



**Kithuku v (Dpp & 3 others (Anti-Corruption and Economic  
Crime Petition E009 of 2022) [2022] KEHC 13061 (KLR) (Anti-  
Corruption and Economic Crimes) (21 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13061 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
ANTI-CORRUPTION AND ECONOMIC CRIME PETITION E009 OF 2022  
EN MAINA, J  
SEPTEMBER 21, 2022**

**BETWEEN**

**NICHOLAS MWENDWA KITHUKU ..... PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION (DPP ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 2<sup>ND</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The Petitioner/Applicant is the president of the Football Kenya Federation (“FKF”), a sports organization registered under the *Sports Act*. He is aggrieved by various decisions of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents relating to his arrest and prosecution in respect of a Preliminary Report of Football Kenya Federation Inspection Committee dated November 5, 2021.
2. The Petitioner/Applicant has filed a Notice of Motion dated July 8, 2022 supported by an affidavit sworn on the same date seeking the following orders:
  - 1) Spent;
  2. Grant an order of interlocutory injunction and or prohibition or any other interim order to prevent and or stop the Director of Criminal Investigations, Inspector General of Police and or the Director of Public Prosecutions from arresting, interrogating, harassing, recommending prosecution or arrest of the Petitioner in respect of the Preliminary Report of Football Kenya



Federation (FKF) Inspection Committee dated November 5, 2021, the Press Statement issued by the Cabinet Secretary for Sports, Culture & Heritage dated November 11, 2021 and the Gazette Notice No 12374 dated November 12, 2021 pending the hearing and determination of this Application;

3. Spent;
  4. The Respondents to bear the cost of this Petition.”
3. The Application is based on the grounds stated on the face of it and the supporting affidavit as follows:
- 1) On November 15, 2022. *vide* Misc Criminal Application No E3965 of 2021, Republic through the Director of Criminal Investigations (serious Crimes Unit Versus Nicholas Mwendwa Kithuku, the respondents applied for custodial order so as to be allowed to detain the Petitioner (who had been arrested on a Friday and detained at a police station over the week end) for a period of 14 days in order to complete investigations. By a ruling delivered on November 17, 2021, the respondents were granted 7 days within which to prefer charges against the Petitioner. The Petitioner was released on bond.
  2. On November 26, 2021, the Petitioner was for the second time arrested on a Friday, spent the week end at a police station until the following Monday the November 29, 2021 when he was arraigned in court and charged in Anti-Corruption Case E026 of 2021, *Republic V Nicholas Mwendwa Kithuku*. The Petitioner's preliminary objections to the charges and taking of plea were overruled and pleaded to the charges on November 30, 2021.
  3. Following a review application before this court in HCACEC Misc Cr Application No E044 of 2021, *Nicholas Mwendwa Kithuku v Republic*, by a ruling delivered on February 24, 2022, the court dismissed the application based on the reasoning that

“What the applicant was required to prove in order for this court to halt the prosecution is that the decision is based on malice, an ulterior motive, or other extraneous reasons...and my finding is that no such ulterior motive or malice or extraneous reasons have been demonstrated.”

By the Petition herein we have demonstrated that post the foregoing court ruling, the respondents have acted and continue to act with malice, in bad faith, with ulterior motive, and have abused of the court process.
  4. On February 4, 2022, after the DPP submitted before the trial court that he had supplied to the defense (Petitioner) all documentary evidence and Witness statements, the court fixed the case for hearing on the 5th, 6th, 7th, 8th, 12<sup>th</sup>, and 14<sup>th</sup> July and then on the 2nd, 3rd, 4th, and August 5, 2022. The DPP was also ordered to disclose, 30 days to the trial date. to the Petitioner, the order in which Witnesses were to testify. The DPP did not comply with the said directive.
  5. On July 5, 2022. the DPP applied for an adjournment and for all the hearing dates to be vacated on grounds that he required more time (until October 2022) to study the file and new evidence, which application was opposed by the Petitioner. The court declined to grant the application by the PP and directed that the case would proceed to a hearing the following day, the July 6, 2022.
  6. On July 6, 2022, the DPP once again applied for adjournment on grounds that they had not bonded witnesses and that they required time to review the file and to make further disclosure



of new evidence, which application was opposed by the Petitioner. The trial court declined to grant the prayer for adjournment upon which the DPP applied to withdraw the case under section 87 (a) of the *Criminal Procedure Act*. The Petitioner opposed withdrawal of the case under section 87(a).

