Law Society of Kenya & 3 others v Inspector General of Police & 4 others (Constitutional Petition E009 of 2025) [2025] KEHC 236 (KLR) (Constitutional and Human Rights) (23 January 2025) (Ruling)

Neutral citation: [2025] KEHC 236 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E009 OF 2025

EC MWITA, J

JANUARY 23, 2025

BETWEEN

LAW SOCIETY OF KENYA ..... 1ST PETITIONER

JUSTUS MUTUMWA ..... 2ND PETITIONER

MARTIN MWAU ..... 3RD PETITIONER

KARANI MUEMA ..... 4TH PETITIONER

AND

INSPECTOR GENERAL OF POLICE ..... 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 2ND RESPONDENT

CABINET SECRETARY, MINISTRY OF INTERIOR AND NATIONAL ADMINISTRATION ..... 3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS ..... 4TH RESPONDENT

HONOURABLE ATTORNEY GENERAL ..... 5TH RESPONDENT

RULING

1. This is a ruling on the application dated 14th January 2025 seeking to set aside orders issued on 8th January 2025 and reiterated on 13th January 2025 and leave to file a response to the application dated 8th January 2025. The application is supported by affidavits sworn on 14th January 2025 by Gilbert Otiende (SSP) and Amos Omuga (AIGP).

2. The application is premised on the grounds that: that the 1st and 2nd respondents were not served with the application and orders issued on 8th January 2025 directing them to release the 2nd to 4th petitioners or to produce their bodies in court.

3. The 1st and 2nd respondents stated that petitioners purported to haver served them by email, but there was no evidence that the email addresses used were their (1st and 2nd respondents') last confirmed email addresses and that the affidavit of service by Noel Odiwour sworn on 13th January 2025 was not proof of service.

4. The 1st and 2nd respondents maintained that they were not served with the orders and application as such, they were not aware of those orders and the date of 13th January 2025. They further argued that the orders issued on 8th January 2025 are final yet they were heard.

5. In his supporting affidavit, Mr. Otiende, SSP, director of legal services at the National Police Service stated that on 13th January 2025, the 1st respondent learnt through the media that the court had issued orders on 8th January 2025, directing the 1st and 2nd respondents to unconditionally set the 2nd to 4th petitioners at liberty. The 1st respondent instructed counsel to peruse the court file, ascertain the true position and obtain pleading to enable him (1st respondent) respond as he had not been served.

6. On perusing the file, counsel ascertained that orders were issued directing the 1st and 2nd respondents to release the 2nd to 4th petitioners. In the alternative, the court issued an order of habeas corpus that bodies of the 2nd to 4th petitioners be produced in court on 13th January 2025. On 13th January the court, relying on the affidavit of service by Noel Odiwour, issued orders on failure by the 1st respondent to attend court.

7. According Mr. Otiende, SSP, although service was effected through email, the affidavit of service did not contain a deposition that the email address used was the 1st respondent's confirmed email address. He gave the 1st respondent's email address as igsecretary@nationalpolice.go.ke.

8. Mr. Otiende, SSP, deposed that he had been advised by counsel that the expert orders issued on 8th January 2025 were issued contrary to express provisions of article 50 of *the constitution*. They were issued without hearing the 1st respondent and are final leaving only compliance for determination unless they are set aside. He maintained that the petitioners' application was not served on the 1st respondent.

9. Mr. Omuga, AIGP and Director of Legal Services at the Directorate of Criminal Investigations, also swore an affidavit in support. That affidavit contains similar depositions to those by Mr. Otiende, SSP. Mr. Omuga, AIGP, denied that the 2nd respondent had been served or was aware of the orders and application. He denied that the email address used was the 2nd respondent's confirmed email address and gave the 2nd respondent's confirmed email address as director@dci.go.ke.

10. According to Mr. Omuga, AIGP, there is real danger of grave miscarriage of justice if the court proceeded with the orders issued on 8th January 2025 without the participation of the 2nd respondent.

