



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CONSTITUTIONAL PETITION NO. E 04 OF 2021

**IN THE MATTER OF ENFORCEMENT OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 165(3), 258(1) & 259(1) OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THREATENED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS IN ARTICLES
25(c), 27(1) (2), 28, 29(a) 40, 47, 48, 50 AND 159 OF THE CONSTITUTION OF KENYA AND CONTRAVENTION ABUSE OF
ARTICLE 157**

AND

**IN THE MATTER OF CONTRAVENTION ABUSE OF ARTICLE 157 AND CHAPTER FOURTEEN, PART 4 OF THE
CONSTITUTION**

AND

IN THE MATTER OF INTENDED ILLEGAL PROSECUTION OF BERNARD TONNY ATANCHA

AND

IN THE MATTER OF ALLEGED VIOLATION OF SECTION 339(1) OF THE PENAL CODE

BETWEEN

BERNARD TONNY ATANCHA.....1ST PETITIONER/APPLICANT

DOUGLOUS NYAKINYA ATANCHA.....2ND PETITIONER/APPLICANT

STEPHEN ANDARA.....3RD PETITIONER/APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

SUB COUNTY CRIMINAL INVESTIGATION OFFICER,

KISII SOUTH.....2ND RESPONDENT

OFFICER COMANDING STATION,

Gesonso and Suneka POLICE STATIONS.....3RD RESPONDENT

AND

JARED ATANCHA.....INTERESTED PARTY

RULING

1. The subject of this ruling is a Notice of motion dated 4th March 2021 brought pursuant to **Articles 50 of the Constitution, Rules 11, 12, 20, 21 of the (Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2012 and Sections 1A, 1B and 34 of the Civil Procedure Act, Order 51 of the Civil Procedure Rules, 2010** and all enabling provisions of law. It is premised on the grounds set out in the application and the supported by an affidavit sworn by the 1st petitioner on behalf of his co-petitioners. The petitioners seek orders that;

1) Spent;

2) *A conservatory order do issue prohibiting and/or restraining the Respondents, their officials, employees, servants and/or agents or anybody working under or for them from summoning, investigating and/or further investigating, charging and/or prosecuting any of the petitioners for any charge arising from the complaints lodged by the interested party, or anyone else so long as the facts of the complaint point to any alleged acts arising at and/or are in relation to the property composed of the estate of late Gilbert Moracha Atancha, pending the hearing and determination of this application inter partes;*

3) *A conservatory order do issue prohibiting and/or restraining the Respondents, their officials, employees, servants and/or agents or anybody working under or for them from summoning, investigating and/or further investigating, charging and/or prosecuting any of the petitioners for any charge arising from the complaints lodged by the interested party, or anyone else so long as the facts of the complaint point to any alleged acts arising at and/or are in relation to property composed of the estate of late Gilbert Moracha Atancha, pending the hearing and determination of this petition.*

4) *Any other or further relief which this Honourable Court deems fit and just to grant.*

5) *The costs of this application be provided for.*

2. The 1st petitioner, the 2nd petitioner and the interested party are siblings contesting the distribution of estate of their father who died on 24th August 2017. The petitioners claim that despite the pendency of the Succession Cause No. 127 of 2020 between Benard Tony Atanch & Another vs Jared Atancha, the interested party hived for himself a section of the estate and erected upon it a structure. Intermeddler proceedings were instituted against him and the court issued an injunction. The petitioners claimed that following the institution of intermeddler proceedings, the interested party resorted to using state machinery to intimidate and threaten them.

3. On the 16th December 2020, the Interested Party lodged a complaint against the petitioners for malicious damage to property and assault. As a result, the Officer Commanding Police Station in Suneka Sub County Police Station informed the 1st petitioner that the interested party had lodged a complaint of malicious destruction of property, the property being his house under construction in Suneka Sub County Village of Kisii County. The complaint was then forwarded to the Office of the Director of Public prosecutions for purposes of initiating criminal prosecutions.

