



**Okul & 2 others v Director of Criminal Investigations & another;  
Maina (Interested Party) (Constitutional Petition 238 of 2022)  
[2022] KEHC 15947 (KLR) (Civ) (25 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15947 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CONSTITUTIONAL PETITION 238 OF 2022**

**M THANDE, J**

**NOVEMBER 25, 2022**

**BETWEEN**

**LEAH ANYANGO OKUL ..... 1<sup>ST</sup> PETITIONER**

**GEORGE MURIMI KIHU ..... 2<sup>ND</sup> PETITIONER**

**NJOROGE MURIMI KURIA ..... 3<sup>RD</sup> PETITIONER**

**AND**

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**SHIRLEY MAINA ..... INTERESTED PARTY**

**JUDGMENT**

1. In a Petition against May 24, 2022, the Petitioners seek the following reliefs:

1. A Declaration does issue declaring that the Petitioners' right to access to information as guaranteed under Article 35 of the Constitution; the right to equal protection of the law as guaranteed under Article 27(1); the right to have his dignity respected and protected under Article 28; the right to privacy as guaranteed under Article 31 of the Constitution; the right to access justice as guaranteed under Article 48 of the Constitution; the right to administrative action that is reasonable and procedurally fair as guaranteed under Article 47 of the Constitution; and the right to a fair trial as guaranteed under Article 50 of the Constitution, violated and contravened by the Respondents.



2. A Permanent Injunction be and is hereby issued restraining the Respondents whether by themselves, their agents, representatives and/or all other officers subordinate from summoning, arresting, holding, detaining, incarcerating and/or in any other way interfering with the Applicants' liberty in matters related to Nordic Apartments Limited.
3. An Order awarding costs to the Petitioner.
2. The background of this matter as stated in the Petition and in the supporting affidavit sworn by the 1<sup>st</sup> Petitioner on even date, is that the petitioners are directors of Swivel Marketing Limited (the Company) which entered into an agreement with the Interested Party, for the off-plan sale of an apartment. The project was however not completed as planned due to the financial challenges brought about by the Covid-19 pandemic. The Company therefore agreed to reimburse the Interested Party, the deposit paid of kshs 2,000,000/= as per her demand. Before the payment was made however, the Petitioners received summons from the 1<sup>st</sup> Respondent (DCI) towards the end of 2021 and they committed to a payment plan. They have so far paid kshs 600,000/= on December 29, 2021 and kshs 300,000/= on April 4, 2022. Following financial challenges, the Petitioners proposed to adjust the payment plan of the balance to kshs 100,000/= per month. The proposal was however rejected by the Interested Party who instead directed the Kilimani DCI officers, Mr. Obiero and Mr. Kibei to arrest the Petitioners.
3. It is the Petitioners' case that the Company is a separate entity apart from its directors. As such, the directors cannot be held personally liable unless the corporate veil has been legally lifted. They further contended that the agreement between the parties has an arbitration clause for settling disputes. According to them, the intention of the Kilimani DCI is to harass, arrest and detain the Petitioners as per the orders of the Interested Party, despite there being no cause of action. The Petitioners are willing to cooperate with the DCI and the Company is willing to pay the sums due to the Interested Party. They however seek the protection of this Court from arbitrary arrests and being charged with bogus and unfounded charges.
4. The Petitioners averred that there is real danger of threat to violation by the Respondents of their rights to equal protection of the law, human dignity, freedom and protection from arbitrary arrest, access to information, freedom of movement, fair administrative action and fair trial. The constant telephone calls from unknown numbers have caused them great inconvenience, disturbance and mental anguish and torment and have occasioned great prejudice on the Petitioners' constitutional rights. They asserted that they have a legitimate expectation that the State shall accord them the rights guaranteed by the Constitution as they exercise their powers in accordance with the Constitution. The actions of the Respondents however are contrary to that legitimate expectation.
5. The Petitioners also filed an application of even date seeking similar orders in the interim.
6. The Petition and application are opposed by the Respondents and the Interested Party. In an affidavit sworn on June 7, 2022, PC Boniface Obiero, a police officer, stated that DCI Kilimani was investigating an alleged case of obtaining money by false pretenses contrary to Section 313 of the *Penal Code* vide OB No 61/28/10/2020, reported by the Interested Party. He averred that in the course of the investigations, the accused person and the Interested Party asked him to give them more time to resolve the issue and part of the monies in question was paid to the Interested Party. Following disagreement on the settling of the balance, he summoned the accused person, not to arrest her, but to assist with completion of the investigations and forward the file to the Director of Public Prosecutions (DPP) for perusal and advice. He stated that he forwarded the file to the DPP through the DCI Regional Office vide a letter dated May 24, 2022.



