



**Gusmaroli & another v Inspector General of the National Police Service &  
2 others (Constitutional Petition E393 of 2022) [2023] KEHC 2219 (KLR)  
(Constitutional and Human Rights) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2219 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E393 OF 2022**

**M THANDE, J**

**MARCH 24, 2023**

**BETWEEN**

**GIUSEPPE GUSMAROLI ..... 1<sup>ST</sup> PETITIONER**

**ALPHONSE O'MAKALWALA OTIENO ..... 2<sup>ND</sup> PETITIONER**

**AND**

**THE INSPECTOR GENERAL OF THE NATIONAL POLICE  
SERVICE ..... 1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**THE HEAD OF SERIOUS CRIMES UNIT, DIRECTORATE OF CRIMINAL  
INVESTIGATIONS ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before me for determination is an Application dated 1.8.22 which is anchored on a Petition of even date and in which the Petitioners seek the following orders:
  - a. Spent.
  - b. That an Order compelling the 1<sup>st</sup> and 3<sup>rd</sup> Respondents to furnish the Petitioners/Applicants within 30 days of service of this Honourable Court's Order:
    - i. A written confirmation of whether or not there exists in their database any complaint by Mr. Paul Mwangi Muriithi and/or his agents or clients in relation to



the forfeiture of shares undertaken by the Petitioners in the year 2020 in respect to Witaly Shipping Ltd (formerly AA & S Shipping Ltd) Incorporation no. PVT-Y2UQZAP.

- ii. A written confirmation of whether during the process of forfeiture of shares undertaken by the 2nd Petitioner on behalf of the 1st Petitioner there was any irregularity and illegality as relates to Witaly Shipping Ltd (Formerly AA & S Shipping Ltd) Incorporation no. PVT-Y2UQZAP.
  - c. Spent.
  - d. That pending the determination of the petition herein, the Respondents themselves, their servants, agents and/or whoever acting either independently or under the directions or command of the Respondents be are restrained from arresting, detaining and/or apprehending the 1<sup>st</sup> Petitioner/1<sup>st</sup> Applicant or in any other manner howsoever inhibiting the 1<sup>st</sup> Petitioner/1<sup>st</sup> Applicant's freedom.
  - e. Spent.
  - f. That pending the determination of the petition herein, the Respondents themselves, their agents, servants or whoever else acting either independently or under the directions or command of the Respondents be are restrained from entering into any premises, building or any form of property held by and in the occupation and/or possession of the petitioner for any purpose.
  - g. That the costs of this application be in the cause.
2. The 1<sup>st</sup> Petitioner is an Italian citizen resident in Dubai, U.A.E while the 2<sup>nd</sup> Petitioner is his advocate. Their case is set out in the affidavit sworn on 29.7.22 by the 1<sup>st</sup> Petitioner and supported by the 2<sup>nd</sup> Petitioner in his affidavit sworn on even date. The 1<sup>st</sup> Petitioner avers that he engaged the 2<sup>nd</sup> Petitioner's legal services to ensure that the 1<sup>st</sup> Petitioner would be able to forfeit all shares and business relations with Witaly Shipping Ltd (formerly AA & S Shipping Ltd) Incorporation no. PVT-Y2UQZAP (the Company), an assignment which the 2<sup>nd</sup> Petitioner successfully did. The 1<sup>st</sup> Petitioner alleges that Mr. Paul Mwangi, an advocate and representative of a Mr. Walter Zachello, the then sole shareholder of the Company insisted, vide an email dated 3.5.2020 that both Petitioners colluded to illegally alter documents at the Companies Registry. Paul Mwangi also accused the Petitioners of hacking the e-Citizen platform and National Security Systems amongst other illegalities. He further alleged that the Petitioners were informed that reports had been made to relevant security agencies including the International Criminal Police Organization (Interpol) and investigations were underway.
3. The Petitioners claim that Paul Mwangi has failed to disclose to the Petitioners details of where the said reports had been made. The 1<sup>st</sup> Petitioner registered a complaint with the 3<sup>rd</sup> Respondent vide a letter dated 9.6.2020 requesting that investigations be conducted into the serious allegations made. The 1<sup>st</sup> Petitioner and his Italian lawyer Fabrizio Biondi as well as the 2<sup>nd</sup> Petitioner recorded statements on 9.10.2020. However neither Paul Mwangi nor Walter Zachello have been summoned by the 3<sup>rd</sup> Respondent. In spite of several letters and meetings and assurances with the 3<sup>rd</sup> Respondent, no action has been taken by the DCI.



