



**Maina v Bitta & 11 others (Miscellaneous Criminal Application
E033 of 2023) [2023] KEHC 17658 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17658 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CRIMINAL APPLICATION E033 OF 2023**

HM NYAGA, J

MAY 25, 2023

BETWEEN

EDWARD KINGS ONYANCHA MAINA APPLICANT

AND

EMMANUEL BITTA 1ST RESPONDENT

JOSEPH NGUMBI 2ND RESPONDENT

CHINA JIANGSU IETC CORPORATION & 8 OTHERS 3RD RESPONDENT

GUO HUA DONG 4TH RESPONDENT

JAMES OCHIENG ODUOL 5TH RESPONDENT

TOM O ONYANGO 6TH RESPONDENT

JINARO K KIBET 7TH RESPONDENT

JOHN M OHAGA 8TH RESPONDENT

CECYL LAZARO KUYO 9TH RESPONDENT

KENVINE ODHIAMBO OUMA 10TH RESPONDENT

KELVIN NJUGUNA 11TH RESPONDENT

OCHIENG ONYANGO KIBET & OHAGA ADVOCATES 12TH RESPONDENT

RULING

1. The Applicant moved this Court under Certificate of urgency vide the Notice of Motion Application dated March 13, 2023 under the provisions of Articles 1, 2, 3(1), 10, 19-23(1), 25(1), 27, 28, 30, 31, 33, 35, 40, 43, 47, 48, 50, 59, 160, 162(1), 164, 165(3) & 259-260 of the Constitution 2010; Order 1 Rules



3&10, Order 15, 22 Rule 18-23, Order 40, 51 & 53 of the Civil Procedure Rules; Sections 1A, 1B, 3A, 7, 38, 66 & 95 of the Civil Procedure Act; Sections 60-63, 108-131, 253, 285, 300, 317, 347, 353-398 of the Penal Code; Mutunga Rules, Prevention of the Organized Crimes Act 2010 and the Evidence Act. The prayers sought are :

- i. Spent
 - ii. Spent
 - iii. That an order of Mandamus be and is hereby issued compelling the Inspector General of the Kenya Police Services enjoined with the County Police Commander Nairobi City County and the County Police Commander Nakuru County to arrest and arrange (sic) forthwith the Respondents herein before Nakuru Chief Magistrate's Court for prosecution of inter alia Perjury, subordination of perjury; false swearing; false utterances including deceitful and fraudulent expropriation of the decretal sum of Kshs 5,873,216.60 in Nakuru HCCC No 125/1993 contrary to sections 60-63; 107-131, 253, 285, 300, 317, 347, 353, 373, 393-398 of the Penal Code.
 - iv. That an order of Mandamus be and is hereby issued forthwith compelling the Registrar of Companies to deregister Guo Hua Dong as director and or managing director pursuant to Companies Act including File F47/86 namely China Jiangsu IETC Corporation.
 - v. That an order of prohibition be and is hereby issued forthwith refraining the Chief Registrar of the High Court enjoined by the Chief Executive Officer of the Law Society of Kenya from issuing the Annual Practicing Licenses for the next 15 years from January, 2023 to and in the name and title of Emmanuel Bitta; Joseph Ngumbi; James Ochieng Oduol; Tom O Onyango; Jinaro K Kibet; John M Ohaga; Cecyl Lazaro Kuyo; Kenvine Odhiambo Ouma & Kelvin Njuguna issued pursuant to Section 24 of the Advocates Act.
 - vi. That the Respondents do bear the costs of this Application.
2. The application is supported on the grounds on its face as well as by an affidavit sworn on the March 13, 2023 by Edward Kings Onyancha Maina, the Applicant herein.
 3. The matter revolves around the decisions which were made by the Court in Nairobi HCCC No 440 of 2011, Nakuru HCCC No 299 of 2009, Nairobi HCCC No 1227 of 1996, Court of Appeal Civil Appeal Nos. 193, 194, 259, 71 & 70 all of 1995, Court of Appeal Civil Case No 193 of 1995, Nakuru HCCC Nos. 125 and 132 all of 1993 and Nakuru RMCR No 326 of 1989.
 4. The applicant avers that he is a plaintiff and decree holder in Nairobi HCCC No 440 of 2011 formerly Nakuru HCCC 299 OF 2009 & Nairobi HCCC No 1227/96 formerly Nakuru HCCC No 125 of 1993 & HCCC No 132 of 1993; the Respondent cum judgement creditor in Court of Appeal Civil Appeal No 70 of 1995 formerly Nakuru HCCC 125 of 1993, Court of Appeal Civil Appeal No 71 of 1995 formerly Nakuru HCCC No 132 of 1993 & Court of Appeal Civil Application No 259 of 1995 formerly Nakuru HCCC No 125 of 1993 & HCCC No 132 of 1993; Court of Appeal civil Appeal No 193 of 1995 formerly Nakuru 125/93 & Court of Appeal Civil Appeal No 194 of 1995 formerly Nakuru HCCC No 132 of 1993; & the Plaintiff cum Judgement Creditor in Nakuru HCCC Nos. 125 & 132 all of 1993.
 5. The Applicant avers that the 3rd Respondent, China Jiangsu IETC Corporation is the defendant in Nairobi HCCC No 440 of 2011 formerly Nakuru HCCC No 299 of 2009, Judgement Debtor in Nairobi HCCC 1227 of 1996 formerly Nakuru HCCC No 125 of 1993 & HCCC No 132 of 1993, Court of Appeal Civil Case No 193 of 1995 formerly Nakuru HCCC No 125 of 1993, Court of