4. On learning that the interested party had sought prosecutorial intervention, the petitioners, through their advocates on record, wrote to the Office of Director of Public Prosecution expressing their concerns as regards their intended prosecution as the conflict was purely a family feud. In a letter written by the petitioners' advocates the investigating agency were informed that the house allegedly damaged was intact. The Petitioners' advocates also indicated that the complaints raised had to be regarded as family feuds. The investigating agency was also informed that the building allegedly destroyed was the subject of a court injunction pending the determination of an intermeddling application filed against the interested party. The advocates indicated that since the contested property was the subject of Kisii Succession Cause No. 127 of 2020, the interested party had no proprietary rights over the property which had not been allocated to him. The investigating agency were also informed that the 1st petitioner who had been accused of destroying the said property had not visited the location of the property for over three (3) years due to the family conflict.

5. Despite the breakdown of facts by the petitioners' advocate, the 1st Respondent took a decision to prosecute the petitioners and secured warrants of arrest against them. On 3rd March 2021, the police apprehended the 3rd petitioner and took him to custody on account of the intended prosecution.

6. The petitioners averred that the decision to charge them flew in the face of **Section 4 of the Office of the Public Prosecutions Act and Article 157 of the Constitution**. They also believed that the unreasonable administrative decision of the 1st respondent to prosecute them for crimes whose ingredients had not been met, threatened the violation of their rights to security of persons under **Article 29 of the Constitution**, human dignity under **Article 28** and equality of treatment by law under **Article 27**. They were apprehensive that if the application was not granted, the 1st respondent would maliciously, unconstitutionally and illegally use the criminal process initiated by the interested party to harass and intimidate them, eventually influencing the outcome of Kisii Succession Cause No. 127 of 2020.

7. In response, Philip Gatheru, the investigating officer in the complaint lodged by the interested part averred that the interested party had reported that his house had been demolished by the 1st petitioner. He averred that their mother Teresa Kimuma, who was the intended administrator of the estate of Moracha Atancha had no problem with the interested party constructing his house within the homestead as his brothers the 1st and 2nd petitioners, had constructed theirs on the property as well.

8. He deposed that the 1st petitioner had obtained a court order stopping the interested party from continuing to construct and the interested party had complied. That notwithstanding, the 1st petitioner had led a group of people to demolish the house under construction. He averred that his recommendation was that the petitioners be charged with the offence of malicious damage to property contrary to **section 339 (1) of the Penal Code**. He also recommended that they be charged with the offence of assault contrary to **section 251 of the Penal Code**, which was committed in the course of the demolition.

9. The investigating officer claimed that he had been able to obtain statements of witnesses who were ready to testify in support of the charges. He deposed that he had visited the site with other officers, taken pictures and obtained a number of eye witnesses who had given their statements. He therefore opposed the petition.

10. The 1st, 2nd and 3rd respondents also filed grounds of opposition contending that;

1) *The office of the ODPP is a creation of the Constitution of the Republic of Kenya under Article 157 of the Constitution of Kenya 2010.*

2) *The Constitution of Kenya 2010 gives the ODPP powers under Article 157 (6) (a), (10) and 157(11).*

3) *The office of Criminal Investigations is a creation of the statute whose functions are;*

4) *The office of the National Police Service is a creation of the constitution Article 239(l), (c) and the statute The National Police Service Act Cap 84 (revised 2014) and has powers under Section 51 and 52 of the said Act to deal with suspect and arrest/detect crimes.*

5) *The respondents are empowered by the constitution and the statute to summon, investigate, and/or further investigate, charge and or prosecute any person who after investigations is found to have committed a recognizable offence.*

6) *The petitioners were properly investigated and found to have committed an offence of malicious damage to property contrary to Section 339 of the penal code.*

7) *Investigations commenced after a complaint by the complainant, the interested party herein, investigations carried out and eye witnesses bonded who are ready to testify in court.*

8) *The existence of Kisii Succession Cause number 127 of 2020-Bernard Tony Atancha Anor -vs- Jared Atancha cannot be a bar to criminal proceedings properly instituted before the criminal court of law. (Section 193 A of the Criminal Procedure Code provides:*

"Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceeding."

