



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. E357 OF 2020**

**ANDREW OMBWAYO P/A**

**ANDREW OMBWAYO & CO ADVOCATES.....1<sup>ST</sup> PETITIONER**

**GEORGE ODHIAMBO.....2<sup>ND</sup> PETITIONER**

**WYCLIFF MUGA.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT**

**THE NATIONAL POLICE SERVICE/DIRECTORATE**

**OF CRIMINAL INVESTIGATIONS.....2<sup>ND</sup> RESPONDENT**

**ETHICS AND ANTI-CORRUPTION COMMISSION.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The 1<sup>st</sup> Petitioner, Andrew Ombwayo, is an advocate practicing under the name and style of Andrew Ombwayo & Co. Advocates. The 1<sup>st</sup> Petitioner acts or acted for the 2<sup>nd</sup> Petitioner, George Odhiambo, in *Nairobi HC Constitutional Petition No. 180 of 2020* and *Nairobi ELRC Petition No. 19 of 2020*. The 1<sup>st</sup> Petitioner is also the advocate of the 3<sup>rd</sup> Petitioner, Wycliffe Muga, in *Nairobi JR Applications Nos. 39, 88, 90 and 104 all of 2020*.

2. The 1<sup>st</sup> Respondent, the Director of Public Prosecutions (DPP), exercises State powers of prosecution in criminal cases before any court, other than a court martial, by virtue of Article 157 of the Constitution.

3. The 2<sup>nd</sup> Respondent, the National Police Service, is established under Article 243 of the Constitution whereas the Directorate of Criminal Investigations is a branch of the National Police Service established under the National Police Service Act, 2011.

4. The 3<sup>rd</sup> Respondent, the Ethics and Anti-Corruption Commission, is a constitutional commission established pursuant to Article 79 of the Constitution, with the status and powers of commissions under Chapter Fifteen of the Constitution. Its core mandate is to ensure compliance with, and enforcement of, the provisions of Chapter Six of the Constitution. For purposes of record, the claim against the 3<sup>rd</sup> Respondent was by consent of the Petitioner and the 3<sup>rd</sup> Respondent withdrawn on 9<sup>th</sup> December, 2020 with no orders as to costs.

5. At the time of filing the petition dated 2<sup>nd</sup> November, 2020, the petitioners also filed a notice of motion seeking orders as follows:

**(i) Spent;**

**(ii) THAT pending the hearing and determination of this application inter partes and or till further orders of this Court, a**

conservatory order be and is hereby issued stopping the Respondents from summoning, investigating, arresting, detaining, charging and prosecuting the petitioners, jointly and or severally, over documents prepared by the 1<sup>st</sup> Petitioner on behalf of the 2<sup>nd</sup> Petitioner and the 3<sup>rd</sup> Petitioner (on behalf of EAA Company Limited) and specifically signed by them, and lodged in NBI HC Constitutional Petition Nos. 34 & 180 of 2020, NBI ELRC Petition No. 19 of 2020, JR Applications Nos. 39, 88, 90 and 104 of 2020 regarding the Pre-Export Verification Of Conformity (PVOC) to Standards for Used Motor Vehicles, Used Spare Parts and Mobile Equipment public tenders and contracts given or undertaken by or through the Kenya Bureau of Standards, commenced or continued by the 2<sup>nd</sup> Respondent's letter dated 27<sup>th</sup> October 2020 or by the Respondents in any other manner whatsoever;

(iii) THAT pending the hearing and determination of the petition herein filed, a conservatory order be and is hereby issued stopping the Respondents from summoning, investigating, arresting, detaining, charging and prosecuting the petitioners, jointly and or severally, over documents prepared by the 1<sup>st</sup> Petitioner on behalf of the 2<sup>nd</sup> Petitioner and the 3<sup>rd</sup> Petitioner (on behalf of EAA Company Limited) and specifically signed by them, and lodged in NBI HC Constitutional Petition Nos. 34 & 180 of 2020, NBI ELRC Petition No. 19 of 2020, JR Applications Nos. 39, 88, 90 and 104 of 2020 regarding the Pre-Export Verification of Conformity (PVOC) to Standards for Used Motor Vehicles, Used Spare Parts and Mobile Equipment public tenders and contracts given or undertaken by or through the Kenya Bureau of Standards, commenced or continued by the 2<sup>nd</sup> Respondent's letter dated 27<sup>th</sup> October 2020 or by the Respondents in any other manner whatsoever;

