



REPUBLIC OF KENYA



KENYA LAW
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**Ibrahim v Global Initiative Against Transnational Organised Crime
& another (Petition E163 of 2021) [2022] KEHC 3357 (KLR)
(Constitutional and Human Rights) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 3357 (KLR)

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

PETITION E163 OF 2021

HI ONG'UDI, J

MAY 31, 2022

**IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF
RIGHTS UNDER ARTICLE 22(1) OF THE CONSTITUTION**

**IN THE MATTER OF ARTICLES 1, 2, 3, 4, 10, 19, 21, 22, 23,
24, 25, 27, 28, 29, 31 AND 165 OF THE CONSTITUTION**

IN THE MATTER OF COMPUTER MISUSE AND CYBERCRIMES ACT, NO.5 OF 2018

IN THE MATTER OF THE PENAL CODE, CHAPTER 63 OF THE LAWS OF KENYA

BETWEEN

MOHAMUD HAYIR IBRAHIM PETITIONER

AND

**GLOBAL INITIATIVE AGAINST TRANSNATIONAL ORGANISED
CRIME 1ST RESPONDENT**

JAY BAHADUR 2ND RESPONDENT

RULING

1. The petitioner moved this court through the petition dated 4th May 2021 and an application of even date. Each was supported by an affidavit of even date. The Application is brought pursuant to Articles 1, 2, 3, 4, 10, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 31 and 165 of the *Constitution* and the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013. It seeks for; conservatory orders restraining the respondents from infringing the petitioner's privacy by accessing his personal details and email account without his knowledge and from using the obtained information in violation of his privacy to his detriment pending the hearing and determination of the



application and petition; any other further orders permissible under Article 23 of the Constitution or any other law; and costs of the application.

2. He seeks the following reliefs in the petition:-

- a) An order of declaration declaring that the act of the respondents in accessing the petitioner's details, accessing the petitioner's email account without his knowledge is unconstitutional and therefore illegal and void.
- b) An order of prohibition prohibiting the respondents from further infringing the petitioner's privacy by accessing the petitioner's personal details and / or information, accessing the petitioner's email account without the petitioner's knowledge.
- c) An order of prohibition prohibiting the respondents from using the obtained information in violation of the petitioner's privacy to the detriment of the petitioner.
- d) An order of compensation for breach of the petitioner's constitutional rights and issue any such orders that would be in the interest of justice and would protect the petitioner's rights.
- e) Costs of the petition; and
- f) Any other orders that the Honourable court may deem just and fit to grant as the justice of this case may permit.

The Petitioner's case

3. A summary of his case as set out in the petition and affidavit in support is that, the respondents illegally obtained entry into his email accounts; he fears for his life and is unduly stigmatized.
4. By reason of the aforesaid actions, the respondents contravened Articles 3(1), 10 (2) (c) and (d), 23, 25(a), 29, 31(a) and (b) of the Constitution.

The Respondents' case

5. The respondents filed a notice of preliminary objection dated 2nd July 2021 and notice of motion dated 7th July 2021 which is supported by the affidavit of Jay Bahadur sworn on even date.

The preliminary objection

6. In the preliminary objection, the respondents state that the petition offends the doctrine of constitutional avoidance and is incurably defective and incompetent. They claim that the complaints raised by the petitioner are premised on an erroneous presupposition of facts that the respondents engaged in unlawful conduct criminalized by Section 17 of the Computer Misuse and Cybercrimes Act (No. 5 of 2018) (CMCA). That the complaints ought to have been the subject of a criminal complaint to the Directorate of Criminal Investigation under the CMCA and not the basis upon which to bring a constitutional petition for protection of privacy.

The notice of motion

7. The notice of motion dated 7th July 2021 (application) is brought pursuant to Order 26 Rules 1 and 4 of the Civil Procedure Rules, 2010, Sections 1A and 3A of the Civil Procedure Act Cap. 21 and all other enabling provisions of the Law. It seeks for orders that the petitioner do provide security for costs of this petition in the form of a deposit of US\$25,000.00. That the same plus costs should be deposited in a joint account in the names of respective counsel for the parties herein before any further step is taken by the petitioner in the proceedings.