7. By a reasoned ruling delivered on the same day, the trial court approved the plea by the DPP by allowing the withdrawal of the case under section 87 (a) but observed and held as follows:

“In the absence of witnesses and any proof of having bonded them... in absence of reasonable explanation- - in absence of interim draft amended charges, I find this utter disregard of the court’s order amounts to contempt of court... It is evident that the prosecution are ill-prepared to proceed as investigations appear not to have been concluded... the prosecution appeared on the hearing date purporting to have acquired fresh evidence and casually sought to vacate all hearing dates...”
  8. In what amounts to an abuse of the criminal justice system and the court process, on July 7, 2022, a day after the DPP had sought time to review evidence by withdrawing the case, he registered similar charges in a different court at Kiambu Law Courts and sought to have the Petitioner arrested.
  9. Further, in a contradictory press statement dated July 7, 2022, the DPP informed the public that he had reviewed the evidence and that the Petitioner was to be arraigned at Kiambu Law Courts on Monday the July 11, 2022. Firstly, it is an abuse of court process for the DPP to forum shop by seeking to charge the Petitioner in a court outside the jurisdiction where the alleged offense was committed. Second, it is in bad faith, abuse of the court process and is not in the interest of administration of justice for the DPP to make submissions before one court that he required more time to review evidence then proceed to charge the Petitioner the following day.
  10. It has come to the Petitioner’s knowledge that the DPP has a conflict of interest in this matter. After disbanding FKF, the Cabinet Secretary for Sports appointed a Caretaker Committee to manage FKF with a budget of Kshs 800 million. Among the members of the said Committee is a brother to the DPP, one Hassan Haji.
  11. This court should not be a by-stander when the state abuses its authority. It should raise to the occasion to check such excesses by the state by not allowing a blatant abuse of the court process in the manner demonstrated above. It should stop the said abuse of office and violation of the Petitioner’s rights.
  12. The intended arrest and prosecution is in bad faith intended to achieve other ulterior motives and interests. Unless the court issues the orders sought the Petitioner is likely to be arrested and locked in police cells for 4 days given that Monday the July 11, 2022 has been declared a public holiday.
  13. The facts of the case demonstrate grave violations of the criminal justice system from investigations, arrest, incarceration, detention and abuse of the court system, which cannot be divorced from the charges and or criminal proceedings. Accordingly, the criminal proceedings ought to be quashed.”
4. The Applicant filed written submissions dated July 22, 2022 in further support of the Application. In his supporting affidavit, the Applicant contends that the facts surrounding the investigation, arrest



- and arraignment in court amount to abuse of court process; that he was first arrested and detained for 7 days and eventually released on November 25, 2021 without any charges being preferred against him.
5. He contends that he was then re-arrested November 26, 2021, on a Friday and when the matter came up for hearing, the 1<sup>st</sup> Respondent applied to withdraw the case against the Applicant, only to re-arrest and charge him for a third time within 24 hours, before a different court in Kiambu. This constituted forum shopping and abuse of the court process. He cited *Barloword Limited v Anti-Counterfeit Agency & Another Limited* [2017] eKLR and *Omar Ali Abdulrahman* [2019] eKLR
  6. In his written submissions, the Applicant contends that it amounts to lowering the court's dignity for the state to misrepresent to one court that it is required to review the evidence and then immediately prefer fresh charges in a different court. That the rule of law requires the court's dignity to be upheld, and cited *Nthabiseng Pheko v Ekurhuleni Metropolitan Municipality & Another CCT 19/11(75/2015)* a case cited by the court in [\*Kenya Human Rights Commission v Attorney General & Another\*](#) [2018] eKLR.
  7. The Applicant submits further that on the two occasions he was arrested, he was not shown a copy of the Preliminary Inspection Report nor told the reason for his arrest. In violation of his rights under Article 49. That the figures on the charges were based on the Preliminary Investigation Report. That in being re-arrested, he was not informed of the new evidence in relation to the fresh charge contrary to procedure. He relied on *David Hassan Haji & Another v The Hon. Attorney General & 4 others* [2018] eKLR and [\*Republic v Attorney General and 4 others ex parte Diamond Hashim Lalji and Ahmed Hasham Lalji\*](#) [2014] eKLR.
  8. The Applicant contends that the Petition has inherent merit and that he has a *prima facie* case; that unless the orders are issued, his constitutional rights will continue to be violated and the entire Petition will be rendered nugatory. He relied on *inter alia, Regina v Ittoshat* [1970]. 10 CRSN 385 cited in [\*Ronald Leposo Musengi v Director of Public Prosecutions\*](#) [2015] eKLR and [\*Centre for Rights Education and Awareness \(CREAW\) & 7 others v Attorney General\*](#) [2011] eKLR and [\*Gitaru Peter Munya v Dickson Mwenda Kithinji and 2 others\*](#) [2014] eKLR.

