioner/Applicant's rights either under the Constitution or the Data Protection Act; that the Petitioner/Applicant is pre-empting that he will be charged hence crossing the bridge before he gets there; that investigations are on-going and hence granting any substantive orders will hinder the course of justice and prevent the Respondent from carrying out its mandate and will also prejudice his (Interested Party's) interest in the matter. It is also contended that the WhatsApp messages between the Interested Party and the Petitioner/Applicant annexed to the affidavit in support of the Amended Petition are inadmissible for reason that they are not accompanied by the requisite certificate under Section 65 (5)(c), 6 and 8 and Section 106B of the Evidence Act.

8. The Amended application was heard through written submissions.
9. Quoting extensively from the case of Isaiah Luyara Odando & Another v Kenya Revenue Authority & 6 others; Nairobi Branch Law Society of Kenya (Interested Party) [2022] eKLR (Ruling No 1), the Petitioner/Applicant submitted that he was deserving of the order sought in that he had demonstrated that he has a prima facie case with a likelihood of success, that the orders he seeks shall enhance the constitutional values and the rule of law in governance of the country's affairs as a democracy and that should the order not be granted the petition shall be rendered nugatory. The Petitioner also submitted that he shall suffer prejudice and that granting the applications shall serve the public interest. The Petitioner contended that he seeks only to stop the respondent from relying on illegally obtained evidence but does not seek to stop investigations; that should the petition fail to succeed the recordings will still be available as evidence in the ongoing investigations and hence no prejudice will be occasioned to the Respondent and the Interested Party. He urged this court to grant the order and undertook to cooperate with the court so as to expedite the hearing of the petition.
10. In regard to the Preliminary Objection the Petitioner/Applicant submitted that the same does not raise a pure point of law as it is dependent on proof by evidence whether or not he attached a document to the original pleadings and to the amended pleadings; that the Preliminary Objection and grounds of opposition are purely reminiscing on how the Interested Party would have prosecuted the Preliminary Objection and grounds of opposition filed in the response to the original pleadings and that because pleadings were yet to close he still had an opportunity to attach the certificate that is the subject of the Preliminary Objection.
11. Ms Clare Lai, Learned Counsel for the Respondent reiterated the depositions in the Respondents affidavits and submitted that the Petitioner/Applicant has not established a prima facie case with a probability of success as would warrant this court to grant him the order sought. Counsel stated that the investigations which entailed carrying out overt operations are within the mandate of the Respondent and are not a violation of a person's rights; that under Section 23 of the Anti-Corruption and Economic Crimes Act the respondent's investigators have the same powers, privileges and immunities of a police officer. Counsel reiterated that the Respondent did not require a court warrant or order to carry out such overt operations; that it cannot be said that the Respondent acted in excess of its mandate; that in its wide and critical mandate to combat corruption under the Constitution and the law, the Respondent assumes different postures depending on the nature of the specific function and applies different sets of laws and strategies. Counsel contended that the impugned audio recordings can only be prejudicial to the Petitioner/Applicant at the point at which they are tabled in a court of law as evidence and as investigations are still in progress to grant the order would essentially be an affront to the Commission's mandate. Moreover, that the application is premature as



the order would have been issued in vain were the Director of Public Prosecutions decide not to charge the Petitioner. Counsel also submitted that it would be against the public interest to grant the order sought. In support of her submissions, Counsel placed reliance on the following cases:-Kenya National Examination Council v Republic Exparte Geoffrey Gathenji & 9 others NBI Civil Appeal No 266 of 1996.Ibrahim Wako Boru v Ethics & Anti-Corruption Commission & another [2018] eKLR.Supreme Court Petition No 30 of 2019 EACC & Another v Prof. Tom Ojienda & Others.Benson Muteti Masila & 5 others v Chief Magistrate Milimani Law courts & 4 others [2020] eKLR.Sofia Mohammed v Ethics & Anti-Corruption Commission & 3 others [2018] eKLR.Lydia Lubanga v Inspector General of Police & 4 others [2016] eKLRKuria & 3 others v Attorney General [2002] 2 KLR 69.

12. On his part, learned Counsel for the Interested Party contended that the Petitioner/Applicant was not deserving of the conservatory order; that the Petitioner/Applicant has not demonstrated any violation or threat of violation of his Constitutional rights; that he has not shown how the conservatory order will serve the public interest; that the petitioner will suffer no prejudice should the order be refused but that the Respondent shall suffer prejudice as public funds have been expended in the investigations and halting the same will lead to loss of precious time and important information and will therefore be prejudicial to public interest. Counsel also submitted that the order will interfere with the legal mandate of the Respondent. Counsel asserted that this court ought not to be used as a conduit of precluding constitutional bodies from conducting their mandate but rather it should check the constitutionality of their decisions upon them completing their mandate. Counsel urged this court to dismiss the application with costs to the Interested Party and the Respondent. He relied on the following cases to support his submissions: -[Board of Management of Uburu Secondary School v City County Director of Education and 2 others](#) [2015] eKLR.Supreme Court Pet. No 30 of 2019 (Consolidated with Pet. No 31 of 2019); [EACC & Another v Prof. Tom Ojienda, Commissioner of Police & The Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others](#) [2013] eKLR.[Nelson Andayi Havi v Law Society of Kenya & 3 others](#) [2018] eKLR.[David Morton Silverstein v Atsango Chesoni](#) [2002] eKLR.