8. The application is premised on the grounds on its face and on the respondents' affidavit in support sworn by the 2nd respondent on even date. The summary grounds in support of the application are that:
- i) The petitioner is a foreign national and a citizen of the Republic of Somalia currently serving as a cabinet minister in the Government of the Republic of Somalia wherefore he is presumed to be ordinarily resident in Somalia and therefore not within the jurisdictional reach of this honourable court.
 - ii) In the event that the petition fails the respondents are likely to suffer complete and total loss of the costs of the appeal as recovery thereof from the petitioner in Somalia will be impossible.
 - iii) It would therefore be in the interest of justice and a judicious exercise of the court's discretion that this application be allowed.

The Respondents' submissions

9. The respondents filed submissions dated 26th January 2022. Relying on the Supreme Court of Kenya holding in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR, they argued that the doctrine of constitutional avoidance precludes a court from determining as a constitutional question a matter that may be properly decided on another basis.
10. They also put reliance on: *International Centre for Policy and Conflict & 5 others v Attorney General & 5 others* [2013] eKLR; *Uhuru Muigai Kenyatta v Nairobi Star Publications Limited* [2013] eKLR; *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR; *Josphat Koli Nanok & another v Ethics and Anti-Corruption Commission* [2018] eKLR; and *Ruth Maranga & 4 others v Silas Osogo Maranga & 5 others* [2020] eKLR among others where the doctrine has been decided on. They maintained that the complaints of constitutional violations of privacy rights, by the petitioner ought to have been subject of a complaint to the relevant authorities of the breach of Section 17 of the *Computer Misuse and Cybercrimes Act* (No. 5 of 2018) (CMCA).
11. Counsel submitted that the issue of fear for his life, is a subjective perception founded on his suspicions, without evidential basis, of the respondents' culpability in what he alleges has been unlawful access of his computer and emails. He further submits that the proper recourse was for the petitioner to make complaints to the relevant authorities for appropriate investigations to be carried out to establish the truth.
12. Further that such complaints would have then precipitated a criminal investigation, under the relevant law which is either the *CMCA* or *Penal Code*. It is upon the conclusion of such investigation that a finding would be made as to whether any crime had been committed and by who. He submits that the petition herein is premature and incapable of establishing as a fact the allegation against the respondent of criminal liability.
13. In respect to the application and while relying on *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR and *Abel Moranga Ongwacho v James Philip Maina Ndegwa & 3 others* [2012] eKLR counsel argued that it is upon the discretion of the courts to order for security for costs.
14. Further reliance was placed on *Saudi Arabian Airlines Corporation v Sean Express Services Ltd* [2012] eKLR where Gikonyo J cited with approval the cases of *Shah v Shah* [1982] KLR 95 and *Cosmos Holidays Plc. v Dhanjal Investments Limited* HCCC No 112 of 2012 (OS) (unreported) for the proposition that lack of evidence of ownership of assets is a crucial issue in determining whether to grant security for costs. Accordingly, he argues that the petitioner being a foreigner with no known assets in Kenya should give security for costs.



The Petitioner's Response

15. The petitioner filed a replying affidavit sworn on 10th September 2021 in response to the application and grounds of opposition dated 10th September 2021 in response to the preliminary objection.
16. A summary of the Grounds are that :-
- i) The objective is not clear on the provision of the law allegedly contravened hence the objection is not capable of finally disposing the whole matter.
 - ii) The doctrine of constitutional avoidance is inapplicable in this petition
 - iii) The petition raises serious constitutional issues, is justifiable hence competent and should be allowed as prayed.
 - iv) The violations of the petitioner's rights under Articles 23, 25, 29, 31 of the *constitution*, are constitutional issues which the High Court is enjoined to safeguard and protect and the recourse for violation of constitutional rights lies to the High Court and not the Directorate of Criminal investigations as alleged by the Respondents.
 - v) The preliminary objection is replete with juristic shortcomings and incompetent, misconceived, bad in law and merely intended to frustrate and delay the hearing and determination of the petition and the contemporaneous application.
 - vi) It is in the interest of justice that the preliminary objection be dismissed with costs to the petitioner.
17. In the replying affidavit, he deposes that the application has been brought in total disregard of the provisions of the *Constitution of Kenya (Protection of rights and fundamental freedoms) Practice and Procedure Rules* 2013 which do not provide for security for costs. That the said application impedes access to justice under Article 48 of the *Constitution* and that the grant of the orders for security for costs is a matter of judicial discretion hence the respondents cannot dictate its terms. Further that the respondents have not adduced evidence as to how they arrived at the figure they have quoted.
18. He avers that the respondents have not shown they have a *bonafide* defence to warrant the orders sought. It is their onus to prove his inability or lack of good faith that would make the order for security for costs reasonable. They have further not established that he would be unable to pay costs in the event that his case is unsuccessful.

