



Oyaro & another v Director of Public Prosecution & 2 others (Miscellaneous Criminal Application E038 of 2022) [2022] KEHC 14708 (KLR) (28 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14708 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CRIMINAL APPLICATION E038 OF 2022**

A. ONG'INJO, J

OCTOBER 28, 2022

**IN THE MATTER OF ARTICLE 2, 19, 20, 22, 23, 25, 27, 29, 47, 48,
49, 50, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF FREEDOM OF SECURITY OF PERSONS

BETWEEN

CHRISTOPHER OMBASO OYARO 1ST APPLICANT

LYDIA NYANCHAMA ONGARI 2ND APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

**DIRECTOR OF CRIMINAL INVESTIGATION CID HEADQUARTERS 2ND
RESPONDENT**

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

RULING

1. The applications dated March 11, 2022 sought that: -
 - i. The applicants be granted anticipatory bail and/or bond pending arrest or charge as the court may deem fit.
 - ii. The Applicants also sought an interim conservatory order restraining the Respondent from arresting, harassing or otherwise interfering with the Applicant pending the hearing and determination of this application.



- iii. They further sought that an interim conservatory order be issued restraining the Respondents from interfering with their properties including but not limited to motor vehicles, homes, commercial and personal properties pending the determination of this application.
 - iv. It was also sought that the court issues a permanent conservatory order restraining the Respondents, their servant, agents, junior officers and/or anybody from arresting, harassing or otherwise interfering with the Applicants at their homes, places of work and/or leisure.
 - v. They further sought that a permanent conservatory order be issued restraining the Respondents from interfering with their properties including but not limited to motor vehicles, homes, commercial and personal properties pending the determination of this application.
2. This application was settled by a consent recorded in court on March 25, 2022 where it was agreed that the Applicants attend to the DCI Headquarters Nairobi on April 5, 2022 so that SP Obadiah Kuria the Investigating Officer could record their statements. It was also agreed that in the event the investigations are not concluded on April 5, 2022, the Applicants were to be released on police bond terms to attend until investigations are concluded.
 3. By a letter dated April 20, 2022, the advocate to the Applicants wrote to the court saying that the Applicants were not able to attend to SP Obadiah Kuria on the said date due to unavoidable circumstances. They sought for a mention date so that they could be given a fresh date to attend.
 4. The matter was listed for mention on May 23, 2022 on which date the state also filed an application dated May 16, 2022 seeking that the court finds that the Applicants were in breach of the undertaking given in court on March 25, 2022 and were therefore in contempt and should be committed to civil jail for six months. The Application is supported by the Affidavit of PC Bakhith Khaungu sworn on May 16, 2022.
 5. In response, the 1st Applicant filed a Replying Affidavit sworn on May 20, 2022 contending that their advocate informed the 2nd Respondent of their inability to comply with the order for reason that there was a countrywide fuel crisis and they were held from travelling to Nairobi in the 1st and 2nd week of the month. That when they approached the Respondent to seek an alternative date, their approaches were rebuffed for reasons that they failed to comply with specific directives of the court. The Deponent said that the 2nd Applicant fell ill and was being attended to by Dr. Urayan R. Sheth. The Deponent also said that she is a patient and has been undergoing treatment for memory and psychiatric related issue following a severe assault she suffered in 2009 which condition has led to intermittent memory loss and resurgent trauma. He said that by a letter dated April 20, 2022, their advocate sought for variance of the order of March 25, 2022 to facilitate their compliance and this correspondence was brought to the attention of the Respondent.
 6. The 1st Applicant argued that their application to cite for contempt was premature and a testament of the overzealous nature of the 2nd Respondent in trying to find any form of guilt on the part of the Applicants.
 7. When the consent order was entered into on March 25, 2022, no sanctions were given as to the breach of the said order but being that the Applicants had sought restraining orders from the court against the Respondents, the implied consequence of their failure to comply was that the 2nd Respondent was at liberty to do that which the Applicants sought to restrain them from doing without resorting to the court. Being that they did not pursue the Applicants until they brought a letter asking to be given



another date, it would be in the interest of justice to indulge them so that they comply with the order of March 25, 2022.

8. In consideration of the above, the Applicants are hereby granted an opportunity to attend to the investigating officer in the subject matter on 3rd day of November 2022.

9. The application dated May 16, 2022 is dismissed. No orders as to costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 28TH DAY OF OCTOBER, 2022.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for 1st Respondent

Mr. Makuto for 2nd and 3rd Respondents

Mr. Mogaka for Applicants - present

HON. LADY JUSTICE A. ONG'INJO

JUDGE

