Lenolkulal v Director of Public Prosecutions & 2 others (Anti-Corruption and Economic Crime Constitutional Petition 07 of 2022) [2023] KEHC 1158 (KLR) (Anti-Corruption and Economic Crimes) (21 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1158 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

ANTI-CORRUPTION AND ECONOMIC CRIMES

ANTI-CORRUPTION AND ECONOMIC CRIME
CONSTITUTIONAL PETITION 07 OF 2022

EN MAINA, J

FEBRUARY 21, 2023

BETWEEN

MOSES KASAINE LENOLKULAL ..... PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS ..... 1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE ..... 2ND RESPONDENT

THE CHIEF MAGISTRATE'S COURT AT NAIROBI ..... 3RD RESPONDENT

RULING

1. The Petitioner who is an accused person in Milimani Chief Magistrate's Court Anti-Corruption Case No. 3 of 2019 has through a petition dated 16th November 2022 sought orders which in principal seek to stop the prosecution of that case. The gravamen of the application is that the 1st Respondent had through an application dated 13th October 2022 sought to terminate that case an application which it subsequently withdrew. It is his contention that the withdrawal of the application was unfair, irregular, unprocedural, unconstitutional, null and void ab initio and the same should be brought into this court and quashed. The petition also seeks compensation by way of general damages for the violation of his rights.

2. Simultaneously with the Petition the petitioner filed a Notice of Motion in which he seeks the following orders: -

> " 1) That this application be certified urgent, be heard ex parte and service be dispensed with in the first instance.

2) That pending the hearing and determination of this application inter parties, this Honourable Court be pleased to issue a conservatory order staying further proceedings of the criminal case and which is the substratum of the petition herein and which case is serialized as Nairobi, Milimani Chief Magistrate's Court – Anti-Corruption Case No. 3 of 2019.

3) That pending the hearing and determination of his petition, this Honourable court be pleased to issue a conservatory order staying further proceedings of the criminal case and which is the substratum of the petition herein and which case is serialized as Nairobi, Milimani Chief Magistrates' Court Anti-Corruption Case NO. 3 of 2019.

4) That the Honourable Court be pleased to issue such other orders or directions as it deems fit in view of the facts, circumstances and issues raised in the petition and application herein.

5) That the costs of this application be awarded to the Petitioner/Applicant."

3. The application is premised on the following grounds: -

" 1. That on or around the year 2019 the Petitioner/Applicant herein was charged in a suit serialized as Nairobi, Milimani Chief Magistrates' Court Anti-Corruption Case No. 3 of 2019.

2. That all the prosecution witnesses have already testified except the investigating officer who is in the middle of his testimony.

3. That on or about 12th October, 2022 the 1st Respondent herein made an oral application to the Honourable Court informing the Court that they had perused and interrogated the entire evidence with respect to the Anti-Corruption case serialized as Nairobi Milimani Chief Magistrates' Court Anti-Corruption Case No.3 of 2019.

4. That upon perusal of the said case the 1st Respondent found and deemed it necessary to review the decision to charge the petitioner.

5. That the 1st respondent therefore sought to withdraw the charges as against the petitioner but the trial magistrate did not allow the oral application made for withdrawal of charges and directed that the 1st Respondent to make a formal application to that effect.

6. That on or around 13th October 2022 the 1st Respondent herein went ahead and made a formal application dated the 13th October, 2022 and which application was under certificate of urgency seeking to be allowed to withdraw the charges against all the accused persons in Nairobi Milimani Chief Magistrates Court anti-Corruption Case No. 3 of 2019.

7. That on the same day on 13th October, 2022 the petitioner was duly served with the said application.

8. That the said application was unopposed and noting the same was filed under certificate of urgency, the same ought to have been herd on or around 13th

October, 2022 and where the 1st Respondent's request for withdrawal (sic) of the charges as against the Petitioner/Applicant would have been granted.

9. That the 1st Respondent through its principal prosecution counsel one Wesley Nyamache under oath deponed under paragraph 9 of the said supporting affidavit that any further prosecution of the said matter would amount to abuse of the legal process. The said paragraph reads as follows;

> "That the decision of the Applicant in making this application is based on public interest; interest of administration of justice and the need to prevent abuse of the legal process." (Emphasis mine)

10. That the said application dated 13th October, 2022 gave a chronology of the said anticorruption case and indeed confirmed the same is solely based on conflict of interest but went ahead to demonstrate that indeed the Petitioner/Applicant had declared the said conflict of interest vide a letter dated 5th April, 2013.