The Petitioner's submissions

19. The petitioner did not file any submissions.

Analysis and determination

20. Having carefully considered the respondents' application, the petitioner's response, parties' submissions, and the law I find the following issues to arise for determination: -
- i. Whether the petition offends the doctrine of constitutional avoidance
 - ii. Whether the court should order for security of costs



i. Whether the petition offends the doctrine of constitutional avoidance

21. The respondents submitted that the petition is premature and offends the doctrine of constitutional avoidance. They argued that the petitioner ought to have first reported to the relevant authorities before invoking this court's jurisdiction. That there was also no evidence that the alleged entry to his email and personal computer was done illegally.
22. The petitioner on the other hand, in his grounds of opposition stated that the petition raised serious constitutional issues and that the recourse for violation of constitutional rights lies to the High Court. Further, that the doctrine was not applicable to this instant petition.
23. De Waal, Johan, Iain Currie, and Gerhard Erasmus in their book, *The Bill of Rights handbook*, Lansdowne: Juta & Co. 2001 offer insight that while dealing with the bill of rights its entitlement calls for both direct and indirect application as follows:
 - i. Indirect application: The Constitution and the Bill of Rights establish an "objective normative value system," a set of values that must be respected whenever the common law or legislation is interpreted, developed or applied. This form of application is termed the "indirect" application of the Bill of Rights. When indirectly applied, the Bill of Rights does not override ordinary law or generate its own remedies. Rather, the Bill of Rights respects the rules and remedies of ordinary law, but demands furtherance of its values mediated through the operation of ordinary law.
 - ii. Direct application: In disputes in which the Bill of Rights applies as directly applicable law, it overrides ordinary law and any conduct that is inconsistent with it. To the extent that ordinary legal remedies are inadequate or do not give proper effect to the fundamental rights, the Bill of Rights generates its own remedies. The methodology for the conduct of direct-rights litigation is applicable.
24. The doctrine of constitutional avoidance was expounded by the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR. The court held as follows:-
 - "(256) The appellants in this case are seeking to invoke the "principle of avoidance", also known as "constitutional avoidance". 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."
 - (258) From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright-infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court."



25. In *Southlake Panorama Limited v Kenya Electricity Transmission Company Limited & 3 others* [2021] eKLR, the court stated;

“29. The constitutional jurisdiction of the court is a very specific jurisdiction which is not open to general claims. It is invoked pursuant to Articles 22 (1) and 23 of the *Constitution* by filing a petition. The reliefs that a court exercising the constitutional jurisdiction can grant are clearly spelt out by Article 23 (3). The “compensation” contemplated by Article 23 is in regard to denial, violation or infringement, or threat to a right or fundamental freedom in the Bill of Rights under Article 22 and not compensation in respect of wayleave.

30. So as to ensure that constitutional jurisdiction of the court is not misused, the doctrine of constitutional avoidance comes in handy. It frowns upon the practice of bringing ordinary disputes to the constitutional court. In that regard, the Supreme Court observed as follows in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR...”

26. Justice J. M Mutungi in *Grays Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot* [2021] eKLR observed that: -

“parties are increasingly filing matters that are essentially civil matters and christening the same as constitutional petitions which is not proper...where there is an alternative remedy of filing a suit in the ordinary civil courts, a party ought not to invoke the jurisdiction of the constitution court.”

27. In the case of *Godfrey Paul Okutoyi & others –vs- Habil Olaka & Another* (2018) eKLR Chacha, J on the issue of there being an alternative remedy in lieu of constitutional remedies at paragraph 65 stated:-

“It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional petition. A party should only file a constitutional petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.”
Also see

- i. *Council of County Governors vs. Attorney general & 1 others* [2018] eKLR
- ii. *Bernard Murage v. Fine Serve Africa Ltd & others* [2015] eKLR.