## The Response

9. The 1<sup>st</sup> Respondent opposed the Application vide a replying affidavit sworn by Thelma Nanjala, Prosecution Counsel on July 18, 2022 and written submissions dated July 26, 2022. The 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents did not file any response or submissions to the Application.
10. The 1<sup>st</sup> Respondent avers that the trial court's declining of the prosecution's application for adjournment on July 5, 2022 necessitates the withdrawal of the matter as they had not bonded witnesses and could not proceed with the hearing. That the prosecution could not discharge its duty of disclosure within the short notice given by the court and that due to the public interest nature of the case, they required additional time to review the new evidence.
11. The 1<sup>st</sup> Respondent avers further that it was in the best interest to withdraw the matter under Section 87 (a) Criminal Procedure Code and Article 157(11) of the [\*Constitution\*](#).
12. They contend that the charges in Kiambu Law Courts were instituted in a court of competent jurisdiction. That the allegations of malice and intimidation against the Petitioner/Applicant are unfounded in law and have matter of fact been overtaken by events as summons have been issued for the Petitioner to appear in court for plea taking.
13. The 1<sup>st</sup> Respondent contends further that the Petitioner's complaint on his being charged in Milimani Chief Magistrates Anticorruption Case No E 026 of 2021 lacks a proper factual and legal foundation



- as that matter was withdrawn on July 6, 2022 under Section 87(a) of the Criminal Procedure Code. That the Petitioner had made such similar allegations in HCACEC Cr Application No 044 of 2021 which application was dismissed by this court.
14. They contend that the correctness of fact and evidence can only be assessed by the trial court. that there is no evidence of malice, unlawful action, want of authority, intimidation, or manipulation of the court to deprecate the likelihood that the petitioner will be denied a fair trial.
  15. In their written submissions, the 1<sup>st</sup> Respondent submits on 5 issues for determination: whether this Honourable Court has jurisdiction to hear and determine the Application herein;
    - i. whether this Honourable court has jurisdiction to hear and determine the Application herein;
    - ii. whether the respondent has the constitutional mandate to review the evidence during trial;
    - iii. whether the duty of disclosure under Article 50 of the Constitution is mandatory or limited to pretrial conference;
    - iv. whether there is a violation of the Petitioner's rights; and
    - v. whether the Applicant has met the threshold to warrant an order of stay of proceedings.
  16. The 1<sup>st</sup> Respondent reiterates the factual background as stated by the Applicant and submits that this court lacks jurisdiction to grant the reliefs sought. That the Petitioner ought to have challenged the plea taking at the trial court and only then could they have filed a Petition or a Review at the High Court in Kiambu.
  17. They submit that the Petitioner is not facing Anti-Corruption charges but is an ordinary criminal matter under the Penal Code. They referred to Gazette Notice Vol. CXVIII No 153 dated December 9, 2016 which published The Practice Directions of the Anti-Corruption Division of the High Court, they also referred to Section 3 of the Anti-Corruption and Economic Crimes Act 2003 on the specific matters to be tried by the Anti-Corruption courts which do not include the Petitioner's case.
  18. On the second issue, they submit that the 1<sup>st</sup> Respondent is established under Article 157 of the Constitution as an independent constitutional office that does not require the direction and control of any person or institution. Whilst deciding to charge, the 1<sup>st</sup> Respondent considers the public interest and evidential test to ensure that there is fair administration of justice and it's on this basis that the prosecution exercises the role of reviewing evidence. They cited Francis Anyango Juma v DPP and another Petition No 160/12 in support.
  19. On the third issue, the 1<sup>st</sup> Respondent submits that the duty to disclose the evidence and charges to the accused person is a continuous duty, codified in Article 10 of the Universal Declaration of Human Rights, Article 14(3) (b) of the International Covenant on Civil and Political Rights and that Article 50 (2) (j) of the Constitution guarantees the right of an accused person to be informed in advance was expounded further in Hussein Khalid and 16 others v Attorney General & 2 others [2019] eKLR.
  20. On whether there is a breach of the Petitioner's rights, the Respondent submits that the Petitioner has not demonstrated any violation of his rights. That the issues raised are evidential matters that can only be canvassed in the trial court upon hearing the evidence. That the Respondents demonstrated that they had legitimate reasons to investigate and prosecute the Petitioner.
  21. They submit that the Applicant has not demonstrated that he will not receive a fair trial during the hearing of the matter or that there was malice on the part of the Respondent. They contend that the Applicant has not met the threshold to warrant stay of proceedings; that stay of proceedings in



