



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kanee v Director of Public Prosecution (Constitutional Petition
10 of 2022) [2023] KEELC 21969 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21969 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CONSTITUTIONAL PETITION 10 OF 2022**

**MD MWANGI, J
NOVEMBER 30, 2023**

BETWEEN

PETER MWANGI KANEE PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

*(In respect of the Petitioner's application dated 26th April, 2021 seeking
conservatory orders to stay further proceedings in criminal case No. 4398/2020)*

RULING

Background

1. The Petitioner commenced the proceedings herein by way of the Petition dated 26th April, 2021 in the High Court. The matter was subsequently transferred to this court on the 14th July, 2022. Alongside the Petition, the Petitioner filed an application under Certificate of Urgency seeking for orders that;
 - a. Spent;
 - b. Spent
 - c. The Honourable Court be pleased to issue conservatory orders staying further proceedings in Criminal Case Number 4398 of 2020 pending the hearing and final determination of the Petition.
 - d. The Honourable Court be pleased to give such directions as it deems fit for the expeditious hearing and determination of the Petition filed herein.
 - e. That the costs of this application be provided for.
2. The application is premised on the grounds on the face of it and restated in the Supporting Affidavit of Peter Mwangi Kanee, the Petitioner herein, sworn on the 26th April, 2021. The Petitioner deposes that



on 30th October, 2020 he filed a suit being ELC No. E228 of 2020; Peter Mwangi Kanee -vs- Jaspal Singh Birdi and 2 Others before this court. In the said proceedings, he sought among other prayers, a declaration that he is the proprietor of all that parcel of land known as L.R. No. 12458/8 amongst other prayers. The matter is still pending hearing and determination.

3. The Petitioner avers that he arrested and charged before the Magistrates' Court at Milimani in Criminal Case No. 4398 of 2020; Republic versus Peter Mwangi Kanee. He was charged with the offence of forgery of certificate of title for L.R No. 12458/8 contrary to the provisions of Section 350(1) of the Penal Code with intent to defraud Davinder Singh Viridi.
4. The deponent avers that during his incarceration, the Directorate of Criminal Investigation, Land Fraud Unit seized his private Motor Vehicle and broke into his home without a court order and confiscated his original Certificate of Lease for the parcel of Land known as L.R No. 12458/8. He cannot therefore use it to prepare his defence in the criminal case.
5. He deposes that it is his belief that the filing of the Environment and Land Court case led to his arraignment on a charge of forgery whose intention is to criminalize a purely civil dispute. He asserts that his prosecution is tainted with ulterior motives and is thus void ab initio and contravenes his fundamental rights and freedoms. He opines that the Defendants in ELCC/E228 of 2020 are using the criminal justice system to force him into abandoning his civil claim which he believes is otherwise meritorious.
6. The Petitioner, in his Petition and in the application under consideration contends that the Respondent's proceedings, decisions and orders are unconstitutional for the reason that the Respondent confiscated his original title without a court order thereby violating his right to a fair trial under Article 10 and 50(2) of the Constitution. Further that by commencing criminal proceedings against the Petitioner during the pendency of ELCC/E228/2020, the Respondent violated the Petitioner's constitutional rights under Article 50 and there is a likelihood that the courts may make different determinations over the same issue.
7. It is therefore only fair that a conservatory order be issued staying further proceedings in the Criminal Case Number 4398 of 2020 pending the hearing and final determination of the Petition herein.

Respondent's Replying Affidavit

8. The Respondent opposed the application by the Petitioner through the Replying Affidavit of Chief Inspector, Brenda Omwenga deposed on the 11th May, 2021.
9. The deponent avers that she is an investigator currently attached the Directorate of Criminal Investigations, Land Fraud Investigations Unit(LFIU). She deposes that it is the lawful duty of the DCI to conduct criminal investigations and processes pursuant to Section 35 of the National Police Service Act. She affirms that the DCI acts independently under no command or control of anyone in commencing or continuing with investigations.
10. The deponent avers that on 20th September, 2020, Davinder Singh Viridi, lodged a complaint at the DCI Headquarters after the Petitioner attempted to erect a perimeter wall around the suit property. Subsequently, investigations were commenced and found out that L.R No. 209/12458/5 is actually owned by four tenants in common.
11. She states that they then requested for more particulars of the said parcel of land from the Ministry of Lands. The Ministry responded and provided a search certificate for L.R No. 12485/5 indicating that the four tenants in common were the rightful owners thereof.