9) *That it's only fair the petitioners rights and the rights of the complainant to access justice be left to follow the trial process whereby the petitioners will have the opportunity to challenge all the evidence presented against them and present their defence while enjoying the constitutional safeguards of a fair trial.*

10) *The charges once presented to court are based on evidence collected during investigations hence can only be countered during the trial process.*

11) *That the petitioners intention is only to curtail the constitutional and statutory obligations of the respondents in order to serve their ego at the expense of the complainant.*

12) *The petitioners have not disclosed any breach to their constitutional rights and on how they have or will suffer once the trial commences.*

13) *The petitioners have failed or ignored to heed summons issued by a statutory body whereas police have finalized investigations and now what is remaining is for the petitioners to take a plea for the trial process to commence as per the law.*

14) *The petitioners should face fruits of their actions however bitter they might be.*

15) *That the trial court is the one to evaluate the evidence and decide to acquit or convict they should not condemn themselves in advance.*

16) *The petitioners should not hide behind the Constitution to cover for their criminal acts, justice has to be served or seem to be served equally.*

17) *There is nothing unconstitutional when a suspect is being arraigned in court to answer to charges upon completion of investigations.*

18) *The petitioners have chances to exonerate themselves at the trial court and appeal all the way to the Supreme court of Kenya.*

19) *The prosecution should be given space to carry out its mandate.*

20) *The instant petition lacks merit and should be dismissed with costs.*

11. The interested party swore affidavits in response on 17th April 2021 and on 26th April 2021 He stated that he was the eldest son of the

late Moracha Atancha who passed away on 24th August 2017 and the 1st and 2nd petitioners were his younger brothers. The interested party averred that among the properties left by the deceased was a parcel of land number known as Wajare/Bomerenda/57 in Bunyaoro which was the genesis of the dispute before the court. He claimed that he had built a semi-permanent house on the land where he had also interred the remains of his late wife. His two younger brothers had also constructed permanent houses on the parcel of land.

12. The interested party stated that he had decided to demolish the semi -permanent house to pave way for a permanent structure. The construction was progressing well until the 2nd petitioner went to the site with hired goons on 4th June 2020 and chased away his workers. He also warned them that he would demolish the structure because the interested party was not supposed to construct on that particular area. His workers informed him of the incident, and he reported the matter to Suneka Police Station where the OCS and some officers escorted him to the site.

13. Upon reaching the site, they found that the 2nd petitioner had left. The OCS Suneka summoned him and he returned with his goons. The interested party claimed that in a show of arrogance and disregard for authority the 2nd petitioner promised the OCS Suneka that he would destroy the structure that night. True to his word, the 2nd petitioner came that night with his goons in a motor vehicle and destroyed one side of the house. The watchmen hired by the interested party raised alarm and with the assistance of the neighbours the goons were chased away.

14. On 5th June 2020, the interested party visited Suneka police station and reported the matter. He was assigned an officer from Suneka police station with whom they visited the site to assess the damage. On 10th June 2020, the interested party received a court order stopping him from continuing with the construction. The following day, the 1st petitioner went with police officers from Kisii Central Police Station with the deputy OCS and proceeded to demolish the entire structure. The interested party went to court and successfully had the ex-parte orders which had been issued on 10th June 2020 vacated. He also reported the incident at Suneka police. They once again visited the site and took pictures and obtained a number of eye witness accounts.

15. The interested party averred that the 2nd petitioner was a police officer who was abusing his powers. He asserted that he was constructing on the same portion where his semi-permanent house stood and the petitioners' actions were only aimed at disinherit, intimidating and humiliating him.

16. In his affidavit sworn on 26th April 2021 the interested party claimed that the 1st and 2nd petitioners had forged the death certificate of the deceased which indicated that the deceased had passed on while domiciled at Rigoma yet he had died domiciled at Bonyaoro. He deposed that using the fake death certificate, the 1st and 2nd petitioners had filed an ELC Case No. 36 of 2020 and obtained orders of injunction which they had illegally used to demolish structures he had constructed on the property. After the demolition, he had filed an application before the trial court which lifted the orders of injunction. He claimed that their mother had filed an application challenging the issuance of the temporary letters of administration in Succession Cause No. 127 of 2020.