(iv) THAT this application be heard together with the Notice of Motion dated 29<sup>th</sup> October 2020 lodged in NBI HC CONSTITUTIONAL PETITION NO. 180 OF 2020 and any further pleadings respecting that application;

(v) THAT costs of the application be to the petitioners;

(vi) THAT this Court shall deem just. (sic)

6. The 1<sup>st</sup> Petitioner's case is that he acted as an advocate and represented the 2<sup>nd</sup> Petitioner in *Nairobi High Court Petition No. 180 of 2020* and *Nairobi ELRC Petition No. 19 of 2020*. He also acted for the 3<sup>rd</sup> Petitioner in *JR Application No. 39 of 2020*, *JR Application No. 88 of 2020*, *JR Application No. 90 of 2020*, and *JR Application No. 104 of 2020*. He averred that some of these matters are still pending in various courts.

7. The 1<sup>st</sup> Petitioner averred that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents had indicated that they would investigate the issues raised by the 2<sup>nd</sup> Petitioner in *Nairobi HC Petition No. 180 of 2020*. According to the 1<sup>st</sup> Petitioner, the 1<sup>st</sup> and 2<sup>nd</sup> respondents, and possibly the 3<sup>rd</sup> Respondent, had, however, neglected to investigate the public interest issues raised in that case and instead diverted their efforts to investigating the petitioners regarding the affidavits prepared by the 1<sup>st</sup> Petitioner in his capacity as an advocate for and on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners in the stated cases, on allegation of suspected forgery of judicial documents or affidavits. The 1<sup>st</sup> Petitioner deposed that he had subsequently been summoned by the 2<sup>nd</sup> Respondent through a letter dated 27<sup>th</sup> October, 2020 to appear before the police on 2<sup>nd</sup> November, 2020 with the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners for purposes of investigations.

8. It is the petitioners' averment that the respondents' disregard and neglect of the public interest as regards the violation of consumer rights raised by the 2<sup>nd</sup> Petitioner, and by diverting their investigations to impugn the documents in support of the cases of the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners amount to abuse of their powers of investigation and prosecution. It is the petitioners' case that the abuse of power by the respondents is manifested by their attempts to stop the unveiling of violations against the public, to stop the fair hearing of the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners' respective cases and to intimidate them and their advocate from continuing to pursue cases involving the PVOC to standards tenders and contracts by the Kenya Bureau of Standards.

9. The petitioners further deposed that the investigations and threatened consequential prosecutions on criminal charges are being undertaken in violation of Article 157(11) of the Constitution which demands that prosecutorial powers be exercised in the public interest, in the interest of the administration of justice and with a view to preventing and avoiding abuse of legal process.

10. The petitioners also averred that there is no duty placed upon private persons under Section 27(1) of the Office of the Director of Public Prosecutions Act, 2013 or under any other provision of the law, to help the respondents with investigations. Additionally, the petitioners deposed that as an advocate, the 1<sup>st</sup> Petitioner has no legal obligation to tender his clients or any other person for that matter to the respondents for purposes of investigation or prosecution for alleged criminal offences.

11. The petitioners further stated that the actions by the respondents against them violate the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners' rights under Article 50(1) and (2) of the Constitution as they seek to deter them from pursuing their respective suits in the public interest or in their representative capacity as the investigations will have the effect of impugning the entire documents that they have signed, owned up to, and are before the courts.

12. The petitioners therefore urged this Court to grant the prayers sought and exercise its judicial authority without unreasonable restrictions as provided under Article 22(3) of the Constitution. They accused the respondents of breaching Order 19 of the Civil Procedure Rules, 2010. The petitioners asserted that they had suffered injuries as a result of the respondents' actions.