11. The petitioners filed a replying sworn by the Florence Muturi, the 1st petitioner's Chief Executive Officer (CEO.) Ms. Muturi stated that the application has been made in bad faith; is based on a misconception and is intended to delay determination of the matter. According to Ms. Muturi, the court issued orders directing the 1st and 2nd respondents to release the 2nd to 4th petitioners immediately and unconditionally and, in the alternative, produce their bodies before the court.

12. Although the 1st and 2nd respondents were served on 9th January 2025 through their known email addresses, they did not comply with orders. Ms. Muturi deposed that the 1st and 2nd respondents had previously been served with pleadings in Petition No. E714 of 2024 through the same email addresses where they are represented by the same without raising any issue. They cannot now claim that they were not served.

13. According to Ms. Muturi, the 4th respondent was also served on the same day through an email address obtained from its website and attended court on 13th January 2025. Existence of other email addresses is not sufficient ground for holding that there was no service.

14. Ms. Muturi maintained that the application is a deliberate attempt to evade, obstruct and delay the course of justice which is prejudicial to the 2nd to 4th petitioners. The 1st and 2nd respondents' refusal to comply with court orders continues to risk the lives of the 2nd to 4th petitioners. If the application is allowed, the 2nd to 4th petitioners' fundamental rights will be further compromised.

15. During the hearing of the application, Mr. Okello appeared together with Mr. Nyawa and Mr. Odiwour for the petitioners; Mr. Nyamodi with Mr. Barasa for the 1st and 2nd respondents; Mr. Omari with Mr. Nyaberi for the 3rd respondent; Mr. Manda with Mr. Barasa M., Mr. Jami, Mr. Achochi and Mr. Sonye for the 4th respondent and Mr. Kuria with Mr. Wachira for the 5th respondent.

16. Mr. Nyamodi moved the application and urged the court to set aside the orders and grant the 1st and 2nd respondents leave to file a response to the petitioners' application. He maintained that the 1st and 2nd respondents were not served and that there was no proof of such service as required by law. Mr. Nyanodi further argued that the orders were final in nature and left nothing in the application for hearing.

17. According to Mr. Nyamodi, the affidavit of service did not contain evidence of service. He argued that service through email pursuant to Order 5 rule 22B, has to be to the confirmed email address. The affidavit of service has no averment that the email addresses used were the confirmed email addresses of the 1st and 2nd respondents. Such an averment can only be in an affidavit of service and not in a replying affidavit as the petitioners have done.

18. Mr. Nyamodi again argued that service is deemed to have been effected when the sender receives a delivery receipt. No delivery receipt was attached to the affidavit of service. Counsel relied on the decision in Sifuna & Sifuna Advocates v Hon. Patrick Simiyu Khaemba (ELC Misc. Civil Application No. 14 of 2021 (paragraphs *18* and *19*).

19. Mr. Nyamodi asserted that the advocate did not state in the affidavit of service where he got the email addresses. The affidavit of service did not also state which email was used to serve which respondent. He relied on the decision in Henkel Polymer Company Ltd t/a Henkel Chemicals E A v personal care Industries Ltd [2024] KEELC 3794 (KLR) paragraph *17* (c), that it is not enough to file an affidavit of service only stating that service was by email. It was Mr. Nyamodi's position that the email addresses used were not the 1st and 2nd respondents' confirmed email addresses.

20. Regarding the orders, Mr. Nyamodi asserted that the orders issued on 8th January 2025 are final in nature and the only remaining issue is compliance and were issued without giving the 1st and 2nd respondents an opportunity to be heard. He stated that he had instructions that the 1st and 2nd respondents have a response and urged the court to set aside the orders so that the 1st and 2nd respondents can file a response.

21. Mr. Kuria supported the application on the grounds of public interest. He argued that the right to be heard, just like habeas corpus, is non derogable. He took the view, that if the orders are not set aside, the 1st and 2nd respondents will have been condemned unheard. He relied on the decision in Republic v Kithure Kindiki , Cabinet Secretary Interior and Coordination of National Government exparte Katiba Institute & others [2024] KEHC 1649 (KLR)- (paras 48 50, 52 and 53) and urged the court to allow the application.