Appeal Civil Case No 194 of 1993 formerly Nakuru HCCC No 132 of 1993, NAI Court of Appeal Application No 259 of 1995, Court of Appeal Civil Appeal No 70 & 71 all 1995, Nakuru HCCC No 125 of 1993 & HCCC No 132 of 1993 and Co- accused and Sole witness in Nakuru SRMCR No 326 of 1989.

6. The 4th Defendant, Guo Huo Dong, is the alleged Sole Managing Director of the 3rd Respondent.
7. Emmanuel Bitta, Joseph Ngumbi, James Ocheing Oduol, Tom O Onyango, Jinaro K Kibet, John M. Ohaga, Cecyl Lazaro Kuyo, Kenvine Odhiambo Ouma & Kelvin Njuguna, the 1st, 2nd, 5th, 6th, 7th, 8th, 9th, 10th & 11th herein are Advocates who represented the 3rd Respondent, China Jiangsu IETC Corporation in the above matters while the 12th Respondent is a law firm run by the 5th Respondent herein.
8. The main issues upon which the Application is brought is that the suit involves the judgement delivered by Justice BK Tanui on July 14, 1993 for payment of Kshs 5,488,325/= in Nakuru HCCC No 132 of 1993, for payment of Kshs 335,000/= in Nakuru HCCC No 125 of 1993, a certificate of Taxation issued on May 26, 2000 for payment of Kshs 6,818/= in Nairobi Court of Appeal Civil Application No 259 of 1995, Certificate of Taxation issued on September 13, 2020 for payment of costs Kshs 16,257/= each in Court of Appeal Civil Appeal No 70 & 71 all of 1995; the conditional adjournment order issued on February 26, 1997 for payment of Kshs 2,400 and Kshs 400 in Nairobi HCCC No 1227 of 1996.
9. According to the Applicant, the 5th Respondent enjoined (sic) by the 1st, 2nd, 6th, 7th, 8th, 9th, 10th & 11th respondents sabotaged the administration of justice since 27th July 1993 by perpetrating false swearing of affidavits by the 4th Respondent that the 3rd Respondent, China Jiangsu IETC Corporation, never entered and recorded consent in Nakuru RMCR 326 of 1989 that culminated in the decisions in the above paragraph.
10. He further contends that the 5th Respondent falsely swore that the 3rd Respondent was liable to pay and remit the amounts stated in paragraph 8 yet the said amounts had already been paid and remitted to him thus making the ruling by Justice Mabeya delivered on July 31, 2015 in Nairobi HCCC No 440 of 2011 res judicata.
11. The Applicant basically details the proceedings that led to the courts' decisions in the aforesaid matters and reiterates that decisions therein were obtained through fraud perpetrated by the advocates/ Respondents in this matter.
12. He avers that allowing this Application will enhance Justice.
13. The 3rd, 4th, 5th, 6th, 7th, 8th, 10th, 11th and 12th respondents opposed the Application via a Notice of Preliminary Objection dated April 18, 2023 on grounds that: -
 1. The court lacks Jurisdiction to hear and determine this Application as filed and same should be dismissed in limine.
 2. The Application is an abuse of the Court Process for being in express contradiction of the Rulings delivered on July 30, 2020 and July 26, 2021 by Honourable Lady Justice Kamau in Civil Suit No 440 of 2011.
 3. The Application falls foul of constitutional imperatives that need to be met in requesting the prayers sought.
14. The other Respondents did not file any response.



