



**Haji & 3 others v Strate & 4 others; Kamotho & 2 others (Interested Parties)  
(Petition E037, E459 & E453 of 2021 (Consolidated)) [2023] KEHC 2616 (KLR)  
(Constitutional and Human Rights) (30 March 2023) (Directions)**

Neutral citation: [2023] KEHC 2616 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E037, E459 & E453 OF 2021 (CONSOLIDATED)**

**HI ONG'UDI, J**

**MARCH 30, 2023**

**BETWEEN**

**NOORDIN MOHAMMED HAJI ..... 1<sup>ST</sup> PETITIONER  
THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> PETITIONER  
JUSTICE SANKALE OLE KANTAI ..... 3<sup>RD</sup> PETITIONER  
LAW SOCIETY OF KENYA ..... 4<sup>TH</sup> PETITIONER**

**AND**

**GABRIEL HANNAH VAN STRATE ..... 1<sup>ST</sup> RESPONDENT  
IBRAHIM NDUNG'U NDIRANGU ..... 2<sup>ND</sup> RESPONDENT  
PUBLIC SERVICE COMMISSION ..... 3<sup>RD</sup> RESPONDENT  
INSPECTOR GENERAL OF NATIONAL POLICE SERVICE . 4<sup>TH</sup> RESPONDENT  
DIRECTORATE OF CRIMINAL INVESTIGATIONS ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**SARAH WAIRIMU KAMOTHO ..... INTERESTED PARTY  
PETER NJOROGE KARANJA ..... INTERESTED PARTY  
FRANCIS NYAGA NJERU ..... INTERESTED PARTY**



## DIRECTIONS

1. During the court proceedings dated March 17, 2023, Counsel for the 3<sup>rd</sup> respondent, Mrs Manani informed the Court that all the petitions filed at the Public Service Commission by the 1<sup>st</sup> respondent for the removal of the 1<sup>st</sup> petitioner had been withdrawn. The communication was done by the 1<sup>st</sup> respondent's Counsel, Musyoki Mogaka and Company Advocates who had filed 5 petitions in this regard. In view of this she noted that the instant consolidated petition could therefore not proceed as it would be a waste of judicial time.
2. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> petitioners, Mr Taib opposed this proposal stating that the substratum of the petition was still subsisting. In particular, he pointed out that the petition was still not only against the 1<sup>st</sup> respondent but also the 2<sup>nd</sup> respondent and the interested party who had also filed petitions before the 3<sup>rd</sup> respondent. He emphasized that there was no evidence before the Court that the other parties had withdrawn their petitions before the 3<sup>rd</sup> respondent and neither had they applied to withdraw from the instant petition. These sentiments were also supported by Counsel for the 1<sup>st</sup> interested party, M/s Kala.
3. Mr Wanyama, Counsel for the 3<sup>rd</sup> petitioner proposed a different approach. He suggested for a meeting between the 2<sup>nd</sup> petitioner and the 3<sup>rd</sup> respondent to ascertain and clarify Mrs Manani's communication on withdrawal of the petitions before the 3<sup>rd</sup> respondent. He relied on article 159(1) of the Constitution that encourages such dialogue to resolve the dispute.
4. Mrs Manani in further reply informed the Court that 4 other petitions had been filed before the 3<sup>rd</sup> respondent against the 1<sup>st</sup> petitioner. She stated that the 3<sup>rd</sup> respondent had not been able to act on them due to the subsisting conservatory orders that were issued by this Court on October 28, 2021. She urged that in the event that the petitioners opted to proceed with the petition, the Court should hear its application dated November 29, 2021 seeking to have the conservatory orders dated October 28, 2021 set aside. This would then enable the 3<sup>rd</sup> respondent deal with the other petitions filed before it.
5. In a letter addressed to the Court dated March 14, 2023, the 3<sup>rd</sup> respondent through Dr Simon K Rotich, the Chief Executive Officer of the 3<sup>rd</sup> respondent informed that the firm of Musyoki, Mogaka and Company Advocates on behalf of its client, Gabriel Hannah Van Straten sought to withdraw her petition for removal of the 1<sup>st</sup> petitioner. This was communicated in the firm's letter dated October 31, 2022.
6. The key subject in the instant case are the petitions filed before the 3<sup>rd</sup> respondent for the removal of the 1<sup>st</sup> petitioner from office. The petitions are as follows:
  - i. The petition dated September 27, 2021 for removal of the Director of Public Prosecution, Mr Noordin Haji on grounds of non-compliance with Chapter six, incompetence and gross misconduct. This was filed by Ibrahim Ndirangu Ndungu (2<sup>nd</sup> respondent) who represented himself.
  - ii. The petition dated October 13, 2021 for removal of the Director of Public Prosecutions, Mr Noordin Haji on grounds of bias, partiality, disregard to the rule of law, obstruction in the administration of justice, delay in dispensation of justice, abuse of office, interference with mandate of the office of the Director of criminal investigations, non-compliance of chapter six of the Constitution, incompetence, lack of qualification to hold office and lack of integrity.