11. That the conflict of interest as against the Petitioner/Applicant having been declared therefore exonerated me from any wrong doing and as such the charges preferred against me were/are misplaced and had failed to consider this fact.

12. That the 1st Respondent further deponed and confirmed to having received a letter dated 22nd September 2022 from the head of treasury and who in the said letter confirms that no money was lost by the County Government of Samburu and that the County Government got value for their money.

13. That the said letter dated 22nd September. 2022 and produced by the 1st Respondent further indicated and recommended that the Petitioner had not done any wrong as no money was lost and that the matter should not have attracted criminal sanction.

14. That a reading of the application and the supporting affidavit together with the annexures therein confirms that indeed I was not involved in any criminal act and the 1st Respondent under oath confirms the same.

15. That the said application was not just supported by the supporting affidavit of principal prosecution counsel one Wesley Nyamache but was further supported by evidence inform of three documents "EN1, WN2 & WN3."

16. That unfortunately even with all these overwhelming evidence and a formal application seeking withdrawal of charges and the application having been filed under certificate of urgency, the said application was still not allowed.

17. That in a new twist of events the 1st Respondent ex parte came back to the Honourable Court and unceremoniously withdrawal (sic) its application dated 13th October 2022.

18 That the 1st Respondent wants to now proceed with the criminal proceedings as against the Petitioner/Applicant and which proceedings under oath it deponed would amount to abuse of legal process.

19. That the facts and evidence as per the Respondent's application dated 13th October. 2022 has not changed and as such any further proceedings as against the Petitioner/Applicant clearly is an abuse of court process and solely meant to punish the Petitioner herein due to his political stance.

20. That this Honourable Court has supervisory jurisdiction and which is meant to quash and remove such unfair, unconstitutional, unmerited and clear abuse of criminal proceedings and legal processes in our criminal justice system.

21. That the Petitioner's constitutional rights have been infringed and continue to be violated by the Respondents herein and as such and in line with Article 25 (3) of *the Constitution* the Petitioner is entitled to conservatory orders at this stage so as to halt the infringements and/or violation of the Petitioner's constitutional rights.

22. That That the prosecutorial powers of the 1st Respondent are not absolute but are limited under Article 157(11) of *the Constitution*, 2010 and requires the Respondent to have regard to public interest. the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.

23. That allowing the criminal proceedings as against the Petitioner/Applicant in Nairobi, Milimani Chief Magistrates' Court Anti-corruption Case No. 3 of 2019 to proceed shall essentially be allowing the 1st Respondent and as confirmed by itself in the application dated 13th October, 2022 to violate the provisions of Article 157(11) of *the Constitution*, 2010 as the same is a clear abuse of the legal process, it's against public interest and the interests of the administration of justice,

24. That the 3rd Respondent in failing to allow the application dated 13th October, 2022 and in further allowing the Respondent to unceremoniously withdrawal (sic) the same exparte acted ultra vires and is in total breach of the celebrated principles of natural justice.

25. That the Petitioner is aggrieved by the unceremonious withdrawal (sic) of the application dated 13th October, 2022 and which was supported by facts and evidence and which application ought to be allowed.

26. That there was no change of circumstances or facts to warrant the withdrawal of the application dated 13t October, 2022 and the application and the depositions therein remain true to date.

27. That the 2nd Respondent and noting the averments made by the 1st Respondent in the application dated 13th October 2022 acted irrationally and failed to undertake their core duty of conducting due diligence and being fair during investigations by failing to appreciate the import of the letter dated 5th April 2013 in its investigations which clearly demonstrate that there was clear bias in the investigations and the ultimate decision to prosecute me.

28. That the 1st Respondent failed to conduct its due diligence as required by Article 157 of *the Constitution*, 2010 prior to preferring the charges as against me and which charges are solely pegged on conflict of interest yet I had way back in the year 2013 as required by law declared my conflict of interest.

29. That the actions of the Respondents herein and the decision not to withdrawal (sic) the charges against me in light of the prevailing circumstances and the application dated 13th October, 2022 is illegal, irrational, biased, ultra vires and are in breach to the provisions of the Fair Administrative Actions Act, 2015 and *the Constitution* of Kenya, 2010.

30. That the impartial and objective assessment and analysis of the prosecution's evidence and as well captured in the 1st Respondent's application dated 13th October, 2022 leads to the inescapable conclusion that no competent, independent, professional prosecutor acting impartially within constitutional bounds could have reached the decision to prosecute me.