22. Mr. Nyawa, opposed the application on behalf of the petitioners. He argued that the contention that the orders issued on 8th January 2025 are final and will lead to a miscarriage of justice is not correct. According to counsel, article 23 of *the constitution* gives the court jurisdiction to grant appropriate orders that enforce *the constitution* and fundamental freedoms. He cited the decision in Gitirai Peter Munya v Dickson Mwnda Kithinji [2014] eKLR, (para 86) that conservatory orders are intended to enforce constitutional principles.

23. Mr. Nyawa again argued that rule 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, (the Mutunga Rules), allows the court to issue conservatory or interim orders. The commensurate relief at the time the application was considered where the allegation was that the 2nd to 4th petitioners were missing, was to ordered their immediate release and, in the alternative, for the 1st and 2nd respondents to appear in court. The 1st and 2nd respondents cannot allege violation of the right to be heard when they are supposed to appear in court. He relied on the decision in Andrew Ndaba Karanja & another v Ambassador Simon Nabukwesi ELC No. E201 of 22 (para 66) citing the decision in Union Insurance Co of Kenya Ltd v Ramzan Abdul Dhanji (Civil Application No. 179 of 1998, that the law is not that a party must be heard in every litigation but that he must be given an opportunity to be heard.

24. Regarding public interest, Mr. Nyawa argued that public interest lies in favour of maintaining the orders so that there is strict observance of *the constitution*. He cited article 238 as reiterating the principles of national security to include; respect to the rule of law, human rights and fundamental freedoms as mentioned in article 10. When the right to life is threatened, it is for the officer to come to court to explain.

25. On service, Mr. Nyawa maintained that the 1st and 2nd respondents were properly served and that the decisions relied on are distinguishable and inapplicable to this case. According to counsel, the decisions are on service in civil disputes and not on service upon public officers or public institution whose contacts are publicly available. He pointed out the deposition by the 1st petitioner's CEO in the replying affidavit that the 1st and 2nd respondents had previously been served through the same email addresses.

26. On the affidavit of service, he argued that rule 14(2) of the Mutunga Rules provides what an affidavit of service should contain. Civil Procedure rules come in where there is a gap which is not the case here. Mr. Nyawa maintained that there was no evidence that the email addresses used do not belong to those public offices. Although article 245 establishes the office of the 1st respondent, he is the commander of the National Police Service. Where service is effected to that office, the 1st respondent is deemed to have been served.

27. Mr. Nyawa relied on Shah v Mbogo [1967] EA 116 that setting aside is a discretionary power which should be exercised to obviate hardship, but not to obstruct justice. In this case, the 2nd to 4th petitioners' families want to know where their kins are. Mr. Nyawa maintained that article 165(3) does not give the court jurisdiction to allow violation of *the constitution*. He urged the court to dismiss the application.

28. In a brief rejoinder, Mr. Nyamodi contended that the decision in Shah v Mbogo (supra) should be read together with that of Express (Kenya) Ltd v Manju Patel [2001] eKLR so that where it is shown that service was not effected, the exparte orders should be set aside as a matter of right. He maintained that reliance on rule 14 of the Mutunga Rules is an afterthought since the affidavit of service cited Order 5 rule 22B and C.

29. Mr. Nyamodi asserted that everyone is entitled to the article 50 protection since service is the gateway to a fair hearing. He argued that when the court considered this matter on 13th January 2025, it relied on the affidavit of service. The purpose of service was to allow the respondents an opportunity to be heard. He cited the decision in Patrick Omondi Opiyo t/a Dallas Pub v Shaban Keah & another *CA No. 68 of 2017* (par 19) that service of summons accords the sued party the opportunity to be heard before any orders are issued against him/her.

30. Mr. Nyamodi contended that service was not effected through the 1st and 2nd respondents' last confirmed email addresses as required by the rules. He relied on paragraph 11 of the two supporting affidavits which gave the 1st and 2nd responses confirmed email addresses. He also pointed out that the Inspector General is a constitutional office established under a different article of *the constitution* from that of the National Police Service. Service to the 1st respondent could not be effected through the National Police Service. He cited the decision in Philomena Mbete Mwilu v British Broadcasting Corporation (HCC E165 OF 2022-para 23) on the importance of service.