17. Due to the immense damage occasioned to his house, the interested party had lodged a complaint with the police. He averred that the photographs attached to the petitioners' affidavits were taken before the demolition and had been deliberately filed in order to mislead the court that the structure was still intact.

18. He claimed that the 1st petitioner, who was also known as Tom Atancha, kept changing his identity to evade prosecution in criminal cases where there were unexecuted warrants of arrest against him. He claimed that the petitioners had gone under to avoid arrest and were now intent on using this court as a shield against prosecution for the offences they had committed. He asserted that he was not involved in the succession cause before the probate court which was between the 1st and 2nd petitioners and Teresia Kemuma Atancha. He was of the view that it would serve the interest of justice for the applicants to present themselves to the respondents for prosecution rather than seek the protection of this court which they did not deserve.

19. The 1st petitioner swore a further affidavit in which he started off by assailing the grounds of opposition filed by the respondents he asserted that grounds of opposition should be confined to points of law but in this case the Grounds of Opposition dated 7th April, 2021, contained reference to facts that were liable to be contested and to be proved through the process of leading evidence.

20. The 1st petitioner averred that in exercising its prosecutorial powers, the 1st respondent had to be guided by Article 157 of the Constitution of Kenya and the National Values and Principles under Article 10 of the Constitution. In particular, the 1st respondent was to have regard to the public interest, the interests of administration of justice and the need to prevent and avoid the abuse of legal process. In insisting to prosecute the petitioners, the 1st respondent had blatantly departed from the guiding principles of prosecution.

21. The petitioner denied the respondents claim that the intended prosecution was founded on a sound legal basis as no investigative reports had been made available to the court nor to the Petitioners to confirm the veracity of the intended charges. He also denied the respondents' claim that the petitioners had failed to heed to summons as they had not received any summons.

22. Regarding the respondents' claim that their investigations had found that the petitioners had committed an offence of malicious damage to property, the petitioner asserted that the threshold for establishing the offence had not been met. He averred that the charges could not stand as the property that had allegedly been destroyed was the subject of an active succession cause, thus the interested party had no proprietary rights and was in fact an intermeddler. He also insisted that the property was not damaged and the complaints made were merely family feuds.

23. In response to the respondents' assertion that the petitioners had not disclosed any violation of their constitutional rights, the petitioner averred that a threat of violation of rights alone was sufficient to cloth the petitioners with locus standi. He maintained that the petitioners had a right to institute the petition and had set out with a reasonable degree of precision all the rights that had been threatened with violation. He averred that even after it became apparent that the dispute giving rise to the intended prosecution emanated from a family feud out of a

contested succession, the Respondents proceeded to prosecute the Petitioners in a bid to aid the interested party gain an upper hand in the succession dispute.

24. He observed that the interested party had acknowledged constructing on the property in dispute in disregard of court orders prohibiting anyone from dealing with the land. He stated that if at all the interested party had secured orders from court vacating the earlier orders barring him from dealing in the land, those orders had not been made available to any party. The petitioner insisted that there was no evidence pointing to the fact he was seen anywhere in Kisii County destroying the property erected on the subject parcel of land and accused the interested party of resorting to use of state machinery to intimidate his siblings by mounting criminal prosecutions that had no merit in law.

SUBMISSIONS

25. The petitioners' counsels submitted that in order for conservatory orders to issue, the Applicant had to demonstrate that he had a prima facie case with a likelihood of success and that unless the conservatory orders were granted there was a real danger that he would suffer prejudice as a result of the violation or threatened violation of the Constitution. Counsel submitted that the petitioners had demonstrated that the 1st Respondent had preferred charges against the petitioners which were based on illegal attempts to afford the interested party an unfair advantage against his siblings in the succession dispute between them.