4. The 1<sup>st</sup> Petitioner stated that he is eager to conduct shipping business in Kenya and Africa. It is his case that he cannot enjoy his liberty and physical security if he travels to Kenya based on the allegations that have been made against him. He is apprehensive that the justice system will not treat him fairly and efficiently. Further, that if he is arrested, he will be subjected to physical torture and will not be able to move freely to conduct his business affairs across the world or have family visit him. On his part, the 2<sup>nd</sup> Petitioner claims that he is aggrieved that 2 years on, the investigation is yet to commence. Due to the allegations, his character has been tainted and his professional standing has been lowered. He has also suffered economic loss as the 1<sup>st</sup> Petitioner terminated his services in March 2021. Both Petitioners claim that as a result of the Respondents' actions, they have suffered mental stress.
5. In light of the foregoing, the Petitioners claim that the 2<sup>nd</sup> Petitioner is entitled to information held by the state under Article 35 of the Constitution. Further that they are both entitled to information sought to enable them exercise their rights. They are also entitled to correction of untrue allegations made against them. The Petitioners further claim that they have a right to fair administrative action under Article 47 as read with Sections 4 and 5 of the Fair Administrative Action Act (FAAA). The Respondents are under a duty to issue written reasons within a reasonable time frame for any omission on their part. They further urge that the 1<sup>st</sup> Petitioner is entitled under Article 27(1), 29(a) & (d) and 39(1) & (2) to equality and freedom from discrimination, mental and physical torture. The Petitioners further contended that Article 244, places the Respondents under a duty to conduct their affairs in manner that complies with the standards set out in the Constitution.
6. Directions were given on the filing submissions. However, only the Petitioners complied. I have considered their submissions and note that they are simply a reproduction of the averments in the 1<sup>st</sup> Petitioner's affidavit sworn on 1.8.22.
7. The Petitioners seek information from the 1<sup>st</sup> and 3<sup>rd</sup> Respondents as to whether there exists any complaint against them from Paul Mwangi or his agents or clients, in relation to forfeiture of shares in the company undertaken by the Petitioners in 2020. The Petitioners rely on Article 35 of the Constitution in their quest for this information.
8. The right of access to information is a fundamental right that is guaranteed under Article 35 of the Constitution of Kenya, 2010 as follows:
  1. Every citizen has the right of access to—
    - a. information held by the State; and
    - b. information held by another person and required for the exercise or protection of any right or fundamental freedom.
  2. Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
  3. The State shall publish and publicise any important information affecting the nation.
9. The Access to Information Act (AIA) was enacted to give effect to Article 35 of the Constitution. Section 8 of the AIA stipulates the procedure for an application for access to information while Section 9 makes provision for the processing of such application. In particular, Subsection (1) provides that a decision on an application for access to information shall be made as soon as possible, but in any event, within 21



days of receipt of the application. Under Subsection (6), an application in respect of which no response has been received within the stipulated period shall be deemed to have been rejected.

10. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents as public officers, are bound by the provisions of Article 35(1) of the [Constitution](#) and the provisions of the AIA. The provisions place on the 1<sup>st</sup> and 3<sup>rd</sup> Respondents, an obligation to disclose.
11. In the event an application for information is rejected, an applicant may invoke the provisions of Section 14 of the AIA which provide a remedy as follows:

14(1). Subject to subsection (2), an applicant may apply in writing to the Commission requesting a review of any of the following decisions of a public entity or private body in relation to a request for access to information—

- a. a decision refusing to grant access to the information applied for;
  - b. a decision granting access to information in edited form;
  - c. a decision purporting to grant access, but not actually granting the access in accordance with an application;
  - d. a decision to defer providing the access to information;
  - e. a decision relating to imposition of a fee or the amount of the fee;
  - f. a decision relating to the remission of a prescribed application fee;
  - g. a decision to grant access to information only to a specified person; or
  - h. a decision refusing to correct, update or annotate a record of personal information in accordance with an application made under section 13.
- (2). An application under subsection (1) shall be made within thirty days, or such further period as the Commission may allow, from the day on which the decision is notified to the applicant.
  - (3). The Commission may, on its own initiative or upon request by any person, review a decision by a public entity refusing to publish information that it is required to publish under this Act.
  - (4). The procedure for submitting a request for a review by the Commission shall be the same as the procedure for lodging complaints with the Commission stipulated under section 22 of this Act or as prescribed by the Commission.

12. Section 23(3) of the [Act](#) provides for appeal of the decision of the CAJ to the High Court:

"A person who is not satisfied with an order made by the Commission under subsection (2) may appeal to the High Court within twenty-one days from the date the order was made."



