REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

PETITION NO. 10 OF 2017

1. JOSEPH OMWENGA.....1ST PETITIONER

2. CAREEN NYABOKE NYAKERIGA.....2ND PETITIONER

3. DIANA BONARERI NYANCHOKA.....3RD PETITIONER

4. JAMES MANYARA ATUTI.....4TH PETITIONER

5. AGNES KWAMBOKA MACHINI.....5TH PETITIONER

6. HEZEKIAH OKENYURI ONDIEKI.....6TH PETITIONER

7. RISPER KANINI OMAE.....7TH PETITIONER

8. JANE GESARE ONSENSE.....8TH PETITIONER

9. GLADYS KWAMBOKA ARUGA.....9TH PETITIONER

10. CAREEN OGACHA OKENYURI.....10TH PETITIONER

11. FREDRICK MATOKE MASENO

(Suing as next friend of PAMPHIL NYAKEYA MATOKE).....11TH PETITIONER

VERSUS

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

2. THE PRINCIPAL MAGISTRATE COURT AT KEROKA.....2ND RESPONDENT

RULING

What is before me for ruling is the application by the petitioners filed simultaneously with the petition herein. The application is for a conservatory order pending the hearing of the petition. There is also a prayer that the 1st respondent be compelled to furnish the applicants with the investigation reports giving rise to their prosecution in a Criminal Case No. 1239 of 2016 Keroka Principal Magistrates Court.

The applicants were on 27th June 2017 granted interim conservatory orders by the High Court sitting in Kisii which were to lapse upon the hearing and determination of this application. The application was canvassed by way of written submissions. I have considered the submissions at length. In the case of **Centre for Rights Education and Awareness (CREAW) & 7 Others Vs. Attorney General [2011] eKLR** Musinga J, as he then was stated: -

> ***"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."***

Likewise, I shall be very cautious not to delve into a detailed analysis of facts and law at this stage.

The principles that should guide this court in determining whether it should grant the conservatory order were enunciated in the case of **Gatirau Peter Munya Vs. Dickson Mwenda Githinji & 2 Others [2014] eKLR** where the Supreme Court held: -

> ***"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 adjudicatory authority of the court, in the public interest.***
>
> ***Conservative orders, therefore are not, unlike interlocutory injunctions linked to such private party issues on the "prospects of irreparable harm occurring during the pendency of a case; or "high probability of success" in the applicant's case for order of stay.***
>
> ***Conservatory orders consequently should be granted on the inherent merit of the case bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributal to the relevant causes."***

The applicants' contention if I understand them properly is that they ought not to have been lumped up together as not all of them were invigilators in the room where the 11th respondent allegedly cheated in the KCPE; that the Kenya National Examination Council (KNEC) carried out its own investigations in the case without relying on information received from supervisors to determine if indeed there was copying and further that by the Kenya Examinations Council allowing the 11th respondent to continue with the examination and by subsequently releasing his results it meant there was no cheating and the charges preferred against the applicants at the Keroka Senior Principal Magistrates Court are flippant. The applicants also contend that the charges brought five months after releasing the results amount to double jeopardy, harassment, are against public interest and are also an abuse of legal process. It is the applicants' contention that if indeed there was any cheating in the examination then the 11th applicant's results in that examination ought to have been cancelled which was not the case. It is their case that the charges against them are an affront to justice and are a violation of their rights to fair administrative action, protection from double jeopardy and freedom of security and they ought to be halted. They contend that only by granting a conservatory order can this court protect them from a flippant criminal trial and they stand to be gravely prejudiced if the orders sought are not granted.

Considering that what must guide this court is the public interest, the constitutional values and the proportionate magnitudes – **see Gatirau Peter Munya Vs Dickson Mwenda Ginthinji & 2 Others (supra),** I am not persuaded that this is a proper case for issue of a conservatory order. What the applicants are seeking is for this court to halt an ongoing criminal case where several witnesses have testified. **Article 157 (1) of the Constitution** vests the prosecution of criminal cases in the office of the Director of Public Prosecutions. The **sub-article** states: -

> ***"10. The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority."***

Whereas I do agree that this court has jurisdiction to interfere in deserving cases where it is shown that the Director of Public Prosecutions has acted otherwise than in the public interest or has abused the legal process it is my finding that issues raised by the applicants are issues that should be properly raised in the trial court and that to grant the order sought would amount to usurping the powers of the Director of Public Prosecutions. Whether releasing the 11th applicant's results while maintaining he was caught cheating is an admission that he was not culpable is an issue that should be determined in the trial. There is no allegation that there is danger of the trial court violating the right of the applicants to a fair trial. In **Republic Vs. Attorney General & 4 Others Exparte Diamond Hashim Lalji and Ahmed Hasham Lalj; [2014] eKLR** the court observed: -

> ***"Our criminal process entails safeguards which are meant to ensure that an accused person is afforded a fair trial and the trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the court may well proceed to acquit the accused. Our criminal process provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words unless the applicants demonstrate that the circumstances of the impugned process render it impossible for the applicant to have a fair trial, the High Court ought not to interfere with the trial simply on the basis that the applicants chances of being acquitted are high. In other words a judicial review court ought not to transform itself into a trial court and examine minutely whether or not the prosecution is merited."***

The above holding was made in a judicial review proceeding but my finding is that the same would also apply to a constitutional application such as the one before me. Without going into the facts of the case I find and hold that the applicants have not demonstrated that the circumstances they are faced with in the criminal prosecution render it impossible for them to have a fair trial. It has also not been demonstrated that the act of the Director of Public Prosecutions in prosecuting the applicants is an abuse of the legal process. It has not been shown that the purpose of charging/prosecuting the applicants is to achieve any purpose other than the vindication of a criminal offence. Moreover, it is obvious from a reading of the submissions by the Counsel for the applicants that what is being asked of this court is to determine the issues in the petition at this interlocutory stage.

In the upshot, I decline to grant a conservatory order against the respondents. The interim orders are hereby vacated. To hasten the disposal of the petition, parties are directed to appear before this court on the **3rd** day of **October 2019** to take directions. The costs of this application shall be in the cause. It is so ordered.

Dated, signed and delivered in Nyamira this 29th day of July 2019.

E. N. MAINA

JUDGE