criminal cases should only be granted in exceptional circumstances and only in the clearest of cases. They referred to the decision *Manilal Jamnandas Ramji Cobil v Director of Public Prosecutions*. They referred further to the legal text: Chris Corns on Judicial Termination of Defective Criminal Prosecutions and submit that the Petitioner has not demonstrated any violation of rights to warrant the grant of the reliefs sought.

22. They urged the court to dismiss the Petition in its entirety.

### **Analysis and determination**

23. The Application is brought under Articles 22, 23, 35(1), 165(3)(b) of the *Constitution* and Rules 13 and 19 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013.

24. Prayers number 1 and 3 of the Application were granted by this court vide the orders issued on July 12, 2022 and July 14, 2022 respectively. That is, the court certified the Application as urgent and granted an interim stay of the proceedings against the Petitioner/Applicant in Kiambu Law courts pending the hearing and determination of the Application and Petition.

25. In the circumstances, the primary issues arising for determination therefore are:

1. Whether this court has jurisdiction to grant the reliefs sought; and
2. Whether the Applicant has met the threshold for grant of a conservatory order stopping the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents from arresting, interrogating, and prosecuting the Applicant with respect to the Preliminary Report of Football Kenya Federation (FKF) Inspection Committee dated November 5, 2021, the Press Statement issued by the Cabinet Secretary for Sports, Culture & Heritage dated November 11, 2021, and the Gazette Notice No 12374 dated November 12, 2021.

Whether this court has jurisdiction to grant the reliefs sought

26. The 1<sup>st</sup> Respondent has contested this court's jurisdiction to hear and determine the Petition and the Application on the ground that the charges the Petitioner is facing are not corruption offenses but offences under the Penal Code; that Gazette Notice Vol CXVIII No 153 dated December 9, 2016 provides for the scope and mandate of the Anti-Corruption and Economic Crimes Division of the High Court which limits the courts mandate to corruption-related offences brought under the *Anti-Corruption and Economic Crimes Act*, 2003. It is their position that the proper forum for filing the Petition is the High Court in Kiambu.

27. In response, the Applicant contends that the High Court has jurisdiction to hear all matters in which it has been granted jurisdiction by the *Constitution*; that the practice and requirements that suits be filed in particular stations of the High Court are purely for administration and convenience in the hearing and determination of suits. They cited the decision of the Court of Appeal in *Christopher Orina Kenyariri t/a Kenyariri Associates Advocates v Salama Beach Hotel Ltd and 3 others* [2017] eKLR in support.

28. It is trite that the High Court retains unlimited original jurisdiction on civil and criminal matters under Article 165(3) (a) of the *Constitution* and the jurisdiction to determine the question of whether a fundamental right or freedom under the Bill of Rights has been infringed under Article 165(3) (b). However, this jurisdiction is operationalized by Statute.