13. It is easily discernible from the above provisions that the AIA has provided a remedy and the procedure to be followed, in the event an application for access to information is rejected. To begin with, an application will only be deemed to have been rejected if no response is received within 21 days. Thereafter an applicant is to apply within 30 days to the CAJ for a review of the rejection of the application for information. A person aggrieved by the decision of the CAJ may then appeal to the High Court within 21 days of the date of the decision.
14. In the present case, the first indication of any request for information is contained in a letter to the 3<sup>rd</sup> Respondent dated 1.4.22. The period between this date and 1.8.22, the date of the Application, is clearly longer than the 21 days stipulated in Section 9(1). By dint of Section 9(6) therefore, the Petitioners application for information is deemed to have been rejected. The Petitioners' recourse lay in writing to the Commission on Administration of Justice (CAJ) within 30 days to challenge the decision. It is only after CAJ makes its decision that the jurisdiction of the Court may be invoked, on appeal.
15. The Court notes that in seeking redress, the Petitioners have not followed the very clear remedial provisions stipulated in the *Act*. The Petitioner ought to have exhausted the stipulated avenues for resolving the dispute before approaching this Court. In this regard, I concur with the holding in *Coast Legal Aid & Resource Foundation (CLARF) v Coast Water Board Services & 2 others* [2021] eKLR, where, Ogola, J stated:
- "Even supposing the 1st Respondent had declined to give the Petitioner the information required after request, the Petitioner still had to exhaust all the avenues of dispute resolution mechanism under the *Access to information Act* before approaching this Court by way of a constitutional Petition. Section 14 of the *Act* provides the remedy in terms of review of the decision of the entity or person that has refused to provide access to the information that is requested."
16. The Application was filed in violation of the doctrine of exhaustion as set out under Section 9(1) and (6) as read together with Section 14(1)(a) and (2) of the AIA. Courts must be the last port of call where alternative dispute mechanism has been provided.
17. In the case of *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] eKLR, Counsel the Court of Appeal had this to say about the doctrine of exhaustion:
- "It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution."
18. While it is true that under Article 165 of the *Constitution*, this Court has unlimited civil and criminal jurisdiction, the Court is required to promote alternative dispute resolution mechanism in the exercise of its judicial authority. Thus where the law provides an alternative dispute resolution mechanism,



such mechanism must be followed. In this regard, this Court is guided by the provisions of Article 159(2)(c) which provides:

"(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(c). alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);"

19. For this Court to assume jurisdiction by by-passing the dispute resolution mechanism provided under statute, it must be demonstrated that special circumstances exist to warrant such action by the Court. In the present case however, the Petitioners have not demonstrated that any special circumstances exist to warrant a departure from the procedure set out in the AIA.
20. In view of the forgoing, I find and hold that by dint of the doctrine of exhaustion, this Court lacks the jurisdiction to grant the orders sought in prayer 2 of the Application.
21. I now turn to prayers 4 and 6 in which the Petitioners seek that the Respondents themselves, their servants, agents and/or whosoever acting either independently or under the directions or command of the Respondents be restrained from arresting, detaining and/or apprehending the 1<sup>st</sup> Petitioner or in any other manner howsoever inhibiting the 1<sup>st</sup> Petitioner's freedom and from entering into any premises, building or any form of property held by and in the occupation and/or possession of the 1<sup>st</sup> Petitioner for any purpose.
22. The Petitioners case is that they are apprehensive the 1<sup>st</sup> Petitioner will be arrested on account of the allegations made by the Paul Mwangi vide his emails dated 3.6.2020 and 26.1.21. The Petitioners have informed that Court that they have written severally to and attended several meetings with the 3<sup>rd</sup> Respondent seeking that Paul Mwangi and his client Walter Zachello be investigated and summoned for questioning.
23. Article 245(1) of the Constitution, establishes the office of the 1<sup>st</sup> Respondent. Clause (4) provides for the mandate and autonomy of the 1<sup>st</sup> Respondent with regards to, the investigation of any particular offence or offences, the enforcement of the law against any particular person or persons and the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service. Section 28 of the National Police Service Act establishes the 3<sup>rd</sup> Respondent while Section 34 of the said Act provides for the functions of the Director. Article 245(4) further provides that no person may give direction to the 1<sup>st</sup> Respondent with respect to investigation of any offence or enforcement of the law against any particular person.
24. Investigations of crime and apprehending offenders are a statutory function of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents. Section 35 of the National Police Service Act provides that the Directorate of Criminal Investigations established under Section 28 of the Act, shall have the following functions:
  - a. collect and provide criminal intelligence;
  - b. undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber crime among others;
  - c. maintain law and order;



- d. detect and prevent crime;
- e. apprehend offenders;
- f. maintain criminal records;
- g. conduct forensic analysis;
- h. execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of the *Constitution*;
- i. co-ordinate country Interpol Affairs;
- j. investigate any matter that may be referred to it by the Independent Police Oversight Authority; and
- k. perform any other function conferred on it by any other written law.