13. In response to the application, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed grounds of opposition dated 16<sup>th</sup> November, 2020. They opposed the application on the grounds that the reliefs sought by the petitioners are meant to curtail or prevent them from performing their constitutional and statutory duties; that the petitioners have not demonstrated a *prima facie* case and what injustice they are bound to suffer if the reliefs sought are not granted; that the petitioners have failed to demonstrate how the 1<sup>st</sup> and 2<sup>nd</sup> respondents have acted in excess of their statutory powers or in violation of the rules of natural justice; and that it is in the interest of justice that the application be dismissed as the petitioners

are acting on presumptions and without evidence of imminent arrest and prosecution by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

14. The petitioners through submissions dated 7<sup>th</sup> December, 2020 argued that they have presented an application deserving of grant of conservatory orders so as to protect them from suffering prejudice. In this regard, they relied on the case of **Leina Konchellah v The Chief Justice & another, Nairobi HC Constitutional Petition No. E291 of 2020**.

15. The petitioners also submitted that the impending criminal investigations and charges against them were being used to intimidate them from pursuing their civil cases. The petitioners conceded that Section 193A of the Criminal Procedure Code, Cap. 75 does indeed allow for the simultaneous prosecution of civil and criminal cases over the same facts. They, however, relied on the case of **Lalchand Fulchand Shah v Investment and Mortgages Bank Ltd [2018] eKLR** to argue that where the criminal process is being used to intimidate a party to abandon the civil claims, the court should stop such proceedings so as to avoid the abuse of the criminal justice system. They also urged that by dint of Article 157(11) of the Constitution, this Court can stop criminal proceedings if those proceedings are oppressive, vexatious and an abuse of the court process. The petitioners hence asked this Court to stop the criminal process commenced by the respondents against them.

16. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed submissions dated 10<sup>th</sup> December, 2020 and submitted that pursuant to Article 245 of the Constitution as well as Section 35 of the National Police Service Act, Cap. 84, the 2<sup>nd</sup> Respondent has the powers to investigate the petitioners. They relied on the case of **Dr Alfred N. Mutua v The Ethics and Anti-Corruption Commission & others, Misc. Application No. 31 of 2016** in support of their argument. The 1<sup>st</sup> and 2<sup>nd</sup> respondents further stated that unless the petitioners prove that the 2<sup>nd</sup> Respondent was acting *ultra vires*, investigative powers should not be curtailed.

17. The 1<sup>st</sup> and 2<sup>nd</sup> respondents further submitted that the 1<sup>st</sup> Respondent has prosecutorial powers bestowed upon him by Article 157 of the Constitution. They stated that in discharging his duties, the 1<sup>st</sup> Respondent is required to act independently and not under the control of anybody. They submitted that the 1<sup>st</sup> Respondent makes the decision to charge based on the available evidence and in public interest.

18. According to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the doctrine of separation of powers requires that the various arms of government should be allowed to discharge their duties without any interference from the other arms of government.

19. The 1<sup>st</sup> and 2<sup>nd</sup> respondents concluded their submissions by stating that the petitioners' application was premature, an abuse of the court process and only meant to circumvent the criminal justice system by preventing the respondents from discharging their constitutional and statutory duties.

20. I have perused the pleadings and submissions of the parties and it emerges that the main issue for the determination of this Court in this ruling is whether the petitioners have successfully made a case for grant of conservatory orders.

21. The Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** identified the grounds for issuance of conservatory orders as follows:

**“[86] “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”**

22. The principles guiding the grant of conservatory orders were also outlined in **Board of Management of Uhuru Secondary School v City County Director of Education & 2 others [2015] eKLR** thus: “25. Foremost, the applicant ought to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice...”

**26. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis...**

**28. Once the applicant has established to the court’s satisfaction a prima facie case with a likelihood of success the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of Rights...**

**29. Thirdly, flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice...**

**30. The fourth principle which emerges from the various cases and is well captured by the Supreme Court of Kenya in the case of Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR is that the court must consider conservatory orders also in the face of the public interest dogma.**

**31. Finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The court must consequently consider all relevant material facts and avoid immaterial matters. The court will consider the applicants’ credentials, the prima facie correctness of the availed information, whether the grievances are genuine, legitimate and**

**deserving and finally whether the grievances and allegations are grave and serious or merely vague and reckless.”**

23. I will adopt the principles outlined in the cited case law in considering the present application. On whether the petitioners have established a *prima facie* case with the likelihood of success, I note that the petitioners’ case is that there are civil cases pending in court and those cases will be interfered with by the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ actions. The petitioners further argue that the investigations have the probable effect of having the documents filed by the petitioners in those cases expunged. The 1<sup>st</sup> and 2<sup>nd</sup> respondents, however, deny these allegations and assert that the petitioners’ case is based on apprehension and without any evidentiary basis.