This petition was filed by Gabriel Hannah Van Straten (1<sup>st</sup> respondent) through her Counsel, Musyoki Mogaka and Company Advocates.

- iii. The petition dated October 21, 2021 for removal of the Director of Public Prosecutions, Mr Noordin Haji on grounds of gross misconduct, bias, impunity, inertia, partiality, nepotism, favoritism, improper motives and corrupt practices, abuse of office, discrimination, disregard to the rule of law, obstruction and inordinate delay in the administration and dispensation of justice and non-compliance of Chapter six of the Constitution. This petition was filed by Francis Nyaga Njeru (3<sup>rd</sup> interested party) through his Counsel, Musyoki Mogaka and Company Advocates.
7. Evidently these petitions instigated the instant consolidated petition. Owing to the Notice of Motion dated October 26, 2021 in Petition No E037 of 2021 Makau, J on October 28, 2021 issued orders in the interim to the effect that:
- b) In the Interim, conservatory orders are hereby granted pending hearing and determination of the application inter-partes in terms of prayers No 2, 3, 4 and 5. To wit:
    - i) A conservatory order be and is hereby issued suspending the 3<sup>rd</sup> respondent's consideration of the two petitions lodged against the 1<sup>st</sup> petitioner and communicated on October 19, 2021 in respect of the 1<sup>st</sup> respondent's petition before the PSC and on the October 19, 2021 in respect of the 2<sup>nd</sup> respondent's petition before the PSC and or taking any further or other steps or action in the proceedings, pending the hearing and determination of this application and petition.
    - ii) A conservatory order be and is hereby issued suspending the 3<sup>rd</sup> respondent from sitting, considering, evaluating, hearing and/or determining the two petitions lodged against the 1<sup>st</sup> petitioner and communicated on October 19, 2021 in respect of the 1<sup>st</sup> respondent's petition and on the October 19, 2021 in respect of the 2<sup>nd</sup> respondent's petition pending the hearing and final determination of this application and the petition herein.
    - iii) A conservatory order be and is hereby issued restraining the 3<sup>rd</sup> respondent's from sitting, considering, evaluating, hearing and/or determining any other petitions for the removal of the 1<sup>st</sup> petitioner pending the hearing and determination of both this application and the petition and/or the further orders of this court.
    - iv) An injunction be and is hereby issued against the 1<sup>st</sup> and 2<sup>nd</sup> respondents from either by themselves, their advocates, agents and/or servants and/or any other parties from commenting, discussing, propagating ,narrowcasting, broadcasting and/or in any other manner whatsoever publishing any information in respect of these matters whether partly or in their entirety or in any other manner pertaining or ancillary to this petition and/or the two petitions before the PSC and the matters before the High Court, namely High Court Constitutional Petition No E334 of 2021 and/or in any manner whatsoever pending the hearing and determination of both this Application and the petition.
8. Equally, following the Notice of Motion application dated October 27, 2021 in Petition E453 of 2021, Makau, J on October 29, 2021 issued the following Order:
2. That pending hearing and determination of the application inter partes, prayer No.2 of the Notice of Motion dated October 27, 2021 is granted in the interim. To wit:



