



**Edambo & 4 others v Independent Policing Oversight Authority (IPOA) &
6 others (Constitutional Petition E499 of 2022) [2022] KEHC 17026 (KLR)
(Constitutional and Human Rights) (21 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 17026 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E499 OF 2022**

JM BWONWONG'A, J

NOVEMBER 21, 2022

**1. IN THE MATTER OF ARTICLES 25 (A), 27 (1), (2), 28, 29 (A) (D),
(F), 47, 49, 50 AND 51 (1) OF THE 2010 CONSTITUTION OF KENYA.**

2. IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT (CAP 84) LAWS OF KENYA

**3. IN THE MATTER OF THE INDEPENDENT POLICING
OVERSIGHT AUTHORITY ACT (CAP 88) LAWS OF KENYA**

**4. IN THE MATTER OF THE INTERNATIONAL CRIMES ACT
(NO. 16 OF 2008) LAWS OF KENYA IN THE MATTER OF THE
ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT**

AND

**5. IN THE MATTER OF THE INTERNATIONAL CRIMES
(PROCEDURE FOR OBTAINING EVIDENCE) RULES 2010**

BETWEEN

VOLKER EDAMBO 1ST PETITIONER

JAMES RONO 2ND PETITIONER

JOSPHAT BOKE SENSERA 3RD PETITIONER

TITUS NZIOKA MUTUNE 4TH PETITIONER

TITUS YOMA 5TH PETITIONER

AND

**THE INDEPENDENT POLICING OVERSIGHT AUTHORITY
(IPOA) 1ST RESPONDENT**

THE KENYA HUMAN RIGHTS COMMISSION 2ND RESPONDENT



THE NATIONAL POLICE SERVICE COMMISSION	3 RD RESPONDENT
THE INSPECTOR GENERAL OF POLICE	4 TH RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS	5 TH RESPONDENT
NOORDIN MOHAMED HAJI	6 TH RESPONDENT
JECINTA NYAMOSI	7 TH RESPONDENT

RULING

The case for petitioners/applicants.

1. On November 17, 2022, counsel for the 1st petitioner (messrs Nzaku) adopted his earlier submission that a conservatory order (being prayer No 3) be issued to preserve the status quo pending the hearing and determination of the application for an interim conservatory order restraining the respondents or their agents from harassing, arresting, charging and/or detaining the petitioners in relation to the alleged information dated October 26, 2022 and presented in court on October 27, 2022, pending hearing and determination of the petition, amongst other orders.
2. Mr Munoko (for the 4th petitioner) and Mr Makundi (for the 5th petitioner) supported Mr Nzaku.

The case for the 1st respondent

3. Messrs Kinoti counsel for the 1st respondent opposed the grant of prayer No 3. The basis of their opposition is that this court (Ogembo, J) had determined the date for plea taking to take place on November 21, 2022 before Kimondo, J the divisional presiding judge. According to them, counsel for petitioners are asking this court (Bwonwong'a, J) to reverse the order of Ogembo, J, in respect of plea taking. According to them the issue of plea taking had been rendered nugatory.
4. Counsel continued to submit that the contention of Mr Nzaku and Mr Munoko, if acceded to will lead to conflict between the orders of the two courts, which will in turn lead to confusion.

The case for the 2nd respondent - (Kenya Human Rights Commission).

5. Mr Kamau supported the position taken by Mr Kinoti. He added that the issue of plea taking had been decided by Ogembo, J and that this court is not the proper forum to ventilate the issue.
6. However, he supported the plan of the petitioners abandoning prayer No 3 in favour of pursuing the petition itself.

The case for the 3rd to the 7th petitioners.

7. Mr Owiti for these respondents adopted his submission of conceding to prayer No 3 so that the parties can move to pursuing the main petition. This, he submitted was in the interests of the speedy disposal of the matter. Additionally, he prayed for 14 days within which to respond to the main petition.

The case for victims

8. Counsel for the victims (Ms Aoko) supported the position taken by Mr Kinoti and Mr Kamau.



The case for the International Justice Mission (IJM)

9. Mr Komu for IJM supported Mr Kinoti and Mr Kamau in opposition to the application.

The case for the Independent Medical Legal Union -IMLU

10. Ms Obara for IMLU supported Mr Kinoti and Mr Kamau in opposition to the application.

Issues for determination.

11. I have considered the submissions of the parties and the law applicable.

As a result, I find the following to be the issues for determination.

- 1 Whether this court has jurisdiction to grant an interim conservatory order in terms of prayer No 3 of the notice of motion.
- 2 what are the appropriate orders that should be made?

