



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.E176 OF 2021**  
**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF FUNDAMENTAL RIGHTS AND FREEDOMS AND THE**  
**CONTRAVENTION AND CONTINUED CONTRAVENTION OF THE CONSTITUTION**  
**UNDER ARTICLES 2(1), 3(1), 21, 22, 23, 27(1), (2), 33, 47, 49 (1a, b, c, d), 156, 245 and 258**

**BETWEEN**

**MICHAEL NJENGA KAMAU .....PETITIONER**

**VERSUS**

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

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

**THE HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**DANIEL GACHINGIRI MATU..... 4<sup>TH</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION.....5<sup>TH</sup> RESPONDENT**

**RULING**

1. By a notice of motion dated 8<sup>th</sup> September, 2021 the petitioner/applicant seeks the following orders:

1. .... spent

2. .... spent

3. .... spent

4. THAT the proceedings at Kiambu Chief Magistrate's Court Criminal case No. 14 97 of 2021 be and is hereby stayed pending hearing of this Petition.

5. ....spent

6. THAT the hearing of this Petition be expedited and the court be pleased to give directions at ex parte stage for an urgent hearing.

7. THAT the costs of this application be reserved.

2. The application is premised on the grounds on its face plus the supporting affidavit of the applicant sworn on 8<sup>th</sup> September, 2021. He has averred that his right to privacy and his rights as an arrested person under Articles 31 and 49 of the Constitution respectively, were violated by the actions of the 1<sup>st</sup> respondent's officers. He further depones that he was arrested by officers of the 1<sup>st</sup> respondent and booked at Muthaiga Police Station vide O.B. No.39/19/08/2021. He was thereafter processed and arraigned in court the next day for plea taking in Kiambu Chief Magistrate's Criminal Case No.1497 of 2021 for a charge of Forgery (MKN4). He was released on a cash bail of KShs.50,000/- and is to appear for hearing on 26<sup>th</sup> October, 2021.

3. He depones that prior to his arrest his constitutional rights were violated in order to give rise to the charges the subject of the criminal case. This he says was done through the confiscation of his private mobile phone, and access to his entire private call log, contacts, messages, phone calls and emails by the 1<sup>st</sup> respondent's officers.

4. He avers that the substance and the basis of the charge sheet is what he seeks to be declared unconstitutional and quashed. He further avers that the substratum of the petition will be lost if the hearing of the criminal case proceeds as scheduled hence the filing of this application.

5. The 4<sup>th</sup> respondent asked the court to rely on his replying affidavit to the petition sworn on 15<sup>th</sup> June, 2021. In it he depones that he is the Chief Executive Officer of Liaison Valuers Limited. That sometimes on 3<sup>rd</sup> May, 2021 he received a complaint against the petitioner in respect to an over valued valuation report by him. There were alterations in the document, among others. Upon being satisfied with the complaint he reported the same to the 1<sup>st</sup> respondent the next day. This culminated in several other internal investigations which led to the suspension of the petitioner and another by the company, on 7<sup>th</sup> May, 2021. The rest of the averments are on the main petition and I would not wish to discuss them here.

6. The 5<sup>th</sup> respondent filed 12 grounds of opposition through the prosecution counsel M/s Judy Kabillah. She has outlined the powers of the Director of Public Prosecution as set out under Article 157(6) and (10) of the Constitution. She has in grounds 3 – 9 stated that the case was well investigated by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the material placed before the 5<sup>th</sup> respondent. The evidence was reviewed as per the law and found to be sufficient with a realistic prospect of conviction. That there was a reasonable and probable cause to have the petitioner charged and this was not activated by any malice from the 5<sup>th</sup> respondent.

7. The 5<sup>th</sup> respondent contends that the accuracy and correctness of evidence or facts gathered in an investigations can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of the evidence adduced in support of the charges in the event of a criminal prosecution.

8. The application was argued orally. In his submissions Mr. Mutanda for the petitioner/applicant argues that the applicant has established a prima facie case to warrant issuance of the orders sought from the court. The 1<sup>st</sup> – 3<sup>rd</sup> respondent whose conduct of investigations is being challenged were served with the application but have not responded. He argues that the orders being sought are in the interim and they are not prejudicial and will not affect the 5<sup>th</sup> respondent's case in the event of an unsuccessful petition.

9. On the issue of conservatory orders counsel relied on the following cases:

(i) **Gatirau P. Munya v. Dickson Mwenda & others [2014] eKLR (Supreme Court)**

(ii) **Centre for Human Rights v. Attorney General [2011] eKLR.**

10. Counsel further submitted that the 4<sup>th</sup> respondent's replying affidavit was of no assistance to the respondents.

11. Mr. Waweru for the 4<sup>th</sup> respondent urged the court to dismiss the application. He argues that the applicant had a duty to establish a nexus between the petition and the criminal case. Further that the issue of the phone is what the petitioner is relying on yet he has not shown that the phone belongs to him.

12. Counsel submits that the issues being raised can be clearly dealt with by the trial court. Further that the petitioner has not proved breach of Article 31 of the Constitution.

13. M/s Kabillah for the 5<sup>th</sup> respondent wholly relied on the grounds of opposition. She submitted that the petitioner had failed to prove a prima facie case for grant of the orders sought.