26. Relying on the case of *Wislon Gathangu Chuchu vs Republic [2018] eKLR*, counsel submitted that for the offence of malicious damage to property to be proved there had to be proof of ownership of the property; proof that the property was destroyed or damaged; proof that the destruction or damage was occasioned by the accused; and proof that the destruction was willful and unlawful. In this case, it had not been shown that the property alleged to have been destroyed was owned by the interested party and that the unlawful destruction of the property had indeed been occasioned by the petitioners. Therefore, the insistence by the 1st Respondent to mount a prosecution against the Petitioners fundamentally violated the provisions of Articles 10 and 157(11) of the Constitution, 2010.

27. The petitioner argued that the prosecutorial powers of the DPP were not absolute and had to be exercised within certain laid down standards provided under the Constitution and the Office of Public Prosecution Act. The guiding principles under the Constitution were that a prosecutorial decision had to pay regard to the public interest, the interest of justice and the need to prevent and avoid abuse of the legal process. The High Court would interfere with a criminal trial in the Subordinate Court if it determined that the prosecution was an abuse of the process of the Court or because it was oppressive and vexatious. Counsel relied on the cases of *R vs Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 46 of 2001*, *Agnes Ngenesi Kinyua aka Agnes Kinywa v Director of Public Prosecution & Another [2019] eKLR*, *Gulam & Anor vs Chief Magistrate's Court & Anor [2006] eKLR* and the *case of Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69* to support this position.

28. Counsel submitted that the Petitioners had attached photographic evidence to demonstrate that the structural integrity of the building alleged to have been demolished was intact and the interested party had not bothered to controvert that evidence. He also observed that the respondents had claimed that the interested party had been assaulted when at the very minimum they had not availed a P3 form. They had also not demonstrated that they had summoned the petitioners. The respondents also talked of concluded investigations when no investigation report had been placed before this court to support that allegation. Counsel submitted that the Petitioners had a right to approach the court when their fundamental rights and freedoms had been infringed or threatened. Counsel urged the court to grant the application as a prima facie case with a high probability of success had been made out.

29. The respondents' counsel on the other hand argued that the prosecution had established the four limbs of a charge of malicious damage to property. They had shown that some property was destroyed; a person destroyed the property; the destruction was willful and the destruction was unlawful. He submitted that it was only the trial court which was competent to convict or acquit the petitioners who would have the chance to counter any allegations made against them. He insisted that the office of the 1st respondent was an independent office which did not act under influence as alleged by the petitioners. He submitted that the petitioners had an alternative remedy in the form of suing for damages if acquitted. Counsel argued that the respondents had a prima facie case against the petitioners and conservatory orders would only delay justice contrary to public policy.

30. He added that the petitioners had not demonstrated how a trial founded on proper investigations would violate their rights. The petitioners were alleging that there was a suit touching on the estate of their late father but **Section 193A** of the **Criminal Procedure Code** provided that the fact that a matter in issue in any criminal proceedings was also directly or substantially in issue in any pending court proceeding would not be a ground for stay, prohibition or delay of criminal proceedings. Counsel submitted that the 1st and 2nd petitioners had refused to heed the call to attend Suneka police station and give their side of the story. He urged that it was only fair that the petitioners' rights and the rights of the complainant to access justice, be left to follow the trial process whereby the petitioners would have the opportunity to challenge all the evidence presented against them, while enjoying the constitutional safeguards of a fair trial.

31. For his part, the interested party denied that the dispute involved a family feud and insisted that the matter related to criminal conduct punishable by law. He argued that it was clear that investigations pertaining to the matter had been concluded and an advisory to prefer charges against the suspects who committed the offence of malicious damage to property and assault rendered. Prosecution had commenced with one suspect known as Opanga Sylvanus Matundura being arrested and charged in Kisii Criminal Case No. 326 of 2021 but the petitioners had gone into hiding to avoid arrest. It was submitted that this court did not have jurisdiction to stop the ongoing process and that no application in the nature of certiorari or prohibition had been sought to stop the prosecution. It was also clear that the applicants had deliberately annexed photographs to mislead the court that the investigations and prosecution were prejudicial to their interest.