Issue No 1

12. The petitioners have sought an interim conservatory order restraining the respondents or their agents from harassing, arresting, charging and/or detaining the petitioners in relation to the alleged information dated October 26, 2022 and presented in court on October 27, 2022, pending hearing and determination of the petition. In this regard, according to the ruling of Ogembo, J supplied to this court by Mr Kinoti. The court (Ogembo, J) in part ruled that:

' In balancing the constitutional rights of the subjects before the court and those of the victims, it is in my view proper and fair that plea be taken so that this matter may be determined one way or the other. It is in the interests of both sides therefore, that the subjects do take plea herein and to respond to the charges herein as urged by the prosecution and counsel watching brief for the victims.'

Thereafter the court (Ogembo, J) proceeded to order that:

' In the meantime, each of the subjects (accused) present before court may execute personal bonds of Kshs 200,000/- and undertake to attend court on the date fixed for plea. Matter fixed for plea. Mention November 21, 2022. Kimondo, J'

13. It is clear from the foregoing passages that the accused were ordered to appear for plea on November 21, 2022 before Kimondo, J.
14. It is equally clear that the Director of Public Prosecutions (DPP) had already filed the charges (the information) in court and the accused petitioners were to plead to these charges which are on the court file.
15. It is therefore clear that the sought interim conservatory order to restrain the respondents or their agents from harassing, arresting, charging and/or detaining the petitioners in relation to the alleged information dated October 26, 2022 and presented in court on October 27, 2022, pending hearing and determination of the petition, amongst other orders, has been overtaken by events by virtue of the order of Ogembo, J.
16. This court cannot therefore issue an order in a vacuum, whose subject matter has since ceased to exist by virtue of the order of Ogembo, J. Therefore, the order sought has become moot or academic. It is



legally impermissible to issue orders in those circumstances. See generally *Attorney General v Ally Kleis Sykes* [1957] EA 257.

17. This court cannot in law grant such an order. The concession by the DPP and counsel for the petitioners that an interim order be granted to enable the parties to pursue the petition itself is invalid. The reason being that parties cannot by their consent confer jurisdiction upon a court of law. The jurisdiction of the court can only be conferred by the either the Constitution or an Act of Parliament (a statute). See the decision of the Supreme Court (W M Mutunga CJ, P K Tunoi, J B Ojwang, S C Wanjala, N S Ndungu, SC JJ) in *Samuel Kamau Macharia & Another Kenya Commercial Bank & 2 others, Application No 2 of 2011 [2012] e-KLR*

Issue 2

18. The appropriate order to be made in this matter is that this matter must be placed before the presiding judge of the criminal divisional to allocate the application and the petition before the trial judge who will himself then determine the issues in dispute or who will refer the matter to the Chief Justice to constitute a bench of three judges to determine the matters. In this regard, I refer to the persuasive decision of the High Court of Uganda in *Masaba v R* [1967] EA 488, in which a similar position arose and that was the procedure adopted.
19. Additionally, our own constitutional litigation history through the case of *Stanley Munga Githunguri v R* [1986] KLR 1, has taught us to avoid a situation where there is an even bench of judges (Schofield and Owuor, JJ), which failed to reach a unanimous decision with the result that the then Acting Chief Justice (Madan, Ag CJ) divested it and proceeded to order the application to heard afresh by a bench of three judges of the High Court.
20. When I brought the attention of the parties to the above Ugandan case, they did not respond to it. Instead they preferred the application and the petition to continue before me and the plea taking to proceed before the judge who will to take plea (Kimondo, J); which is not cost effective monetarily and in terms personnel resource (the judges and their supporting staff) is uneconomical, and may result in conflicting orders that are unenforceable; for every judge of the High Court is a constitutional court.
21. In view of the teaching from the foregoing two authorities, I am persuaded that the right procedure to be followed is found in the case of *Masaba v R*, supra.
22. The upshot of the foregoing is that this application is accordingly referred to the presiding judge of the criminal division to allocate it to the judge who will hear and determine both the application and the petition together with the trial of the offences of murder that have been filed.

These are the orders of this court.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 21ST OF NOVEMBER 2022.

J M BWONWONG'A

JUDGE

In the presence of-

Mr Kinyua court assistant

Mr Mong'eri holding brief for Mr Nzaku 1st to 3rd petitioners/applicants.

Mr. Munoko for the 4th petitioner/applicant



Mr. Makundi for the 5th petitioner/applicant

Mr. Mbugua holding brief for Mr. Kinoti for the 1st respondent.

Mr. Kamau, Mr. Osman and Ms, Lema for the 2nd respondent

Mr. Owiti for the 3rd to 7th respondents.

Ms. Aoko holding brief for Mr. Willis Otieno for the victims.

Mr. Komu holding brief for Mr. Mbanya for IJM.

Ms. Luther, Ms Obara and Mr. Okwach for IMLU.