31. Mr. Nyamodi maintained that a process server should attach a delivery notice and that article 50 places the duty on the court to ensure fair hearing and service is important in that regard. He stated that the argument that the emails are in the public domain should have been in the affidavit of service and not in the replying affidavit.

32. According to Mr. Nyamodi, before the order for habeas corpus was issued, the 1st and 2nd respondents should have been heard. He maintained that the allegations were that the 2nd to 4th petitioners were missing, but the court ordered that they be produced. He told the court that one of the 1st and 2nd respondents' possible responses could be that the 2nd to 4th petitioners are not in their custody. He urged the court to allow the application.

33. I have considered the application and arguments by the parties on whether or not to set aside the orders issued on 8th January 2025. The 1st and 2nd respondents' argument was that they were not served with the application and the orders because the email addresses used were not their last confirmed email addresses. Further, that the affidavit of service did not contain evidence of service, namely; a delivery notice. The petitioners maintained that the 1st and 2nd respondents were properly served with the orders and application.

Service

34. From the affidavit of service sworn by Mr. Noel Odiwour one of the petitioners' advocates on 13th January 2025, service on all the respondents was done by email. The affidavit of service listed the email addresses used to effected that service. The listed emails appears in the order of the parties. The 1st and 2nd respondents were served through nps@nationalpolice.go.ke and director@cid.go.kerespectively, which they have disputed, arguing that those email addresses are not their last confirmed email addresses. They have relied on rule 22B of Order 5 of the Civil Procedure Rules to argue the rule requires service by email to be done through the last confirmed email address of the person being served.

35. Rule 22B provides as follows:

1. Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used E-mail address.

2. Service shall be deemed to have been effected when the Sender receives a delivery receipt.

3. ....

4. An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service.

The rule requires service by electronic mail to be sent to the defendant's "last confirmed and used E-mail address."

36. My reading of the rule is that the last confirmed and used email address refers to a situation where parties have been in communication through email prior to filing of the suit so that service will be effected to the last email address used in such communication. The last used email address is deemed to be the confirmed email address.

37. However, where there has not been communication between the parties, like in this case, there cannot be the last confirmed and used email address as required by the rule. That should not mean a party cannot be served by email as long as the party serving demonstrates that the email address used belongs to the party served, or the party served can be found through the email used. A strict reading of the rule would make it impossible to serve a respondent thus, defeat justice. Where the email address is doubtful, the rules provide for other modes of service which can be resorted to. Service by email should not be attempted unless the party serving is pretty sure that the email being used belongs to the party being served.

38. In this case, the 1st and 2nd respondents, as the petitioners correctly argued, are public officers holding public offices whose contacts, including emails addresses, are publicly available. It is not necessary that there should have been communication between the parties so that there can be a last confirmed and used email address. The publicly available email address can be used as long as it belongs to that officer, office or the institution being served.

39. Mr. Nyamodi argued that the 1st respondent is established under a different article of *the constitution* from that establishing the National Police Service. In his view, the 1st respondent could not be served through the mail belonging to the National Police Service. Though an attractive argument, it is unconvincing. It is true that the National Police Service is established under article 243 while article 245 establishes the office of the Inspector general of the National Police Service to exercise independent command of the National Police Service. That is, the Inspector General is the overall head of the National Police Service. Although established under different article of *the constitution*, Inspector General cannot be delinked from the National Police Service because he is the head of the National police Service. In that respect, service through the email of the National Police Service cannot be disregarded since there is no doubt who the Inspector General of the National Police Service is, being the head of the service.

40. The decisions relied on by the 1st and 2nd respondents correctly capture the essence of service which is to bring to the attention of the person sued, the existence of the suit and give him/her an opportunity to respond and defend himself/herself. Where service has been done through the email of the National Police Service, the service cannot, but bring the pleadings to the attention of its head and commander. I am not persuaded by the 1st respondent's argument that the email address used was not his confirmed email address, or that he was not served.

41. Similarly, the 2nd respondent is the head of the Directorate of Criminal Investigations. Pleadings were served through the email address of the directorate that the 2nd respondent heads and the directorate had an obligation to bring to the 2nd respondent's attention as the head and person sued, the documents served. I am not equally persuaded that the email address used was not his confirmed address, or that he was not served.