14. In a rejoinder Mr. Mutanda clarified that the petition is based on Articles 31, 47 and 49 of the Constitution, and the trial court cannot grant the orders sought. He further added that they are not challenging the powers of the DPP but the manner the investigations were carried out.

### **Analysis and Determination**

15. I have duly considered the application, affidavits, oral submissions and the cited authorities. I find the issue for determination to be whether the criminal proceedings in question are an abuse of the court process and whether they should be stayed pending the hearing and determination of this petition.

16. The applicant's petition is grounded on a claim of violation of Articles 31, 47 and 49 of the Constitution. The only matter the applicant

has mentioned in this application relates to the investigation whereby his private phone was allegedly confiscated by police officers. He claims that the officers took the phone for purposes of extracting information which they did. It is not disputed that the 4<sup>th</sup> respondent is/was the petitioner's boss.

17. The charge sheet (MNK4) shows that the petitioner is charged before the Kiambu Chief Magistrate's court in Criminal Case No.1497 of 2021 where he faces two counts namely:

- i. Conspiracy to commit a felony namely forgery contrary to section 393 as read with section 349 of the Penal Code.
- ii. Forgery contrary to section 345 as read with section 349 of the Penal Code.

18. Plea in the criminal case has already been taken, and the matter fixed for hearing on 26<sup>th</sup> October, 2021. Mr. Mutanda relied on the case of **Gatirau Peter Munya** (supra). In the said case the Supreme Court of Kenya stated thus:

“[86] At the page 114 of the judgment of the Court of Appeal, the learned Judges make the following categorical statement:

*“The trial Judge could not properly make a determination on the weight to be given to exhibits DMK2, DMK3, and DMK4 in relation to the alleged irregularities and malpractices after striking these exhibits from the record and denying himself the opportunity to test in judicial proceedings the veracity of the allegations made. The allegations were substantial enough that the truth thereof could not rationally be established without proper inquiry to resolve the issue one way or the other. In striking out these exhibits, the trial judge breached the rules of natural justice and fair hearing in that no person should be condemned unheard”* [emphasis supplied].

19. In the case of **Centre for Rights Education and Awareness (CREAW) and 7 others Nairobi Petition No.16 of 2011** Musinga, J (as he then was) stated thus:

*“It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the petitioner's application and not the petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”*

20. The above position was echoed in the cases of:

- i. **Judicial Service Commission vs. Speaker of the National Assembly & another [2013]**.
- ii. **Makueni County Assembly v. County Executive Committee Member of Finance, Government of Makueni County & 3 others [2014] eKLR**.
- iii. **Martin Nyaga Wambora v. Speaker of the County Assembly of Embu & 3 others. Petition No.7 of 2014**.
- iv. **Coalition for Reform & Democracy (CORD) & another [2015] eKLR**.

21. Conservatory Orders are meant to maintain status quo/current status of affairs to ensure that circumstances do not change while a matter is before a court of law pending its decision. The issuance of such orders is not automatic or a matter of course. The above decided cases point out clearly what the court faced with such an issue should consider, before issuing such orders. The first requirement is for the applicant to demonstrate that he has a prima facie case with a high chance of success.

22. In this case the applicant says that the material relied on by the 5<sup>th</sup> respondent to charge him was unlawfully obtained from him. Under section 25 of the Evidence Act (Cap 80 Laws of Kenya), illegally obtained evidence is inadmissible. It is the duty of the person affected to raise the issue before the trial court and such court should make a determination on it.

Section 25A and Section 26 of the Evidence Act provide:

*“25(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person's choice.*

*26. A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.”*

23. I associate myself with the findings of Warsame, J (as he then was) in **Misc Application No.68 of 2011 Michael Monari & Another**

vs. **The Commissioner of Police & 3 others** where he held that:

***“It is not the duty of the court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of Criminal proceedings is to hear and determine a matter finally whether the accused has engaged himself in conduct which amounts to an offence and on that account is deserving punishment.”***

24. I therefore find that the trial court is adequately placed to deal with the issue of the allegedly illegally obtained evidence during the criminal trial. The claim against the 1<sup>st</sup> – 3<sup>rd</sup> respondents will therefore be adequately addressed by the trial court if raised by the applicant.

25. This court should not at this stage be seen to be investigating and sieving evidence which is due for presentation before the trial court.

26. The Criminal case is due for the first hearing on 26<sup>th</sup> October, 2021. In view of the nature of the charges several witnesses including the handwriting expert and/or document examiner will be testifying. There is no assurance that all witnesses will be availed and heard on that day, so as to render the petition before this court nugatory.

27. In my analysis I find nothing so urgent and substantive to make this court interfere with the hearing of the criminal case pending at the Kiambu Chief Magistrate’s court, by issuing a conservatory order. I will instead direct the parties to hasten the filing of their pleadings so that the petition is heard and disposed off as soon as possible.

28. The upshot is that the application fails and is dismissed. Costs shall be in the cause.

Orders accordingly.

**DELIVERED ONLINE, SIGNED AND DATED THIS 22ND DAY OF OCTOBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.**

**H. I. ONG’UDI**

**JUDGE OF THE HIGH COURT**