12. The deponent avers that the Letter from Nairobi City County confirmed that there were inconsistencies in the Petitioner's Title. The Officers then sought a clarification from the Ministry of Lands which again confirmed that the registered owner of the suit property was Sterling Developers Limited and not the Petitioner.
13. In the course of their Investigations, the Officers discovered that the Petitioner had purportedly sold the land to Asahabito Enterprises Limited which information was confirmed by the Ministry of Lands. The Investigating Officers then recorded Witness Statements of Mr. Davinder Singh Viridi and that of his other three co-tenants.
14. The deponent deposes that upon receipt of documents from the Ministry of Lands, they submitted the documents to the Document Examiner being a Certificate of Lease and the Specimen Signature of the alleged Land Registrar one Mr. Billow together with his Stamp impression. The Document Examiner's Report showed that the Two documents were made by different instruments.
15. Based on the above findings, the Investigation Officers decided that there was sufficient evidence to charge the Petitioner hence the commencement of the Criminal proceedings referred to herein.
16. Following the above findings, the Respondent's process in arraigning the Petitioner was in accordance with the law and is validly within the intent of Criminal prosecution. As such there is no violation of any of the Petitioner's constitutional rights nor abuse of the criminal process as alleged. As such the application is unmerited and should be dismissed with costs.

Court's Directions

17. The Court directed that the application be dispensed with by way of written submissions. None of the parties complied. The Petitioner instead file submissions to the main Petition rather than the instant applicant. The court therefore proceeded without the benefit of submissions from parties herein.

Issues for determination

18. I have carefully considered the application and the response thereto, and I find that the main issues that arise for determination are;
 - a. Whether the Petitioner has satisfied the principles applicable in applications for conservatory orders and;
 - b. whether the orders sought ought to issue as prayed.

Analysis and determination

A. Whether the Petitioner has satisfied the principles applicable in applications for conservatory orders

19. The court in the case of *Invesco Assurance Co. Ltd vs. MW (Minor suing thro' next friend and mother (HW))* [2016] eKLR defined 'conservatory orders' as follows: -

“A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.”



20. In the case of *Judicial Service Commission v Speaker of the National Assembly & Another* [2013] eKLR, the Court had the following to say about the nature of conservatory orders: -

“Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”

21. In view of the foregoing, there is need to exercise caution in dealing with applications for conservatory orders so as not to venture into the arena of the main Petition. Ibrahim, J (as he then was) in *Muslim for Human Rights (Milimani) & 2 Others vs Attorney General & 2 Others* (2011) eKLR rightly so rendered himself as follows: -

“The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.”

22. In *Speedex Logistics Limited & 2 Others vs Director of Criminal Investigations & 3 Others* [2018] eKLR, the Court emphasized on the need for caution as follows: -

“In considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. Accordingly, in determining this application, this Court is not required, and is in fact forbidden from making any definite and conclusive findings on either fact or law.”

23. The locus classicus is the Supreme Court decision in *Gatirau Peter Munya -v- Dickson Mwenda Kitbinji & 2 Others* (2014) eKLR. At paragraph 86, the Court stated as follows: -

“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 Applicant’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 courses.”