7. In her replying affidavit sworn on June 9, 2022, the Interested Party denied all allegations that she was using the Respondents to harass and intimidate, and arrest the Petitioners and asserted that the charges against the Petitioners were lawful. She averred that the summons by the DCI was to give the Petitioners an opportunity to make good their proposals to pay back the money owed to her. The Interested Party alleged that the Petitioners are hiding behind the Company to commit fraud. She accused the Petitioner of not honouring their commitment to pay the amount owed and have only paid kshs 900,000/= so far. Further that she refused to accept the Petitioners' latest proposal for payment of kshs 100,000/= per month because the previous proposals had not been honoured and that the only payment made has been upon the intervention of the Respondents. She stated that the Petitioners entered into an agreement with her to build an apartment but had a change of plan and started building town houses that were different from what had been agreed upon, and which she could not afford. She contended that if a person obtains money for a specific purpose and neither delivers nor refunds the same, then such money is said to be acquired under false pretenses.
8. In defense of the Respondents, the Interested party stated that they were only discharging their statutory mandate and have not violated the Petitioners' rights as alleged. Further that the Petitioners do not stand to suffer any prejudice from summons to a police station. On the other hand, it is the Interested Party who stands to suffer loss due to the actions of the Petitioner. The Interested Party urged the Court to see through the Petitioners' gimmicks which are geared to wasting judicial time instead of doing what they ought to do and put the matter to rest.
9. Directions were given that the Petition and application be heard together by way of written submissions. I have considered the submissions filed by the Petitioners and the Interested Party, together with all the cited authorities. I note that the submissions are confined to the Petition. The Respondents did not file any submissions though given an opportunity to do so.
10. The Petitioners submitted that that Interested Party's claim is a civil claim. As such the use of the Respondents to settle the civil claim, is an abuse of the criminal justice system. They urged the Court to hold that the dispute is civil in nature and restrain the Interested Party and the Respondents from continuous abuse of the criminal justice system. The Petitioners further urged that the fact that the dispute herein is civil in nature was confirmed by the 1<sup>st</sup> Respondent's replying affidavit. Having done their investigations, the 1<sup>st</sup> Respondent did not see any criminal element or any grounds for institution of criminal proceedings against the Petitioners.
11. The Petitioners further submitted that the agreement for sale in question (which they say is between the Interested Party and Nordic Apartments Limited although the agreement exhibited is between the Interested Party and Swivel Marketing Limited), has an arbitration clause that is binding upon the parties. The Petitioners therefore argued that the Interested Party should be stopped from abusing the criminal justice system and seek redress in arbitration.
12. The Petitioners contend that they have never refused to reimburse the Interested Party the money owed to her and have already paid her kshs 900,000/=. They have also demonstrated their willingness to settle the balance by proposing to issue her with postdated cheques of kshs 100,000/= but she declined. She instead insisted on proceeding with the criminal proceedings which to the Petitioners, reek of mala fides and unreasonableness. They urged that Petition be allowed.
13. The Interested Party submitted that the Petitioners through the Company having altered the terms of the agreement to build an apartment and decided to build stand-alone town houses which she could not afford, the agreement became void ab initio. Following default by the Petitioners on at least 4 reimbursement agreements of the deposit she had paid, the Interested Party got frustrated and sought the intervention of the police. She submitted that under Sections 10, 34 and 35 of the Police National



Police Service Act, the 1<sup>st</sup> Respondent is mandated to investigate fraud. As such, the Petitioners are using the Court to surreptitiously cover up their fraud.

14. Investigations of crime is a statutory function of the 1<sup>st</sup> Respondent. 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. ...

15. The Police also have powers to summon any person to a police station. 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.

16. That in summoning the Petitioners, the 1<sup>st</sup> Respondent was operating within its statutory mandate, is not a subject of debate. 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.

17. It is well settled that constitutional and statutory bodies such as the 1<sup>st</sup> Respondent, 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.

18. To buttress her submission that the 1<sup>st</sup> Respondent has the mandate to investigate matters of fraud, the Interested Party relied on the case of Republic v Commissioner of Police & Another Ex-Parte Michael Monari & Another [2012] eKLR, where Warsame, J. (as he then was) stated:

It is also clear in my mind that the police have a duty to investigate on any complaint once a complaint is made. In deed the police would be failing in their constitutional mandate to detect and prevent crime.



19. In that case, the applicants appeared to have committed criminal offences as a charge over the deceased's property had been registered a year and a half after his demise. The learned Judge noted:

Mr. Muite learned counsel for the respondent submitted that for there to be a replacement of a charge it must be signed by the chargor and/or his personal representative. The learned counsel submitted that the manner in which a further charge was registered discloses a criminal offence namely uttering false document and forgery. The two applicants said that they were directors of the bank when they were not directors of the bank.