31. That the decision to prosecute and now the decision to withdrawal (sic) the 1st Respondent's application dated 13th October, 2022 had an ulterior motive, based on mala fides, is unfair and violates my legitimate expectations.

32. That having been served with the application dated 13th October, 2022 seeking to withdrawal (sic) the charges against and further having been present when the oral application to withdrawal (sic) the charges was made in court the Petitioner had legitimate expectations that the said criminal proceedings as against him had ceased,

33. That the 1st Respondent was thus estopped from then turning around and stabbing the Petitioner in the back. This is clearly a violation of his constitutional right to human dignity and amounts to psychological torture.

34. That the Application herein is meant to restore the rule of law, natural justice, constitutionalism, fair hearing, good governance and transparency.

35. That the Respondents must be tamed by this Honourable Court and compelled to comply *the constitution* and to ensure that there is no breach of the law.

36. That the Respondents herein are public officers, state officers, a court of law and whose decision is subject to this Honourable Court's supervision under the various celebrated writs of judicial review as expressly provided under Article 23(3) of *the Constitution* of Kenya.

37. That in the interest of justice and fairness that leave is granted and the application allowed as the same will not be prejudicial as against the Respondents herein.

38. That in the interest of justice and fairness that leave is granted and the application allowed and the prayers sought thereafter allowed as the same will not be prejudicial as against the Respondents herein.

39. That this Honourable Court has the jurisdiction to grant the orders sought herein as donated to it by virtue of Article 23 of *the Constitution* of Kenya and it is implored to grant the said orders as the same are inherently meritorious bearing in mind the public interest, the Constitutional values and the proportionate magnitudes and priority levels attributable to this scenario.

40 That it is in the interests of justice and the spirit of constitutionalism this Honourable Court do grant the orders sought in the petition and further grants conservatory orders at the interlocutory stage as sought in order to prevent arbitrary undermining of the constitutional order and abuse of power and authority.

41. That unless the said conservatory orders as sought herein are granted the Petition herein shall be overtaken by events and rendered a mere academic exercise.

42. That this Honourable Court has the jurisdiction to grant the orders sought herein as donated to it by virtue of Article 23 of the COK it is implored to grant the said orders as the same are inherently meritious bearing in mind the public interest, the Constitutional values and the proportionate magnitudes and priority levels attributable to this scenario.

43. That it is in the interests of justice, the spirit of constitutionality and the interests of the people of Samburu County that this Honourable Court grants conservatory orders sought in order to prevent arbitrary undermining of the constitutional order and abuse of power and authority."

4. The grounds are expounded in the affidavit sworn on 16th November, 2022 by Moses Kasaine Lenolkulal (the Petitioner) in support of the Petition and the application.

5. The 1st Respondent vehemently opposes the application through a replying affidavit sworn on 16th November 2022 by Wesley Nyamache, Principal Prosecution Counsel. The 1st Respondent argues inter alia that the petitioner has not raised any serious question of law and fact which raises any triable issues to warrant grant of a conservatory order; that under Article 157 of *the Constitution* and Section 5(1) (b) (i) and 25 of the *Office of the Director of Public Prosecutions Act* the 1st Respondent as an independent office has the sole mandate to institute and discontinue criminal prosecution; that in so doing the 1st Respondent does not at under the direction or authority of anybody; that the power to so institute and discontinue criminal proceedings is informed by the National Prosecution Policy and the Decision to Charge Guidelines and as such cannot be deemed to be an abuse of the 1st Respondent's power. Further that under Section 5(4)(e) of the *Office of the Director of Public Prosecutions Act* the 1st Respondent is obligated to continuously review its decision to prosecute any case at any stage before the judgment and that includes the case against the Petitioner; that the application to withdraw the case against the Respondent reverted the case to this original status; That the Petitioner has not demonstrated how the 1st Respondent abrogated the provisions of *the Constitution* or any written rules or rules or that the 1st Respondent acted without or in excess of his mandate/jurisdiction. Further that granting the conservatory orders would cause unnecessary and undue delay in the conclusion of the case which is at its tart end and also that this court would be usurping its jurisdiction were it to delve into the sufficiency or otherwise of the evidence in the trial court as it is being asked to do. It is also argued that the Petitioner has not demonstrated that the 1st Respondent's decision was erroneous, irrational or an abuse of the 1st Respondent's mandate; that he public interest in his case outweighs the interest of the Petitioner and as such the balance of convenience tilts in favour of the 1st Respondent and that the petitioner has not demonstrated that he will not receive a fair trial as provided under Article 50 of *the Constitution* of Kenya.