29. The Chief Justice in exercising his powers under Section 5 of the *Judicial Service Act*, No 1 of 2011 and Section 16 of the *High Court (Organization and Administration) Act* No 27 of 2015 issued Practice



Directions for the Anti-Corruption and Economic Crimes Division of the High Court vide Gazette Notice No 7262 of June 26, 2018. The Practice Directions amended the Gazette Notice No 10263 of December 9, 2016 pursuant to the order of the court in Constitutional Petition No 534 of 2016.

30. Clause 6 of The Practice Directions provide for the mandate of the Anti-Corruption and Economic Crimes Division of the High Court under Rule 6 as follows:

“Scope of Mandate

6. The following matters shall be heard by the Anti-Corruption and Economic Crimes Division of the High Court:
  - a. Petitions and Judicial Review applications on claims of infringement or the threatened infringement of constitutional rights relating to corruption and/or economic crimes and related matters;
  - b. all proceedings relating to corruption and economic crimes over which the Magistrates' Anti-Corruption Court has no jurisdiction:
  - c. all criminal reviews, revisions, appeals and any other applications arising from decisions of the special Magistrates appointed under Section 3 of the *Anti-Corruption and Economic Crimes Act*, 2003;
  - d. cases relating to corruption and economic crimes filed under the following Acts:
    - i. *Anti-Corruption and Economic Crimes Act*, Cap 65
    - ii. *Proceeds of Crime and Anti-Money Laundering Act*, Cap 59B,
    - iii. *Anti-Counterfeit Act*, Cap 130A,
    - iv. *Leadership and Integrity Act*, Cap 182,
    - v. *Public Procurement and Asset Disposal Act*, No 33 of 2015,
    - vi. *Public Officers Ethics Act*, Cap 183,
    - vii. (vii) *Public Finance Management Act*, No 18 of 2012, (viii) *Extradition (Contiguous and Foreign Countries) Act*, Cap 76,
    - viii. *Extradition (Commonwealth Countries) Act*, Cap 77,
    - ix. *Prevention of Organized Crimes*, Cap 59,
    - x. *Mutual Legal Assistance Act*, Cap 75A,
    - xi. Regional and International Treaties and Conventions on Anti-Corruption, and
    - xii. Or filed under any other enabling provisions of law.
  - e. Disputes touching on or related to—
    - i. offences or the recovery, or protection of public property, or
    - ii. the tracing of, freezing of, or confiscation of proceeds of corruption or related to corruption and money laundering, and



iii. the payment of compensation of proceeds of corruption and economic crimes.”

31. A copy of the charge sheet produced at page 208 of the Applicant’s bundle of documents shows that the charge the Applicant is facing in the Kiambu court is for the offence of Stealing contrary to Section 268(1) as read with Section 275 of the *Penal Code* which clearly is not a corruption or economic crime as defined in *Anti-Corruption and Economic Crimes Act*. It does not therefore fall in this Division’s mandate as set out in the aforesaid Practice Directions. It is therefore my view that the appropriate forum for filing the Petition and the Application is the High Court in Kiambu and not this court. The Practice Directions issued by the Chief Justice are not in vain, they are intended for the benefit of the court users and efficient administration of justice. Indeed, the Court in *EACC v Kanyi Joseph Karanja and 10 others* [2020] eKLR held as much:

“23. The objective of the practice directions issued by the Chief Justice is not intended to take away any constitutional jurisdiction of the High Court in any station but to reinforce it for effective case management.”

32. Accordingly, the orders sought by the Petitioner/Applicant cannot be granted by this court and the application is struck out.

33. Clause 10(a) of The Practice Directions provides that where a matter is wrongly filed in the Anti-Corruption and Economic Crimes Registry the court may transfer it to the appropriate Court. The Clause states:-

(a) Where a matter has been wrongly filed at the Anti- Corruption and Economic Crimes Registry, it shall be transferred to the appropriate court. The Court on its own motion or upon application by either of the parties shall have the discretion to order for the transfer of such matters.

(b) The Court shall determine who pays the costs incidental to the transfer.”

34. In the circumstances the petition be and is hereby transferred to Kiambu High Court. The costs of the Application shall abide the Petition. It is so ordered.

**SIGNED, DATED AND DELIVERED VIRTUALLY THIS 21ST DAY OF SEPTEMBER 2022**

**E N MAINA**

**JUDGE**