25. The statutory mandate of the 1<sup>st</sup> Respondent is to, inter alia, summon at a police station or office, any person believed to have information which may assist in the investigation of an alleged offence. Section 52(1) provides:

"A police officer may, in writing, require any person whom the police officer has reason to believe has information which may assist in the investigation of an alleged offence to attend before him at a police station or police office in the county in which that person resides or for the time being is."

26. It is well settled that constitutional and statutory bodies such as the Respondents herein, must be given the space to discharge their mandate and to exercise their discretion in doing so. In the case of *Tom Dola & 2 others v Chairman, National Land Commission & 5 others* [2020] eKLR the Court of Appeal spoke to this issue and stated:

"In *Pevans East Africa Ltd & another v Chairman, Betting Control & Licensing Board & 7 others* [2018] eKLR, this Court emphasised, and we reiterate, that where the *Constitution* has vested specified functions in a state institution or organ, the courts will not readily interfere with the discharge of that mandate unless it is demonstrated that the institution or organ in question has acted ultra vires or in breach of the *Constitution* or the law."

27. It is well settled that the acts of arrest and prosecution do not in and of themselves constitute violation of constitutional rights, unless they have been done maliciously or excess of jurisdiction. In the case of *Cape Holdings Limited v Attorney General & another* [2012] eKLR, Warsame, J. stated:

"My understanding of the law is that the responsibility to investigate, determine the credibility of the complaint and prosecution is solely left for the police under the direction and control of the Director of Public Prosecution. The predominant factor being that they must act in accordance with the law and so long as they do not exceed the limits, then a court should not prohibit the prosecution of an individual. The investigation of a criminal offence or complaint cannot be easily prohibited or stopped unless there is credible and reasonable evidence to show the same is mounted for an ulterior purposes or objectives.

The applicant has failed to demonstrate that the Police lack or acted in excess of jurisdiction or have not complied with the rules of natural justice. In my view it is outside the jurisdiction of this court to supervise how the police should conduct its investigations unless there is evidence to show that the investigation is being conducted in a manner to prejudice the



rights and the interests of the applicant. The police should be allowed to investigate the complaint lodged by the interested party to its logical conclusion and it is now premature for me to determine whether there is any abuse being committed against the applicant."

28. I fully concur with the sentiments of the learned Judge. If at all Paul Mwangi made a criminal report to security agencies as he had threatened, he is, like any other person in the Republic of Kenya entitled to report any complaint of wrong doing to the police for investigation. There is however no evidence that Paul Mwangi made any such report or complaint.
29. I am also at pains to understand how the allegations and threat to make a criminal complaint by Paul Mwangi translates into apprehension of arrest. Since June 2020 when the Petitioners made the complaint to the 3<sup>rd</sup> Respondent and even presented themselves to its offices, they have not been arrested. If indeed there was any threat of arrest, surely it should have been carried out by now. The Application is therefore largely speculative.
30. In the case of *National Conservative Forum v Attorney General* [2013] eKLR, Ngugi, J. (as she then was) considered a petition that was based on mere speculation and had this to say and I agree:

"Within this jurisdiction, the High Court has also held in the case of *Jesse Kamau and 25 others v The Attorney General*, Nairobi Misc. App. No. 890 of 2004 (Unreported), (the Kadhis Court case), that the court cannot be subjected to proceedings where the questions for determination are abstract and hypothetical. In the absence of a real dispute between parties before it, the Court would be engaging in an academic exercise, or, at best, giving an advisory opinion, a role that is vested in the Supreme Court in this country by the *Constitution* under Article 163(6)."
31. The application before me is in my perception, premised upon mere apprehension and speculation, that the 1<sup>st</sup> Petitioner will be arrested. It does not raise any real issue or controversy that the Court can be called upon to determine. Mere trepidation that the 1<sup>st</sup> Petitioner will be arrested over a matter which may not have even been reported to the investigative agencies, does not meet the threshold for the grant of the orders sought.
32. In the end and in view of the foregoing, I find that the Application dated 1.8.22 lacks merit and the same is hereby dismissed. Given that no response was filed, I make no order as to costs.

**DATED AND DELIVERED IN NAIROBI THIS 24<sup>TH</sup> DAY OF MARCH 2023**

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**M. THANDE**

**JUDGE**