32. He questioned this court's jurisdiction to grant the orders sought as it would amount to interfering with an independent arm of government. He argued that the decision to charge the applicants with a criminal offence was a preserve of an independent office of the executive and this court could only interfere with such mandate if it was called upon to supervise and cross check any unprocedural manner in which the respondents may have conducted themselves in the discharge of their duty but an application seeking to stop what had already happened could not be issued in this case. It was argued that since investigations had been completed and prosecution commenced, the

application was overtaken by events. No orders in the nature of a writ had been sought to stay the criminal proceedings pending their determination and the court should not interfere with the discretionary powers conferred upon the respondents to discharge their mandate as required by the law.

ANALYSIS AND DETERMINATION

33. The issue that is for determination in the application before this court is whether the petitioners have met the conditions for grant of conservatory orders. The petitioners seek conservatory orders to restrain the respondents from summoning them, conducting investigations, charging them or prosecuting any of them for any charge in relation to the property comprised of the estate of the late Gilbert Moracha Atancha.

34. Conservatory orders are issued to prevent further violation of rights and fundamental freedoms and to preserve the subject matter pending the hearing and determination of the Petition. A party who seeks conservatory orders must demonstrate that his or her rights are under threat of violation; are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. (See **Centre for Rights Education and Awareness (CREAW) & 7 Others v Attorney General Nairobi High Court Petition No. 16 of 2011 [2011] eKLR**)

35. In the case of **Nubian Rights Forum & 2 others vs. Attorney General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae) Petition Nos. 56, 58 & 59 of 2019 [2019] eKLR**, the court identified the factors to be considered in determining whether to grant interim conservatory orders thus;

[92] The applicable principles for the grant of conservatory orders were detailed by Onguto J. in Board of Management of Uhuru Secondary School v. City County Director of Education & 2 Others [2015] eKLR. In summary, the principles are that the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether, to grant or deny a conservatory order.

36. The first hurdle that the petitioners have to pass is demonstrating that they have a prima facie case with a likelihood of success. A *prima facie* case is a case in which a court properly addressing itself to the material presented before it will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. (See **Mrao Ltd v First American Bank of Kenya Ltd & 2 others CA MSA Civil Appeal No 39 of 2002 [2003] eKLR**)

37. The 1st and 2nd petitioners and the interested party are siblings embroiled in a dispute relating to the distribution of the estate of their father, the late Gilbert Moracha Atancha. The petitioners contend that the respondents have commenced an ill-conceived prosecution against them on account of baseless allegations made by the interested party of malicious destruction to property and assault.

38. In response, the interested party explained that he had lodged a complaint at Suneka police station when the 1st and 2nd petitioners demolished a house he was constructing on the deceased's land parcel No. Wajare / Bomerenda / 57. He claimed that the petitioners had obtained orders of injunction in ELC Case No. 36 of 2020, which they had illegally used to demolish his house. The police officer tasked with investigating the matter swore an affidavit confirming the interested party's claim that his house had been demolished by the petitioners. He claimed that he had obtained statements from witnesses and had taken pictures of the site of the crime and as a result he had made the recommendation that the petitioners be charged with the offence of malicious prosecution to property.

39. The petitioners countered that the interested party was using the respondents to settle personal scores and give him an unfair advantage in the dispute relating to the deceased's estate. According to the petitioners, the charge of malicious destruction to property could not be sustained against them as the house that had allegedly been destroyed was still intact and did not belong to the interested party. They also dismissed the claim that the interested party was assaulted as no P3 form or other evidence had been availed to confirm the allegations. They denied being summoned by the respondents to give their side of the story and pointed out that no investigation report had been placed before this court to support the allegations made by the respondents and the interested party against them.

40. In support of their case that the court is empowered to prohibit the continuation of criminal prosecution if it is based on extraneous matters the petitioners cited the case of **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** where the court held;

“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 process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...”