15. The application was canvassed through Oral Submissions.

Respondents' Submissions on the Preliminary Objection.

16. The Counsel for the respondents submitted that this court lacks jurisdiction to grant the orders sought as the Applicant's claim that his rights have been violated falls short of the legal threshold of a constitutional petition as set out in *Anarita Karimi Njeru v Republic* [1979] eKLR.
17. He submitted that there are specific procedures to be adhered to in deregistering a director of a Company and in disbarring an Advocate and that Article 165(3) is not applicable in this matter.
18. He further submitted that the undisputed facts herein are that the dispute arose in 1993 in a Civil Suit No 132 of 1993 whereby the 5th Respondent was instructed to act for the third respondent. He contended that the applicant obtained a judgement but the same was set aside and since then, the applicant has been attempting to set aside that order.
19. He averred that the other parties are advocates that have acted herein.
20. It was his further submissions that the applicant filed HCC No 440 of 2011 to pursue a non-existent decree and many orders have been issued thereto. He submitted that one of the orders was that the Applicant was declared a vexatious Litigant and he was directed to seek leave of the court before filing any suit in the Ruling of Justice Kamau delivered on July 30, 2020 in HCC No 440 OF 2011 that was reiterated in the same suit in the subsequent ruling of July 26, 2021. Secondly, Justice Nyaga in the Application before him ordered security of costs that the Applicant herein is seeking to stay.
21. The counsel submitted that this Application attempts to litigate issues that were settled in the year 1993. He argued that the Applicant has not led any grounds to justify his case and prayed that the instant Application be dismissed with costs.

Applicant's Submissions on the Preliminary Objection

22. The Applicant submitted that the Preliminary Objection offends the Provisions of Order 9 Rules 2(a)&(b) as it has been filed by the firm of Triple Ok without authorization of the 3rd Respondent. He also asserted that the Notice of Appointment was filed without authorization of the 3rd Respondent and as such both the Preliminary Objection and the said Notice are incompetent and ought to be struck out.
23. He argued that this Application is founded on Articles 1,3(1) &10 of the *Constitution* and submitted that he is before court since his rights were violated.
24. He submitted that in HCCC No 125 of 1993 & 132 of 1993 judgements were delivered and a Certificate of Costs issued and that subsequently warrants of attachment of Kshs 335,000/= & Kshs 5,510,441.25 in the aforesaid matters were issued respectively.
25. He averred that the 5th Respondent swore an affidavit that they were willing to settle the proclaimed sums and offered to deposit security of the entire decretal sum and Justice Nambuye directed the money to be deposited, however, the 5th Respondent appealed against the decisions in the above matters and stay of execution was granted on condition that the 3rd Respondent do deposit Kshs 1,425,830.25 within 45 days. He contended that this amount has never been deposited and he wants the 5th Respondent to account on the same.
26. He argued that this court pursuant to Article 165(3) of the *Constitution* has jurisdiction to summon the 5th respondent before court to give an account on the decretal sum.



27. He contended that the 5th Respondent is guilty of perjury and that the Ruling by Justice Kamau was an abuse of the Court Process as he never heard his case. He also stated that the 4th respondent swore an affidavit without a resolution of the company and urged this court to dismiss the Preliminary Objection.
28. In rebuttal, the Counsel for the respondents submitted that the question is whether this court has jurisdiction given the factual background by the parties. He stated that the Applicant is seeking to enforce an order in a case in 1993 and wondered whether this court can enforce an order in a matter it did not handle.
29. He urged the court to uphold the Preliminary objection.

Analysis

30. The issues for determination are whether the grounds raised fall within the ambit of what constitutes a preliminary objection and if the answer is in the affirmative, whether the court lacks jurisdiction to entertain the entire application as averred by the respondent.

31. As to what constitutes a Preliminary Objection was determined in the well known case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd*. (1969) EA 696 where the court explained as follows:

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

32. The Respondents have raised an issue on jurisdiction of this court to determine the instant application. This is well within the realm of a preliminary objection and as is required the same must be addressed at the earliest opportunity. This has been done by the respondent.
33. The Court of Appeal decision in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR, Nyarangi JA famously held: -

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it.

