



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT BUNGOMA**  
**CONSTITUTIONAL PETITION NO. E003 OF 2020**  
**IN THE MATTER OF ARTICLES 2(1), 2(4), 10, 21(1), 22, 23,**  
**40, 258, 259 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 24,**  
**25, 28, 29, 40, 48, 50, 157(11), 165, 258 & 259 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS**  
**UNDER ARTICLES 22, 23, 24, 25, 27, 28, 29, 40, 47, 48, 49, 50, 64, 65,**  
**165, 258 & 259 OF THE CONSTITUTION OF KENYA 2010**

**BETWEEN**

**PETER WAFULA CHIKATI.....PETITIONER**

**AND**

**MICHAEL OCHIENG PAUL.....1<sup>ST</sup> RESPONDENT**

**PC CATHERINE NYONGESA-KIMILILI POLICE STATION.....2<sup>ND</sup> RESPONDENT**

**O.C.S KIMILILI POLICE STATION.....3<sup>RD</sup> RESPONDENT**

**PRINCIPAL MAGISTRATES COURT-KIMILILI.....4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS.....INTERESTED PARTY**

**RULING**

The Petitioner preferred the instant application dated 12<sup>th</sup> November, 2020 seeking the following orders:-

a) Pending the hearing and determination of this application and the Petition *inter-partes*, an order of prohibition be issued and directed at the 4<sup>th</sup> respondent and the interested party restraining them or any other Judicial Officer in Kimilili Principal Magistrates Court from hearing or in any other way handling any matter either Criminal or Civil and further the 4<sup>th</sup> respondent be restrained from hearing Kimilili Principal Magistrates Court Criminal Case No. 340 of 2020 and handling in any manner any issue arising from a dispute in ownership of land parcel number Kimilili/Kimilili/3665 which is the registered property of the petitioner.

b) Pending the hearing and determination of this application and the petition *inter partes*, there be a declaration that there is no triable case the 4<sup>th</sup> respondent and the interested party are capable of handling as the 3<sup>rd</sup> respondent's communication letter dated 11<sup>th</sup> September, 2020 contain information that the property which the petitioner was accused of stealing and damaging was found in the hands of Kimilili Township Council and not the petitioner and therefore this kind of evidence renders the entire proceedings of Kimilili Principal Magistrates Court Criminal Case No. 340 of 2020 unlawful, scandalous, vexatious, malicious, unconstitutional and further an abuse of the court process .

In his affidavit, the petitioner/ applicant depones that the interested party and the 4<sup>th</sup> respondents have begun hearing Kimilili Criminal Case No. 340 of 2020 which he alleges was maliciously instituted on the basis of the 1<sup>st</sup> respondent's falsehoods and charges preferred by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

That the insistence by the 3<sup>rd</sup> and 4<sup>th</sup> respondents to hear the aforesaid criminal matter despite the applicant's protest is a scheme to advance the 1<sup>st</sup> respondent's ulterior motives and amounts to abuse of the court process.

The applicant further depones that he is the registered owner of the parcel of land known as Kimilili/Kimilili/3665 which forms the subject of the charges levelled against him. That the continuation of the suit will deprive him of his rights to property.

The applicant depones that there is information by way of correspondence that the property he allegedly stole and or damaged were found within Kimilili Township Council Offices and that the respondents shall not be prejudiced in any way if the orders sought therein are granted.

The 1<sup>st</sup> respondent opposed the application through a replying affidavit dated 10<sup>th</sup> December, 2020. He confirms lodging a complaint at Kimilili Police Station after the applicant interfered with his kiosk which he had installed at a parcel of land Kimilili/Kimilili/875 separated from the applicant's by a Public Road.

He depones that the police having carried out investigations arrested and charged the applicant.

The 2<sup>nd</sup> respondent filed a replying affidavit on her own behalf and that of 2<sup>nd</sup> 3<sup>rd</sup> and 5<sup>th</sup> respondents. She depones that on 30/8/2020, the applicant reported an incident of a structure in front of his shop whereupon after visiting the scene, it was established the structures was not within the applicant's parcel of land but separated by a Public Road.

That following the report, the applicant and the 1<sup>st</sup> respondent were summoned to appear before the O.C.S the following morning though the 1<sup>st</sup> respondent arrived earlier and reported his kiosk was missing. After investigations, the Kiosk was found destroyed at Kimilili Subcounty offices. Further investigations showed that the applicant was responsible for the destruction on the basis that the same was constructed on his land.

She depones that the applicant was subsequently charged and therefore prayers sought against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have been overtaken by events. That the issues complained of by the applicant will form the basis of his defence. She denies any malice or excesses of jurisdiction on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents which she depones can only be adjudicated in a civil claim for damages.

The application was disposed of by way of written submissions which were duly filed.

The court has carefully analyzed the application, the replying affidavits thereto and the rival submissions tendered and is of the view that the sole issue that begs determination at this stage is whether the applicant is entitled to the orders sought.

The applicant's complaint springs from Kimilili Criminal Case No. 340 of 2020 where he is charged with the offences of Malicious Damage to property and stealing of the 1<sup>st</sup> respondents property.

The applicant on 30/8/2020 reported an incident of a structure erected in front of his business. The 3<sup>rd</sup> respondent summoned both the complainant and the suspect to appear before him on the 31/8/2020. However on the appointed date, the 1<sup>st</sup> respondent reported earlier than the appointed time that his kiosk had been destroyed and a number of items therein stolen.

The chain of events thereafter are contained in the Investigations Diary annexed to the 2<sup>nd</sup> -5<sup>th</sup> respondents replying affidavit thus the charges facing the applicant.

The court notes that the respondents and the interested party save the 1<sup>st</sup> respondent are constitutional offices. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents are officers of the National Police Service created under Article 243 of the Constitution. Their specific duties are given under Section 24 the National Police Service Act.

The 4<sup>th</sup> respondent is an office created under Article 169 of the constitution and the provisions of the Magistrates Court Act. Its roles are contained therein.

The interested party is equally a constitutional office created under article 157 of the constitution and undertakes criminal proceedings against any person before any court in respect of any offence alleged to have been committed.

The applicant urges this court to issue a prohibition against the respondents from hearing or proceedings with the matter in Kimilili Principal Magistrates Court. The respondents are indeed exercising a constitutional mandate.

In *Republic v Director of Public Prosecutions & 3 others Ex-Parte Bedan Mwangi Nduati & another [2015] eKLR* , it was held;

*It is trite that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.*

Similarly, in *Kuria & 3 Others vs. Attorney General (2002) 2 KLR 69* it was held:

*For an Application of such a nature to succeed, there is need to show how the Court process is being abused or misused, there is need to indicate or show the basis upon which the rights of the Applicants are under serious threat of being undermined by the criminal prosecution.*

*There is public interest underlying every criminal prosecution which must be jealously guarded. At the same time there are private interests of the Applicant to be protected and it is therefore imperative for the Court to balance these considerations”.*

In the instant case, the applicant has not explained how his rights have been violated or threatened to be infringed. The mere fact that he has been charged with an offence he deems not fit in the circumstances is not enough. More so the applicant has a chance to defend himself from the allegations levelled against him.

In consideration of the above, this court finds no concrete basis for stopping the pending criminal proceedings. No cogent basis has been laid to justify the issuance of orders sought. The Applicant’s Notice of Motion is hereby dismissed with no orders as to costs.

**DATED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF JUNE, 2021**

**S. N RIECHI**

**JUDGE**