24. In *Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Other* Nairobi High Court Constitutional Petition No.154 of 2016 (2016) eKLR the Court summarized the three principles for consideration as follows:



- a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution;
 - b. Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
 - c. The public interest must be considered before grant of a conservatory order.
25. I will proceed to analyze the Petitioner’s application against the principles identified above.
26. Courts have settled the definition of a prima facie case in respect of civil applications. In the case of *Mrao vs. First American Bank of Kenya Limited & 2 Others* (2003) KLR 125 the Court defined a *prima facie* case to mean:
- “ In a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself 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 later.”
27. Without venturing into the merits of the Petition, suffice it to say that the Constitution and the law variously provide for the investigative powers of the police. Such powers ought to be sparingly interfered with, and if all, should be in the clearest of cases more so at an interlocutory stage.
28. The Director of Public Prosecutions derives his powers from Article 157 of the *Constitution*. Article 157(4), (6), (10) & (11) of the *Constitution* provides as follows:

“ 157

- (4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.
- (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—
 - a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
 - b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
 - (c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).



- (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.
- (11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall 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.”

29. Section 6 of the [Office of the Director of Public Prosecutions Act](#) on the other hand states as follows:

- “6. Pursuant to Article 157(10) of the Constitution, the Director shall—
- a. not require the consent of any person or authority for the commencement of criminal proceedings;
 - b. not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and
 - c. be subject only to the Constitution and the law.”

30. I have considered the Petitioner’s allegations against the Respondent as well as the contra-position taken by the Respondent in this matter. It is not in dispute that the Petitioner has been charged with a criminal offence in a court of law and the proceedings are on- going. The Respondent avers that that they conducted investigations and on the basis of those investigations decided that there was sufficient evidence to charge the Petitioner.

31. The Petitioner on the other hand is apprehensive that the investigations will compromise the fair hearing of the civil case; ELC No. E228 of 2020; [Peter Mwangi Kanee -vs- Jaspal Singh Birdi and 2 Others](#) in which he seeks for orders that he is the proprietor of all that parcel of land known as LR. No. 12458/8. He argues that the filing of the Environment and Land Court case is actually what led to his arraignment on a charge of forgery of document. He is of the view that the said prosecution is intended to criminalize a purely civil dispute. According to him, his prosecution is tainted with ulterior motives and is thus void ab initio and contravenes his fundamental rights and freedoms. He alleges that the Defendants in ELCC/E228 of 2020 are using the criminal justice system to force him into abandoning his civil claim which he believes is otherwise meritorious.

32. Section 193A of the [Criminal Procedure Code](#), Cap. 75 of the Laws of Kenya provides 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 proceedings.

33. Mrima J in the case of [Amir Lodges Ltd & another vs Mohammed Omar Shariff & Another](#) [2022] eKLR cited the Court of Appeal case in [Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others](#) Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR where the court held that:

“While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised



responsibly, in accordance with the laws of the land and in good faith.It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court.”

34. The Learned Judge went further to state that:

“From the discussions in the superior Courts decisions and the other comparative decisions from foreign jurisdictions, the rule of the thumb in respect of concurrent criminal and civil proceedings based on similar set of facts and circumstances is that the criminal case ought to proceed unless it can be demonstrated that the prosecution of the criminal case will either result to infringement of the rights and fundamental freedoms of the accused persons or will lead to the contravention of the Constitution.”

35. For a Court to so halt a criminal case or investigations, a Petitioner ought to demonstrate that the prosecution of the criminal case will either result to infringement of his rights and fundamental freedoms or that it will lead to the contravention of the Constitution. It is not enough to simply allege the pendency of a civil claim. In this case, the Petitioner merely states that his prosecution is tainted with ulterior motives and that the Defendants in the ELC matter are using the Criminal justice system to force him into abandoning his civil claim. The Petitioner has not corroborated the allegations; neither has he demonstrated how the criminal proceedings will prejudice the civil case.

36. In the light of the foregoing, I am of the considered view that the Petitioner has not demonstrated any prima facie case to justify the issuance of the orders sought. Accordingly, I dismiss the Petitioner’s application dated 26th April 2023. The costs of the application shall be in the cause.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2023.

M. D. MWANGI

JUDGE.

In the virtual presence of:

N/A for the Petitioner

N/A for the Respondent

M. D. MWANGI

JUDGE.