6. The application was canvassed through written submissions.

7. Through the firm of Mirugi Kariuki & Co. Advocates the Petitioner submitted that his application has merit and it ought to be allowed; that he has demonstrated that he has a prima facie case; that it is in the interest of justice for the on-going prosecution to be stayed so that the pertinent issues raised in the petition are determined; that the petition and application are unopposed and hence ought to be allowed and further that it is in the large interest of justice that the application be allowed. Learned Counsel for the Petitioner cited several cases to support his submissions. Counsel submitted that the Petitioner has met all the condition for grant of the conservatory order as set out in the case of Wilson Kaberia Nkunja v Magistrates and Judges Vetting Board & Another [2016] eKLR where it was held:-

> " 25. It therefore follows that an applicant must satisfy three key principles in order to make out a case for the grant of conservatory orders that is:-
>
> a. An applicant must 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*.
>
> b. Whether, if a conservatory order is not granted, the petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
>
> c. The public interest must be considered before grant of a conservatory order." (Emphasis mine)

8. Counsel contended that the Petitioner has ably demonstrated that numerous of his constitutional rights have been violated and has therefore demonstrated he has a prima facie case as defined in the case of Mrao Ltd v First American Bank Ltd & 2 others [2003] KLR 125 where the court observed:-

> " so what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that here exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter....." (Emphasis mine)

9. Counsel asserted that the Petition has also demonstrated that should the order not be granted then his petition shall be rendered nurgatory; that he has met that condition as enunciated by the court in the case of Samuel Asiago Kiari v Directorate of Criminal Investigations & 2 others [2021] eKLR where the court citing with approval the case of Muslims for Human Rights (MUHURI) & 2 others v Attorney General & 2 Others [2011] eKLR stated:-

> " The next step is to find out if the Applicant has demonstrated that failure to grant the orders sought would render his petition nugatory. In the case of Muslims for Human Rights (MUHURI) & 2 others v Attorney General & 2 Others [2011] eKLR, the court while considering the circumstanced under which conservatory orders should be granted observed that:
>
> > 'What is clear to me from the authorities is that strictly a "conservatory order is not an injunction as known in civil matters or generally in other legal proceedings but is an order that tends to and is intended to preserve the subject matter or set of circumstance that exist on the ground in such a way that the constitutional proceedings and cause of action is not rendered nugatory.

> Through a conservatory order the court is able to "give such directions as it may consider appropriate for the purpose of securing of.... The provisions of *the Constitution* (see – BANSRAJ above)." A conservatory order would enable the court to maintain the status quo or existing situation or set of facts ad circumstances so that it would be still possible that the rights and freedoms of the claimant would still be capable protection and enforcement upon determination of the Petition and the trial was not a futile academic discourse or exercise." (Emphasis mine)

10. Counsel urged this court to find that the Petitioner had sufficiently demonstrated the injury he shall suffer as a result of violation of his constitutional rights and that such injury is irreparable. Counsel urged this court to be persuaded by the decision in the case of Prasul Jayantilal Shah & another v Inspector General of the National Police Service & 3 others [2019] eKLR where the court, inter alia, stated:-

> " 41. Whereas it is true that an application seeking to suspend pending criminal proceedings, care must be taken to ensure that no one is condemned unheard. At this stage the first condition the applicant is required to establish is a prima facie case with a likelihood of success. From the evidence on record, there is a petition that has been filed and is yet to be heard.
>
> 42. Without preempting the outcome of the petition, the issues which the petitioners intend to canvass at the hearing of the petition are the contention that the respondents are harassing the petitioners and acting in breach of rights as listed in the petition. The duty to be cognizant of whether or not any continued prosecution of the petitioners has demonstrated that during the proceedings, the human rights of the petitioners has been violated to the extent described in their petition. No matter how strong the evidence against them may be, no fair trial can be achieved and any subsequent trials would be a waste of time and an abuse of court process. There is dicta and holdings from cases in the United Kingdom which provide persuasive guidance to this court in determining whether it has power to issue the orders sought and when such an order may be issued.
>
> .....
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> It would be fair and just to grant a conservatory order pending the determination of the petition. Even though the 3rd Respondent is entitled to mount criminal prosecutions, I find the circumstance of this case warrants a grant of conservatory order so as to preserve the subject of the pending petition. There will be no prejudice suffered by the respondents if the stay is granted as they will commence the prosecutions once the petition fails to succeed. It is noted that most of the petitions are disposed of by way of written submissions and hence the same can be wrapped up quickly without undue delay. To this end therefore the court will ensure that the matter is canvassed on priority basis." Emphasis mine.