24. In my view, the issues raised in the instant petition are pertinent issues which the Court that will hear the petition will have to interrogate in determining whether the respondents conducted themselves as is required of them under the Constitution and enabling statutes. It would therefore be difficult to state that the petitioners have not established a *prima facie* case without going into detailed analysis of the positions of the parties. It is also important to state that a detailed analysis is not possible at this stage considering that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are yet to file substantive replies to the petition. I will thus proceed on the material placed before this Court by the petitioners and conclude that a *prima facie* case has been established.

25. The next step is to assess whether failure to grant conservatory orders will render the main case nugatory, whether failure to grant the orders will prejudice the petitioners and whether it is in the public interest to grant conservatory orders.

26. The petitioners argue that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have resorted to investigating them against the backdrop of public interest cases and a complaint by the 2<sup>nd</sup> Petitioner which the police had indicated that they would investigate. Further, that they challenge the attempt by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to impeach the advocate-client confidentiality between the 1<sup>st</sup> Petitioner on the one hand and the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners on the other hand.

27. The 1<sup>st</sup> and 2<sup>nd</sup> respondents on their part argue that the orders sought by the petitioners are meant to circumvent the criminal justice process and deter them from performing their respective statutory and constitutional functions.

28. I have looked at the evidence placed before the Court and it is not clear that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents are actuated by malice so as to amount to abuse of their authority. The allegation that the petitioners are relying on forged documents in pursuit of what they claim is public interest litigation is serious and must be dealt with by the agencies empowered by the law to deal with such issues. Stopping the 2<sup>nd</sup> Respondent from investigating the matter and asking the 1<sup>st</sup> Respondent not to prosecute the matter, if there is sufficient evidence to do so, will mean that the petitioners will prosecute their claims based on suspect documents. Such action will undermine the tenets of justice.

29. The petitioners assert that the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ actions are meant to deter them from pursuing public interest matters. The question then is why would they be scared if their documents are clean. It is more detrimental to the interests of justice to allow the petitioners to prosecute cases premised on suspect documents than to allow the 1<sup>st</sup> and 2<sup>nd</sup> respondents to execute their constitutional and statutory functions. Nothing has been placed before this Court by the petitioners to show that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are acting outside their mandates.

30. It is also important to observe that there are sufficient safeguards in our laws to protect the petitioners and to ensure that they will enjoy their rights to a fair trial if they will subsequently be charged in court. In this regard, the petitioners really have no reason to fear as they will be vindicated by investigations and the outcome of any trial arising therefrom. It is therefore clear from the contested facts in this case that it has not been shown with certainty that the intended investigation is *mala fides*.

31. As to whether the failure to grant the conservatory orders will render the petition nugatory, I am of the view that the petition can be heard and determined before the investigations are concluded and any prosecution commenced. The petition will not therefore be rendered nugatory by allowing the 1<sup>st</sup> and 2<sup>nd</sup> respondents to carry out and conclude their work. The outcome of the investigations of the 1<sup>st</sup> Respondent will be subjected to review by the 2<sup>nd</sup> Respondent before a decision to prosecute is made.

32. The investigations will disclose whether the 1<sup>st</sup> Petitioner stuck to his lane as is expected of a professional advocate or veered off his lane into the mucky world of crime by aiding the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners to procure forged documents in order to lodge their cases. The 2<sup>nd</sup> Respondent cannot therefore at this stage be said to have violated the principle of advocate-client confidentiality. No prejudice will be suffered by the petitioners if the 1<sup>st</sup> and 2<sup>nd</sup> respondents are allowed to perform their legitimate functions.

33. Owing to what I have stated in this ruling, it follows that the application for conservatory orders is without merit. The application is therefore dismissed.

34. The issue of costs shall abide the hearing and determination of the petition

**Dated, signed and delivered virtually at Kabarnet this 26<sup>th</sup> day of November, 2021.**

**W. Korir,**

**Judge of the High Court**