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence.

A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”



34. In *Republic v Karisa Chengo & 2 others* [2017] eKLR, the Supreme Court of Kenya held: -

“Jurisdiction” has emerged as a critical concept in litigation. Halsbury’s Laws of England (4th Ed.) Vol. 9 at page 350 thus defines “jurisdiction” as “...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.” John Beecroft Saunders in his treatise *Words and Phrases Legally Defined* Vol. 3, at page 113 reiterates the latter definition of the term ‘jurisdiction’ as follows:

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision.

The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited.

A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

35. When a question of jurisdiction is posed, the court must immediately interrogate such issue in limine and determine whether the court has jurisdiction. Where it holds the opinion that it is without jurisdiction the court must down its tools and proceed no further. That is the law as settled in *Mukisa’s case*(supra)
36. In the instant suit the Respondents’ issue on jurisdiction is twofold. First, it is contended that the Application couched as a constitutional application, falls afoul of the legal threshold as set out in *Anarita Karimi Njeru v Republic* (supra). Secondly it is argued that this court cannot be called upon to enforce orders issued by another court.
37. With respect to the first ground, it is my position that the same qualifies as a preliminary objection as it does not require probing of facts. The objection is based on the pleadings filed by the applicant and the court does not need to interrogate or ascertain any fact before determining the issue at hand. Undisputed facts can be considered when addressing a preliminary objection.
38. What is clear is that the applicant is referring to two (2) decrees of the court that were allegedly not satisfied by the 3rd Respondent. In bringing this application, the applicant is asking the court to take over the conduct of a matter that is before courts of competent jurisdiction, either as the trial court or appellate court.
39. Once a court issues a decree, the onus is on the decree holder to proceed to execute that decree. If it is against a private body, institution or person then the provisions of Order 22 of the *Civil Procedure Rules* kick in. If it is a public body, then the decree holder has the right to seek judicial review orders, including those of mandamus to enforce the decree.
40. The applicant’s application is couched in a manner akin to a constitutional petition, even though it is a miscellaneous application. Therefore, the application must meet the test of what would constitute a constitutional petition.



The threshold of what ought to constitute a constitutional petition/application is established in the case of *Anarita Karimi Njeru -v- The Republic* (supra) eKLR. The court in this case held that a Constitutional petition should set out with a degree of precision the petitioner’s complaint, the provisions infringed and the manner in which they are alleged to be infringed. The test was stated thus;

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed”.

41. This principle was later reaffirmed by the Court of Appeal in the case of *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR when the Court at paragraph 87(3) of the judgment stated as follows:-

“It is our finding that the petition before the High Court was not pleaded with precision as required in Constitutional Petitions. Having reviewed the petition and supporting affidavit we have concluded, that they did not provide adequate particulars of the claims relating to the alleged violations of the *Constitution* of Kenya and the *Ethics and Anti-corruption Commission Act*, 2011, accordingly the petition did not meet the standard enunciated in the Anarita Karimi Njeru case.”

42. In a constitutional petition, a party is not supposed to merely cite constitutional provisions. He/she must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated or threatened to be violated and the manner of the violation and/or threatened violation and state some particulars of alleged infringement to enable the respondent to be able to respond to each allegations accordingly.

43. In the instant case the applicant has filed an omnibus application, citing the Constitutional provisions he alleges to be relying upon. However, even after perusing the inordinately lengthy application, I did not find any specified grounds of violation of his rights under the *Constitution*. What he has done is to go on a journey of reciting the history of the matters he wishes addressed, but has fallen short of specificity as set out In Anarita’s case(supra). On this point I am in total agreement with the respondent.

44. I have also considered the application against the principles of constitutional avoidance.

45. What is constitutional avoidance?The Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR stated as follows:-

“The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

(257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some



other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).”

46. In *Sumayya Athmani Hassan v Paul Masinde Simidi & Another* [2019] eKLR the Court of Appeal stated:

“... Where legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the *Constitution* without challenging the legislation in question. That principle has been reinforced by the Supreme Court in Communications Commission case (supra).

In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on the *Constitution*. Accordingly, the petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition. ...”

47. The court in *KKB v SCM & 5 others* (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) stated that Constitutional avoidance has been defined as a preference of deciding a case on any other basis other than one which involves a constitutional issue being resolved.