20. The circumstances in the present case are distinctly dissimilar in that an offence seems to have been disclosed in that case, the Petitioners herein appear to be unable to pay the amount owed to the Interested Party in the manner in which she seeks to be paid. This perhaps informed the conclusion that the 1<sup>st</sup> Respondent did not see any grounds for institution of criminal proceedings against the Petitioners. The letter dated May 24, 2022, exhibited by PC Boniface Obiero in his replying affidavit, forwarding the investigation file to the Office of the Director of Public Prosecutions for action concluded with the following recommendation:

It's apparent that the applicable law to the offence committed is obtaining money by false pretenses contrary to Section 313 of the penal code. Nonetheless, the office is cognizant of the fact that E-1 has indeed paid an aggregate amount of KShs 900,000/- to D-1 as part of the amount in question. In light of the aforementioned, this case is best dealt with in a civil purview, unless otherwise advised.

21. While constitutional and statutory bodies must be allowed to discharge their mandate unhindered, such discharge must be within the four corners of the Constitution and the law. Such bodies such as the Respondents herein must eschew the practice of being used in a manner contrary to law and in particular employing the criminal justice system to settle scores between private parties.
2022. The issue was considered in the case of *Development Bank of Kenya Ltd v Director of Public Prosecutions & another; Giriama Ranching Company Limited (Interested Party)* [2020] eKLR where the Court stated:

49. It must be stated that the law on this issue has never changed since *Kuria & 3 others v Attorney General* [2002] 2 KLR 69 when Mulwa, J held that:-

“It cannot be gainsaid that the court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its processes do not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...

Kuloba J in *Floriculture International HC Misc. Civil App No 114 of 1997* warned, which warning I would concur with, that the machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta.”

23. In the case of *Commissioner Of Police & The Director Of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others* [2013] eKLR, the Court of Appeal considered a matter



in which the criminal process had been employed to assist resolution of a civil dispute. The Court stated:

Clearly, the company and the guarantor through their directors were employing criminal process to assist them in resolving their civil dispute. While the law (Section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that that power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court. This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations. We have no doubt in our minds that the belated involvement of the police in this purely civil dispute is an abuse of their power. The police should direct their energies and resources to prevention of crime which we all know is rampant in this country and is about to get out of control.

24. The Court of Appeal adopted a similar position in the case of *Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others* [2018] eKLR and stated:

47. In terms of Section 193A of the Criminal Procedure Code, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings does not bar the commencement of criminal proceedings. However, where the criminal proceedings are oppressive, vexatious and an abuse of the court process or amounts to a breach of fundamental rights and freedoms, the High Court has the powers to intervene. But this power has to be exercised very sparingly as it is in the public interest that crime is detected and suspects brought to justice.

25. After carefully considering the material placed before me, I do not see any evidence of harassment or intention to arrest and detain the Petitioners by the Respondents. It has also not been demonstrated that the actions of the Respondents are motivated by other than the purpose of conducting a fair investigation. This notwithstanding, I am of the view that this is a case that is better dealt with in a civil court as opposed to invoking the criminal justice system. Indeed, the civil process has its own mechanisms of dealing with breach of contract where moneys are obtained from one party and there is no performance by the other party. The mechanisms also include enforcement of decrees in favour of the winning party.

26. In opposition to the prayer for permanent injunction restraining the Respondents from arresting the Petitioners, the Interested Party contended that she stands to lose more if the Petitioners are allowed to continue wasting judicial time and attempting to frustrate her efforts to get a refund of her hard-earned money. She relied on the case of *Kenleb Cons Ltd v New Gatitu Service Station Ltd & another* [1990] eKLR, where Bosire, J. (as he then was) stated:

To succeed in an application for injunction an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application, but must also show he has a right, legal or equitable, which requires protection by injunction. He must



also satisfy the three tests set out in the often cited case of *Giella v Cassman Brown & Co Ltd*, 1973 EA 358; for the grant of an interlocutory injunction.

27. With respect, this authority is not helpful as it relates to an interlocutory injunction, which is not what is sought herein.
28. Having considered all the material placed before me, it is my finding that the claim by the Interested Party is civil in nature and is best dealt with in a civil court. Accordingly, I allow the Petition dated May 25, 2022 in the following terms:
1. A permanent injunction be and is hereby issued restraining the Respondents whether by themselves, their agents, representatives and/or all other officers subordinate from summoning, arresting, holding, detaining, incarcerating and/or in any other way interfering with the Petitioner's liberty in matters related to the agreement between Swivel Marketing Limited and the Interested Party in respect of Nordic Apartments on Title No Dagoretti/Kinoo/2150.
  2. For the avoidance of doubt, this order shall not apply to any enforcement orders that may be issued by any Court in relation to matters related to the agreement between Swivel Marketing Limited and the Interested Party in respect of Nordic Apartments on Title No Dagoretti/Kinoo/2150.
  3. As the dispute between the Petitioners and the Interested Party is yet to be resolved, each party shall bear own costs.

**DATED AND DELIVERED IN NAIROBI THIS 25<sup>TH</sup> DAY OF NOVEMBER 2022**

**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Petitioners**  
..... **for the Respondent**  
..... **for the Interested Parties**  
..... **Court Assistant**