28. The respondents have made reference to Section 17 of the *Computer Misuse and Cybercrimes Act*. The said section provides as hereunder:-

“17.

- (1) A person who intentionally and without authorisation does any act which intercepts or causes to be intercepted, directly



or indirectly and causes the transmission of data to or from a computer system over a telecommunication system commits an offence and is liable, on conviction, to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding five years, or to both.

- (2) A person who commits an offence under subsection (1) which —
 - (a) results in a significant financial loss;
 - (b) threatens national security;
 - (c) causes physical or psychological injury or death to any person; or
 - (d) threatens public health or public safety, is liable, on conviction to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding ten years, or to both.
- (3) For the purposes of this section, it is immaterial that the unauthorised interception is not directed at —
 - (a) a telecommunication system;
 - (b) any particular computer system data;
 - (c) a program or data of any kind; or
 - (d) a program or data held in any particular computer system.
- (4) For the purposes of this section, it is immaterial whether an unauthorised interception or any intended effect of it is permanent or temporary.

29. The respondents’ argument was that this court’s jurisdiction has been invoked prematurely. They submitted that the proper recourse was for the petitioner to make complaints to the relevant authorities for appropriate investigations to be carried out to establish whether or not there had been unlawful access of his computer and emails and whether or not the respondents were culpable. On the issue of threat to his life no evidence was not adduced by the petitioner to that effect.

30. I do agree with the respondents that based on the aforementioned section of the Computer Misuse and Cyber Crimes Act and the cited case laws, the doctrine of constitutional avoidance is applicable. Further in his letter dated 25th March 2021 and addressed to the 2nd respondents the petitioner admits that the said actions complained about contravened statute law Sections 14, 15 and 16 of the [CMCA](#). On the issues raised by the petitioner it is trite that whoever alleges a fact must prove it as per Section 107 of the [Evidence Act](#).

31. It is also trite that matters concerning the violation of human rights must be very well set out. This was well explained in the case of [Anarita Karimi Njeru vs Republic](#) (1979) eKLR where the court stated 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 ingrained.” (Emphasis added)

32. The case of *Memo Matemu vs Trusted Society of Human Rights Alliance* [2013] eKLR also reaffirmed the position in *Anarita Karimi Njeru* (*supra*).
33. The petitioner has mentioned a number of constitutional provisions that he deems were violated by the respondents. He has however not enunciated them with the precision to show how the same were violated. As already stated, although this court is vested with the jurisdiction to look into matters concerning constitutional violations by dint of Article 165 (3) (b) of the *Constitution* and to grant the orders or reliefs enumerated under Article 23 (3) of the *Constitution*, the issues herein concern the illegal access of the petitioner’s computer.
34. Section 17 of the *Computer Misuse and Cybercrimes Act* tackles the issue and also provides a penalty for the same. In that regard, I do agree with the respondents that the petitioner should have complained to the relevant authorities, for investigations to be conducted. This court would not wish to take up the role of crime investigators.
35. The said *Act* further provides for offences under Part III and even goes further under Section 44 and 45 to provide for remedies which are confiscation or forfeiture of assets and compensation. Part IV provides for investigations and procedures, which confirms that the *Act* clearly provides for the alleged acts complained of by the petitioner.
36. The petitioner has not demonstrated that he reported the matter to the director of criminal investigations and whether the respondents have been investigated and any suit instituted against them in criminal proceedings for the offences or in civil proceedings for compensation. In light of the foregoing, it is my finding that the doctrine of exhaustion has been offended. Further this matter should be handled before the right forum being the criminal or civil courts depending on the outcome of the criminal investigations.

ii. Whether the court should order for security for costs

37. Having found that the petition offends the doctrine of constitutional avoidance I do not find it necessary to deal with the issue of security of costs as sought by the respondents.
38. The upshot is that the preliminary objection has merit and is allowed, with the result that the petition is dismissed with costs.

Orders accordingly.

DELIVERED VIRTUALLY, SIGNED AND DATED THIS 31ST DAY OF MAY, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG’UDI

JUDGE OF THE HIGH COURT