48. It is also my position that the issues raised by the applicant in respect to the decrees in question can be canvassed in the suits that gave rise to them. Non- payment of a decretal sum ordered by a court of competent jurisdiction cannot be equated to an infringement of a constitutional right. As I have stated there exist mechanisms in which the applicant can enforce the decrees. He ought to follow the procedure set out in the *Civil Procedure Act*/Rules.

49. I therefore find that the application has failed to meet the legal threshold of what constitutes a constitutional application.

50. As regards the issue of jurisdiction of this court, I am in agreement with the Respondent that this court cannot enforce orders issued by another court. It is uncontroverted that the dispute herein arose in 1993 in respect to High Court Civil Suits No 125 and 132 all of 1993. The judgements therein were in favor of the Applicant however the same was set aside. The Applicant submitted categorically that he is before this court as he wishes to enforce the orders which were issued in the above suits. He contended that after obtaining judgements in the above matters in his favour, an appeal was subsequently filed by the 3rd Respondent’s Advocate and as a condition precedent for grant of stay of execution, the 3rd Respondent was ordered to deposit the decretal sum of Kshs 1,425,830.25 within 45 days, however, the said money has never been deposited. He wants this court to summon the 5th respondent to explain where that money is. This, clearly, is a prayer to enforce an order issued by another court of concurrent jurisdiction.

51. The High Court has no jurisdiction to enquire into or review the propriety of the decisions of the Judges of concurrent jurisdiction. The system of courts in Kenya is hierarchical in nature. Judges of concurrent jurisdiction do not possess supervisory jurisdiction over each other. This position has been expressly stated in Article 165(6) of the *Constitution* in these terms;

“The High Court has supervisory jurisdiction over the subordinate courts and over any other person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”



52. The Court in *Peter Ng'ang'a Muiruri v Credit Bank Ltd & 2 Others* Civil Appeal No 203 of 2006 in dispelling the notion that a judge of concurrent jurisdiction could supervise fellow judges stated as follows;

“It would be a usurpation of power to push forward such an approach, and whatever decision emanates from a court regarding itself as a constitutional court, with powers of review over decisions of concurrent or superior jurisdiction, such decision is at best a nullity.”

53. In *Kombo v Attorney General* [1995-98] 1EA 168, cited by Ole Keiwua, J (as he then was) properly rejected and repulsed an invitation to scrutinize and interrogate the conduct and decision of a judge of concurrent jurisdiction mounted by way of an application for enforcement of fundamental rights under section 84 of the former Constitution. Said the judge;

“All the applicant’s complaints were criticisms on how the election court [High Court] had acted and this was in the nature of an appeal which appeal did not lie to a judge of coordinate jurisdiction as the election court and was further an attempt to circumvent the provision of section 44(5) of the *Constitution* which provides against an appeal from decisions of the election court. The election court had sat as a High Court in terms of section 44(1) of the *Constitution* whereas the present application was made pursuant to provisions of section 84 of the *Constitution*. The High Court sitting pursuant to the provisions of section 84 of the *Constitution* cannot override the decisions of the same High Court exercising its constitutional jurisdiction.”

54. In *Civicon Limited v Kenya Revenue Authority & Another* [2014] eKLR, Muriithi, J., after examining various decisions on the subject, expressed himself quite strongly on the impropriety of parties attempting to reopen and re-litigate decided issues in original form through the subterfuge of clothing them in constitutional garb;

“I agree with the judicial policy that is variously set out by the authorities relied by the 2nd Respondent-Peter Ng'ang'a Muiruri v Credit Bank Ltd & Anor, Court of Appeal Civil Appeal No 203 of 2006 and Ventaglio International SA and Anor v. The Registrar of Companies and Anor, Nairobi HC Constitutional Petition No 410 of 2012 (per Lenaola, J) that the High Court’s Constitutional Division, indeed any other Division, cannot supervise any other superior court of concurrent jurisdiction or superior jurisdiction. The supervisory jurisdiction is over subordinate courts under Article 165(6) of the *Constitution*. I also consider that it is an abuse of the court process for a litigant to seek to obtain through a constitutional petition or indeed any to other court process before the same court of concurrent jurisdiction a different decision from one already rendered by the court in other proceedings over the same matter. The aggrieved party must be content with the devices of appeal or review of the decision already delivered by the court but cannot be permitted to re-agitate the matter through a constitutional petition or other originating proceedings. See *Beta Healthcare International Ltd v Commissioner of Customs, and 2 Others*. Nairobi HC Petition No 125 of 2010 (per Majanja, J.)”