41. Similarly, the Court of Appeal in the case of **Njuguna S. Ndung'u v Ethics & Anti-Corruption Commission & 3 others [2015] CIVIL APPLICATION NO. NAL 304 OF 2014 (UR 227/2014) eKLR** in allowing an application for conservatory orders to stop the arrest and prosecution of the applicant, held;

The powers of the court to prohibit or otherwise bar a prosecution in an appropriate case have long been recognized in this jurisdiction even before the coming of the new Constitution, most famously in GITHUNGURI vs. REPUBLIC (No 1) [1985] KLR 91 and GITHUNGURI Vs. REPUBLIC (No. 2) [1966] KLR 1. In the latter case, the Court (Madan Ag CJ, Aganyanya & Gicheru JJ) confronted squarely arguments akin to some made before us and we quote them only for the purpose of showing that as long as democracy and the rule of law endure (and long may they endure) citizens will always seek the protection of the courts and courts will hear them. Whether or not their pleas will be granted will depend solely on the strength of each individual case. It will be for the bench hearing the appeal to determine that issue, not for us.

There, as here, the court appreciated that the granting of injunctive or conservatory orders in matters such as this involves a temporary bar to the exercise of the statutory and constitutional mandates of law enforcement agencies, and this is not lightly done. In the final analysis, it is a balancing of interests in the search for justice that is fair, efficient, timely and cost-effective. We were not urged, and nor do we see, that any harm, prejudice or inconvenience would befall the respondents or weaken whatever case they have against the applicant were they to wait until his appeal, on constitutionality no less, is heard and determined.

42. From the foregoing authorities it is clear that the respondents' powers to prosecute are not absolute. The fact that a decision has been made to prosecute an accused does not bar the court from intervening if it is demonstrated that the criminal proceedings are an abuse of court process. In the exercise of their powers, the respondents must have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process as provided under Article 157 (11) of the Constitution.

43. The respondents in this case are categorical that they intend to have the petitioners charged. On the other hand, the petitioners have demonstrated that the basis of criminal charges that the respondents intend to pursue against them is the subject of Kisii Succession Cause No. 127 of 2020. This court is called upon to determine whether the respondents have exercised their powers in violation of the petitioners' constitutional rights. Without going into the merits of the case, I find that the petitioner has established a *prima facie* case which requires a response from the respondents.

44. As to the prejudice that they are likely to suffer, the petitioners claimed that if the orders sought were not granted, the 1st respondent and his agents would maliciously and unconstitutionally use the intended and already on course criminal process to harass, intimidate and demean them and settle score over the pending Succession Cause or achieve their malicious intent of violating or threatening with violation the fundamental rights and freedoms of the petitioners.

45. It would, undoubtedly, be prejudicial for the petitioners to be subjected to criminal proceedings during the pendency of the petition when there is a possibility that this court will find that the respondents acted in contravention of the petitioner's right. The respondents would not suffer any inconvenience nor would their case weaken were they to await the hearing and determination of the petition on its merits. The court in *Mohammed Gulam Hussein Fazal Karmali & Another v Chief Magistrate's Court Nairobi & Another [2006] eKLR* observed that the financial implications of undergoing a frivolous prosecution was sufficient prejudice for the court to intervene. The court held;

The rationale for prohibiting such proceedings is that for a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the Court (of its inherent power to prevent abuse of its process). On the score of cost alone, the exercise of the power will protect the accused person from expenditure on a trial on indictment which he or she cannot recoup"

46) For the reasons given above, the application for conservatory orders is hereby allowed as prayed, "A conservatory order do issue prohibiting and/or restraining the Respondents, their officials, employees, servants and/or agents or anybody working under or for them from summoning, investigating and/or further investigating, charging and/or prosecuting any of the petitioners for any charge arising from the complaints lodged by the interested party, or anyone else so long as the facts of the complaint point to any alleged acts arising at and/or are in relation to property composed of the estate of late Gilbert Moracha Atancha, pending the hearing and determination of this petition.

47) The costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT KISII THIS 28TH DAY OF SEPTEMBER, 2021.

R.E OUGO

JUDGE

In the presence of:

MR. Muga for the Applicants/ Petitioner

1st Respondent Absent

2nd Respondent Absent

3rd Respondent Absent

Mr. Nyambati for the Interested Party

Ms. Rael Court Assistant