42. The 1st and 2nd respondents further argued that the affidavit of service did not attach a delivery receipt as required by rule 22B (4). I have read the affidavits in support of the application. There is no deposition that the pleading served through the emails were not received. The contention was that the email addresses used were not the last confirmed email addresses of the 1st and 2nd respondents. The 1st and 2nd respondents can only raise the issue of delivery receipts where they admitted that the email addresses belonged to them, but denied receiving the emails forwarding the pleadings.

43. Mr. Otiende, SSP deposed that he is the director of Legal Services at the National Police Service but did not deny that the service received the emails forwarding the documents. Similarly, Mr. Omuga, AIGP, deposed that he is the Director of Legal Services of the 2nd respondent. He did not also deny that the directorate received the documents.

44. In the replying affidavit, Ms. Muturi deposed that the 1st and 2nd respondents had on a different occasion been served with pleadings in Petition No. 714 of 2024 through the same email addresses but did not raise the issue being raised now yet they are represented by the same counsel in both petitions. Such deposition cannot be ignored because it confirms the email addresses last used to serve the 1st and 2nd respondent; the pleadings were received and that is why they are represented in court in that petition. Where service is done through the same email addresses the the 1st and 2nd respondent had been served, they are estopped from changing positions to allege that those email addresses are not their last confirmed addresses.

45. In the circumstances, I am persuaded that the 1st and respondents were served with the application and the orders issued on 8th January 2025.

Setting aside

46. The 1st and 2nd respondents urged the court to set aside the orders issued on 8th January 2025 and reinforced on 13th January 2025. The reason advanced in seeking to set aside those orders is that they were issued without hearing them. This, the 1st and 2nd respondents argued, denied them an opportunity to be heard and amounted to condemning them unheard. It also violated their constitutional right to a fair hearing.

47. The petitioners countered that the court had jurisdiction to issue orders that would enforce *the constitution* and that the 1st and 2nd respondents were given an opportunity to appear before court.

48. This court was moved under urgency through an application and petition dated 8th January 2025. The application and petition alleged that the 2nd to 4th petitioners who were arrested by plain clothes police officers on 16th December 2024 and bundled into unmarked vehicle had not been presented before any court or released. Their whereabout was unknown and their families' effort to trace them had come to nothing. So were the reports made at Mlolongo and Athi River police stations. The petitioners sought, among other, an order of habeas corpus directing the respondents to produce bodies of the 2nd to 4th petitioners before court. They also sought an order directing the 1st respondent to appear before court and explain the where abouts of the 2nd to 4th petitioners.

49. The court considered the application and issued a conservatory order directing the 1st and 2nd respondents to immediately and unconditionally release those petitioners. The court issued an alternative order of habeas corpus, directing the 1st and 2nd respondents to produce bodies of those petitioners in court and assigned a return date for that purpose, being 13th January 2025.

50. On 13th January 2025, only the 4th respondent attended court. The rest of the respondents did not attend court and the orders had not been complied with. The court then set the matter for further directions on 17th January 2025 and reiterated the orders issued on 8th January 2025.

51. On 14th January 2025, the 1st and 2nd respondents filed this application seeking to set aside those orders, arguing that they were not served with the orders; that they were not heard before the orders were issued and that their right to a fair hearing is threatened.

52. This court was moved under various articles of *the constitution*, including articles 23, 25, 49 and 50, in the Bill of Rights. When so moved, this court has jurisdiction under article 23 (1) as read with article 65(3) to hear an application for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. In considering such an application, the court may grant appropriate relief, including a conservatory order.

53. Rule 23 of the Mutunga Rules provides that despite any provision to the contrary, a judge before whom a petition is presented "shall hear and determine an application for conservatory or interim orders. Rule (2) allows the court to dispense with service of the application. The rule confers on the court unfettered discretion to grant conservatory or interim orders.