- i. Pending the hearing and determination of this application, a conservatory order be and is hereby issued suspending the 1<sup>st</sup> respondent's further consideration of the petitions dated October 13, 2021, October 21, 2021 and September 27, 2021 seeking the removal of Noordin Mohamed Haji from office of the Director of Public Prosecutions and lodged with the 1<sup>st</sup> respondent by the interested parties, Gabriel Hannah Van Straten, Ibrahim Ndirangu Ndungu and Francis Nyagah Njeru.
9. A perusal of the facts as outlined in the pleadings discloses that Gabriel Hannah Van Straten and Ibrahim Ndungu Ndirangu were introduced as the main respondents in Petition No E037 of 2021 alongside the Public Service Commission. On the other hand, the two were introduced as the interested parties alongside Francis Nyaga Njeru by the Law Society of Kenya in Petition No E453 of 2021. As set out above, the genesis in all these was the petitions the parties filed before the Public Service Commission (3<sup>rd</sup> respondent).
10. Counsel for the 3<sup>rd</sup> respondent indicated that the firm of Musyoki Mogaka and Company Advocates had withdrawn all the petitions it filed before it. Conversely the letter on record only indicated withdrawal of the 1<sup>st</sup> respondent's petition and not the 3<sup>rd</sup> interested party's. Furthermore, it is noted that the 2<sup>nd</sup> respondent who filed his petition before the 3<sup>rd</sup> respondent independently, has not submitted on his interest to withdraw his petition with the 3<sup>rd</sup> respondent or the instant proceedings.
11. Essentially it is my considered opinion contrary to Mrs Manani's submission on behalf of the 3<sup>rd</sup> respondent that the cause of action is still alive. I say so since the 2<sup>nd</sup> respondent's case is yet to be heard, and the 1<sup>st</sup> petitioner has not been involved in the withdrawal of the complaints before the 3<sup>rd</sup> respondent.
12. In such a circumstance, where a party would seek to withdraw from the proceedings the Supreme Court in the case of Hamdia Yaroi Shek Nuri v Faith Tumaini Kombe & 2 others [2019] eKLR guided as follows:

“(13) ...A party who seeks to withdraw from proceedings is required to file a substantive application seeking to withdraw from the proceedings.”
13. In the alternative, owing to the conclusion set out above, Mrs Manani noted that where the petitioners would decline to withdrawal of the petition, the 3<sup>rd</sup> respondent is keen on proceeding with its application dated November 29, 2021 where it seeks the following orders:
  - i. Spent.
  - ii. Order No. b (i) issued by this honourable Court on October 28, 2021, pursuant to the petitioners' application dated October 26, 2021 be varied so as to only subsist during the pendency of the hearing of the petitioner's application dated October 26, 2021.
  - iii. Order number b (ii) issued by this honourable court on October 28, 2021, pursuant to the petitioners' application dated October 26, 2021 be varied so as to only subsist during the pendency of the hearing of the petitioner's application dated October 26, 2021.



iv. Order number b (iii) issued by this honourable court on October 28, 2021 pursuant to the petitioners' application dated October 26, 2021 be discharged, vacated and/or set aside.

v. ...

14. This is a matter that has been pending since October 2021. It is only the ex parte conservatory orders which were issued that are still subsisting without the Applications being heard. In view of what counsel for all parties have submitted on, it would be in the interest of justice to have the 1<sup>st</sup> & 2<sup>nd</sup> petitioners know what particular complaints before the 3<sup>rd</sup> respondent have been withdrawn and by whom.
15. It was not enough for the 3<sup>rd</sup> respondent just to inform the Court of the withdrawal. The 1<sup>st</sup> & 2<sup>nd</sup> petitioners against whom the complaints had been made ought to have been formally informed and participated to enable them apply for withdrawal of the petitions before the Court depending on their choices.
16. On the issue of pursuit of the application my take is that the application has remained pending for 15 months with interim conservatory in place. To save on courts time it would only be prudent to hear the petition expeditiously. In view of the above observations hereby issue the following orders:
- i. A meeting be held between the counsel for the 1<sup>st</sup> and 2<sup>nd</sup> petitioners and the 3<sup>rd</sup> respondents for the said petitioners to be well informed of what is happening.
  - ii. Thereafter the 1<sup>st</sup> and 2<sup>nd</sup> petitioners to decide on the way forward. The meeting should be held within the next 14 days.
  - iii. In the event of there being no progress directions will be taken on the main petition, with no further delays.
  - iv. Conservatory orders to remain in force.
  - v. Mention on April 18, 2023 for a report from the 1<sup>st</sup> & 2<sup>nd</sup> petitioners and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents and further directions on the way forward.

Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 30<sup>TH</sup> DAY MARCH 2023 IN OPEN COURT AT MILIMANI NAIROBI.**

**HI ONG'UDI**