55. This court suo moto at the ex parte stage raised the issue whether it had jurisdiction to grant the orders sought by the Applicant. When the matter came up for inter parte hearing, the applicant, ostensibly conceding that point, quickly abandoned prayer 2 of the Application.



56. Even though prayer 2 was abandoned, the substratum of the application remains the same, in respect to the decrees in question. My answer still remains that the court has no jurisdiction to re-litigate over a matter handled by a court of concurrent jurisdiction.
57. I will now address the other prayers in the application.
58. In Prayer 3 of the Application, the Applicant is seeking an order of Mandamus to compel the Inspector General of Kenya Police enjoined with the County Police Commanders from Nairobi City County and Nakuru County to arrest the Respondents and arraign them before Nakuru Chief Magistrate’s Court for prosecution of inter alia perjury and fraudulent expropriation of Kshs 5,873,216.60 in Nakuru HCC No 125 of 1993.
59. Article 157(4) of the *Constitution* authorizes the DPP to direct the I.G. to investigate any information or allegation of criminal conduct. The said Article provides that
- “(4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.”
60. Article 157 is operationalized by the *ODPP Act* which at Section 5 (1) states that:
- “Pursuant to Article 157 of the *Constitution* the Director shall—
- a) have power to direct the Inspector-General to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction;”
61. Article 157(10) provides that;
- “The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”
62. The courts have in various cases recognized and appreciated the DPP’s constitutional independence. In the case of *Justus Mwenda Kathenge v Director of Public Prosecutions & 2 others* [2014] eKLR the Court while discussing the mandate of the Respondent under Article 157 of the *Constitution* observed that:
- “It is now trite that Courts cannot interfere with the exercise of the above mandate unless it can be shown that under Article 157(11);
- (i) he has acted without due regard to public interest,
- (ii) he has acted against the interests of the administration of justice,
- (iii) he has not taken account of the need to prevent and avoid abuse of Court process.”



63. Similarly, the Court of Appeal in the case of *Diamond Hasham Lalji & another v Attorney General & 4 others* [2018] eKLR opined as follows:

“ Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases...”

64. In view of the foregoing, it is my opinion that this court does not have jurisdiction to grant this prayer as that will be tantamount to interfering with matters that are within the exclusive mandate of ODPP.

65. The Applicant is also seeking for an order of Prohibition refraining the Chief Registrar High Court of Kenya and the Chief Executive officer of the Law Society of Kenya from issuance of the Annual Practicing Certificate to 1st, 2nd, 5th, 6th, 7th, 8th, 9th, 10th & 11th Respondents for a period of 15 years commencing January, 2023.

66. With all due respect to the applicant, I find that this is an order which is outside the purview of this court. There are two main ways in which complaints against Advocates, firms of Advocates, or any member or employees thereof may be lodged. These are through complaints to the Advocates Complaints Commission and the Advocates Disciplinary Tribunal. The Applicant herein should therefore lodge complaints before the said tribunals for issuance of appropriate orders.

67. The Applicant also seeks for an order of Mandamus to compel the Registrar of companies to deregister the 4th Respondent as the managing director of the China Jiangsu IETC Corporation.

68. Again with tremendous respect to the applicant, I hold the view that this court does not have jurisdiction to issue this order. There is a procedure for removal of a director under the *Companies Act, 2015*.

69. Removal of a director of a company is governed by the provisions of Section 139 of the *Companies Act*. A director can be removed in Kenya by way of a Special General Meeting. This involves calling a Special General Meeting with Special Notice (28 days). The Notice must be issued to all the Shareholders and Directors. The meeting will then pass a Special Resolution for the removal of the director. The applicant is not a member of the company so he cannot be involved in the internal affairs of the said company. As an alleged creditor, his cause action lies against the company and if he wishes he can, subject to the laid down law, apply to lift the corporate veil.

70. Stemming from the above narration, I am inclined to uphold the preliminary objection. I hereby proceed to strike out the notice of motion dated 13th March, 2023 with costs to the 3rd, 4th, 5th, 6th, 7th, 8th, 10th, 11th, & 12th Respondents. Orders accordingly.

DATED, SIGNED AND DELIVERED NAKURU THIS 25TH DAY OF MAY, 2023.

H. M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

N/A for Applicant

N/A for Respondent