11. Counsel also placed reliance on the case of Samuel Kamau Macharia & Another v Attorney General & another [2000] eKLR. Counsel urged this court to stay the criminal proceedings pending hearing of the petition on its merits so as to prevent rendering it an academic exercise and so that justice is not only done but is also seen to be done.

12. For the 1st Respondent it was submitted that the Petitioner has not met the mandatory threshold for grant of a conservatory order laid in the cases of Tom Onyango & Independent Police Oversight authority & another [2015] eKLR, Republic v Director of Public Prosecution & 3 others Ex parte Bedan Mwangi Nduati & Another [2015] eKLR and the case of Ezekiel Waruinge v Director of Public Prosecutions & 2 others [2017] eKLR. Counsel for the 1st Respondent cautioned this court against interfering with the mandate of other constitutional organs and cited the case of Pauline Adhiambo Raget v Director of Public Prosecutions and 5 others [2016] eKLR where the Court stated:-

> " The court should not involve itself in a minute and detailed analysis of facts and evidence to determine whether or not a criminal offence had been committed to warrant a return of the decision to prosecute. That truly is the recluse of the 1st Respondent and ultimately of the trial court. Even whether the 1st Respondent is of the independent view that the prosecution to be instituted, the trial court may still return a verdict of no case to answer. It is enough for the Respondent to show that on the facts as investigated and returned, it is reasonable to conclude that an offence has been committed worthy of prosecution and worthy of closer interrogation by a court of law. The satisfaction must be with the 1st Respondent and not this court sitting as a constitutional court over a constitutional question."

13. Counsel further submitted that this court should shy away from delving into matters of evidence and contended that it should be left to the trial court to test the veracity, admissibility and reliability of the evidence. To this end Counsel cited the case of Beatrice Ngonyo Kamau v DCI & Anor [2013] eKLR where Lenaola J, as he then was, stated:-

> " in the instant case I am not going to delve into the merits of the case, the evidence tendered before me is sufficient at a prima facie level to show that the DPP had reasonable ground to suspect that the Exparte Applicant and the interested party may have by negligent criminal action caused the collapse of the building on LR No. 149.... Both pieces of evidence to be relied on at the trial and this court cannot purport to turn into a trial court to determine their value."

And the case of Alfred N. Mutua v Ethics and Anti-Corruption (EACC) & 4 others [2016] where the court observed:-

> " The trial court has the professional competence to consider and evaluate any constitutional issues urged and any applicable defence raised. Any trial court has competent office holders with requisite training and skills to hear and determine any defence that the applicant may proffer. This court is not a trial court to determine the factual merits and cogency of defences available to the applicant; the proper forum to raise and urge any defence is the trial court. In our view, public interest dictates that the rights of the applicant cannot be violated if he is given an opportunity to raise and urge his defence before a trial.
>
> The applicant therefore ought not seek to side step the cause of justice by seeking prohibition and certiorari orders from this court."

14. Counsel further placed reliance on the case of Jago v District Court (NSW) [1989] HCA 46 where the learned judges cited the case of Maevao v Department of Labour [1980] 1 NZLR 464 where Richardson J stated:-

> " The justification for staying a prosecution is that the court is obliged to take that extreme step in order to protect its own processes from abuse. It does so in order to prevent the

criminal processes from being used for purposes alien to the administration of criminal justice under law. It may intervene in this way if it concludes from the conduct of the prosecutor in relation to the prosecution that the court processes are being employed for ulterior purposes or in such a way (for example, through multiple or successive proceedings) as to cause improper vexation and oppression. The yardstick is not simply fairness to the particular accused. It is not whether the initiation and continuation of the particular process seems in the uncertain circumstances to be unfair to him. That may be an important consideration. But the focus is on the misuse of the court process by those responsible for the law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognized purposes of the administration of criminal justice and so constitutes an abuse of the process of the court."

Analysis and Determination

15. The office of the Director of Public Prosecutions is established under Article 157(1) of *the Constitution* while its mandate is set out in Article 6 which states:-

> "(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—
>
> (a) 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;
>
> (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
>
> (c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b)."

16. It is instructive however that while the Director of Public Prosecutions has power to undertake as well as to discontinue a prosecution the DPP's power to discontinue a prosecution is not absolute as it can only do so with the permission of the court.