### Analysis and determination

13. Rule 23(1) of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#), 2013 provides that a Judge before whom a petition under rule 4, such as is the present petition, shall hear and determine an application for conservatory or interim orders.
14. The principles that guide the courts in granting such orders was laid by the Supreme Court in the case of [Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others](#) [2014] eKLR when it stated:-
- “(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 supplicant’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.”
15. In the case of [Judicial Service Commission v Speaker of the National Assembly & Anor](#) [2013] eKLR the court expressed itself as follows:-

“23. Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the [Constitution](#), the Supreme law of the land. They are not remedies



between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”

16. It is also trite that in considering an application for conservatory orders the court must be cautious not to make any definitive finding either on the law or fact in relation to the petition as otherwise that would be tantamount to pre-empting its findings before hearing the petition. This as stated by Musinga J, as he then was, in the case of *Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General* Pet No 16 of 2011 [2011] eKLR.

“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.”

17. In the same vein, the points for determination by this court at this stage, therefore are whether the Petitioner/Applicant has established a prima facie case with a likelihood of success; that there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution, and whether it would be in the public interest to grant the order.
18. It is the Petitioner/Applicant’s contention that the video and audio recordings that by his petition he intends to block the Respondent from using it in its investigations, was obtained in a manner that is in violation of his constitutional rights. It is his contention that should the investigations based on the audio and video culminate in charges being preferred against him he shall be prejudiced and hence this application for a conservatory order pending hearing and determination of the petition.
19. I have carefully considered the application, the response thereto (by the Respondent and the Interested party), the rival submissions and the law. On the first test of a prima facie case I have found that given that a prima facie case is not one that must necessarily succeed, the Petitioner/Applicant has demonstrated that he indeed meets that test. This is given that Article 4 of the Constitution prohibits the admission of evidence that violates any right or fundamental freedom in the Bill of Rights. The Petitioner/Applicant has cited several rights in the Bill of Rights which he contends shall be violated should the audio/video recordings be treated as part of the investigations and that is an issue that should be left to go for trial.
20. As to whether the Petitioner has satisfied this court that there is a real danger that he will suffer prejudice should the order be refused, the test to be applied would be that rendered by Mwongo J in the case of *Martin Nyaga Wambora v Speaker of the County Assembly of Embu & 3 others* [2014] eKLR that:-
- “The danger must be imminent and evident, true and actual and not fictitious so much so that it deserved immediate remedial attention or redress by the court” and “an allegedly threatened violation that is remote and unlikely will not attract the court’s attention.”
21. The EACC/Respondent has in its affidavits and submissions disclosed that it intends to use the audio/video recordings as part of its investigations and asserts that it is entitled to do so. Clearly therefore the danger here is actual and not imagined. There is a real probability of the danger occurring and hence the application meets the test of whether the Applicant has demonstrated that there is a real



danger that he shall suffer prejudice if the order sought is not granted. Should the evidence form part of the investigations and culminates in charges being preferred against the Petitioner/Applicant's constitutional rights then he shall suffer prejudice. On the other hand, even if the petition does not succeed the respondent and the Interested Party will not be prejudiced as the recordings will still be available to them.

22. As to whether it is in the public interest to grant the order sought it is my finding that taking into account the nature of this petition, the constitutional values, the Bill of Rights and applying the principal of proportionality it would serve the interest of the administration of justice and hence the public interest to grant the conservatory order.
23. The veracity or otherwise of the impugned audio/video recordings, whether or not the documents attached to the Amended Notice of Motion and the Amended Petition are admissible as evidence and whether entrapment can be defence in the circumstances are all issues that should be left for determination during the hearing of the petition. As stated earlier this court has been very cautious not to make any definitive findings whether of fact or law at this stage. Accordingly, it declines to make a conclusive determination at this stage on the admissibility of the recordings as that would amount to pre-determining some of the issues in the petition. Nothing therefore turns on the preliminary objection raised by the Interested Party and accordingly the application is allowed and orders granted as follows:-
  - a. That pending the hearing and determination of the petition filed herewith an interim order of prohibition be and is hereby issued prohibiting the respondent from relying and/or from continuing to rely on impugned audio and video recordings (and/or transcripts thereof) of communications between the interested party and the applicant recorded by the respondent and/or the interested party jointly and/or severally at various times between June 1, 2021 and September 17, 2021 for purposes of ongoing investigations and/or making recommendations and/or taking any other/further action on the said video recordings and/or transcripts thereof.
  - b. That costs shall be in the cause.

**SIGNED, DATED AND DELIVERED VIRTUALLY THIS 26<sup>TH</sup> DAY OF JANUARY, 2023.**

**E N MAINA**

**JUDGE**