17. It is also noteworthy that as provided in Article 157(10) of *the Constitution*, the DPP does not require the consent of any person or authority and shall not be under the direction or control of any person or authority in the exercise of his/her powers or functions. This in effect means that the decision to charge or to discontinue a prosecution is an independent decision but once a decision to discontinue is made the termination of the proceedings must be approved by the court concerned. Even then the DPP's exercise of the power to institute criminal prosecutions is also not absolute as the exercise of that power is subject to Article 157 (11) and where the court finds that the DPP is utilizing the criminal proceedings to abuse the court process, for ulterior motives such as to get even then the court may intervene.

18. From the pleadings it emerges that the DPP made a decision to discontinue the case facing the petitioner but before the trial court could make a determination whether or not to approve (give its permission to the DPP) to discontinue the proceedings the DPP withdrew its application. The Petition

herein is brought to challenge the withdrawal of that application. The Petitioner had urged this court to grant him a conservatory order to stay the trial pending the hearing and determination of the petition.

19. I have considered the application, the grounds thereof, the affidavits in support and in opposition, the rival submissions and the law.

20. The principles that guide a court in determining whether to grant a conservatory order or not are now well settled. In the case of Wilson Kaberia Nkunja v Magistrates and Judges Vetting Board Another [2016] eKLR the principles were stated as follows:-

> " 25. It therefore follows that an applicant must satisfy three key principles in order to make out a case for the grant of conservatory orders, that is:
>
> a. An applicant must 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*;
>
> b. Whether, if a conservatory order is not granted the petition alleging violation of, or threat of violation of rights will be rendered nurgatory; and
>
> c. The public interest must be considered before grant of a conservatory order."

21. In the case of Muslims for Human Rights (MUHURI) & 2 others v Attorney General and 2 others [2011] eKLR the court observed that a conservatory order is an order that "tends to and is intended to preserve the subject or set of circumstances that exist on the ground in such a way that the constitutional proceedings and cause of action is not rendered nurgatory, ... so that it would be still possible that the rights and freedoms of the claimant would still be capable of protection and enforcement upon determination of the petition and the trial was not a futile academic discourse or exercise."

22. In the case of Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 others Application No, 5 of 2014 [2014] eKLR the Supreme court summarised the principles as follows:-

> "(86) ..... conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes."

23. In the present case this court is being urged to stay a trial pending hearing and determination of a petition challenging the DPP's decision not to discontinue a prosecution.

24. The principles that govern an application for stay of proceedings which like a conservatory order is discretionary are similar to those that guide the court's discretion in an application for conservatory order. As the Supreme Court stated in the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others (supra) this court must in considering whether or not to grant the conservatory order "bear in mind the public interest, the constitutional values and the proportionate magnitudes." Applying the above principles to this case and while being careful not to go into the merits of the petition this court finds that the petitioner has not demonstrated that he has a prima facie case as would warrant

this court to grant him the order for stay of the proceedings in the trial court. It is my finding that the constitutional principles that trials ought to begin and conclude without undue delay and that generally justice shall not be delayed militate against granting the order. It is my finding that the 1st Respondent's decision to withdraw the application giving rise to the petition herein does not affect the Petitioner's rights under Article 50(2) of *the Constitution*. The trial court is expected to ensure that rights of the Petitioner, as an accused person, are not violated and indeed the Petitioner has not alluded to that not being done. It is also my finding that the Petitioner shall not suffer any prejudice as a result of this court refusing to grant him the conservatory order given that even were his trial to conclude before this petition is heard and he is convicted he shall be at liberty to exercise his right of appeal. He has therefore not demonstrated a real danger of violation of his constitutional rights. It may very well be that the trial may culminate in an acquittal. His petition will not, therefore in other words, have been rendered nurgatory.

25. This is more so given that even were this petition to be determined in his favour the criminal proceedings will simply be rendered null and void, no matter the stage they will have reached, and he shall automatically be acquitted, an outcome that will be in his favour rather that to his prejudice. On the other hand, the reverse would apply as should the petition not succeed the stay will have occasioned delay and inconvenience to the 1st Respondent as its witnesses may no longer be available. It is also my finding that given the nature of the criminal case it would not be in the public interest to grant the order. Further that the interest of justice, which applies both ways, dictates that the trial continues but that the hearing of this petition be expedited. In the premises the application is dismissed but with an order that costs shall be in the cause.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 21ST DAY OF FEBRUARY 2023.

E N MAINA

JUDGE