54. The facts disclosed in the application and petition were that although the 2nd to 4th petitioners were arrested by police officers on 16th December 2024 and bundled into a vehicle, they had not been produced in court; seen or heard of more than 14 days later, in a violation of their rights and fundamental freedoms guaranteed under *the constitution*. The court considered the urgency of the matter and issued orders it considered appropriate to secure the petitioner's liberty or have their bodies presented before it. Under those circumstances, the court did not have to order that the 1st and 2nd respondents be served and heard first as that would defeat the essence of the urgency and the effectiveness of the orders in upholding *the constitution*, the rule of law, human rights and fundamental freedoms.

55. The 1st and 2nd respondents also argued that the orders the court issued had not been sought. Well, the first order to release the three petitioners immediately was informed by the fact that having been arrested and held beyond the time permitted by *the constitution* any further act of holding them was a violation of *the constitution*. Indeed, the court pointed out that "Any continued holding of the four subjects is a violation of *the constitution*, the supreme law of the land and unmitigable." Directing that the respondents be heard first would not be in tandem with constitutional principles. The court had to act to prevent continued violation of *the constitution* and the petitioners' rights and fundamental freedoms.

56. The court also issued an order of habeas corpus directing the 1st and 2nd respondents to present bodies of the 2nd to 4th petitioners to court. The order was intended to b an inquiry to determine whether the petitioners were still alive or dead since they were no longer being lawfully held. The order was a protection against the 3 petitioners' illegal confinement. Habeas corpus was one of the orders the petitioners had sought in the application and the court did not have to hear the 1st and 2nd respondents first in the face of clear violation of *the constitution*, as that would compromise the 2nd, 3rd and 4th petitioners' rights and fundamental freedoms.

57. During the hearing, Mr. Nyamodi argued that although the petitioners did not say that the 1st and 2nd respondents were holding the 2nd , 3rd and 4th petitioners, the court still issued orders directing the 1st and 2nd respondent to release them. A reading of the pleadings (application, the supporting affidavit and the petition) shows that the petitioners were clear that the 2nd to 4th petitioners were arrested ("abducted") by armed police officers, bundled into a vehicle and driven away.

58. The 1st respondent "exercises independent command over the National Police Service and perform any other functions prescribed by national legislation. (art 245). The 1st respondent's core constitutional mandate is that of "command" over the National police service and its officers. This is also reiterated in section 8 of the *National Police Service Act* (the Act). The 1st respondent is therefore responsible for the discipline and actions of the officers under his command. The people who arrested and bundled the 2nd to 4th petitioners into a vehicle were police officers under the 1st respondent's command.

59. Section 24 of the Act provides for the functions of the Kenya Police Service which include;

(b) maintenance of law and order;

(d) protection of life and property;

(e) investigation of crimes;

(g) prevention and detection of crime;

(h) apprehension of offenders;

(i) enforcement of all laws and regulations with which it is charged and

(j) performance of any other duties that may be prescribed by the Inspector-General under the Act or any other written law from time to time.

Other than the duties specifically stipulated in the Act, the only other duties police officers can perform are those prescribed by the 1st respondent.

60. On the other hand, section 28 of the Act, establishes the Directorate of Criminal Investigations which is under the direction, command and control of the 1st respondent. The Directorate is headed by the Director of Criminal Investigations, the 2nd respondent, but he is responsible to the 1st respondent. The functions of the directorate are outlined in section 35 of the Act. They include; (b) undertaking investigations on serious crimes, including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime, among others.

61. It follows that only officers under the command of the 1st respondent and the Directorate headed by the 2nd respondent, are authorized by law to apprehend offenders. The statute uses the words "apprehend" which also means to arrest. The pleadings are clear, that the three missing petitioners were arrested by police officers who are under the 1st respondent's command and the 2nd respondent's directorate responsible for investigating cybercrime.

62. The 1st and 2nd respondents' argument that there was no averment that they were holding the three petitioners yet the court issued orders against them, is implausible in the circumstances of this petition. They lead police officers authorized by law to arrest "offenders." They know what their officers routinely do.

63. An application to set aside orders calls for exercise of judicial discretion which, like all discretions, must be exercised judicially to avoid hardship but not the obstruct justice. As Sir Charles Newbold P stated in the well known case of Mbogo v Shah [1968] EA 93, the test on whether to exercise judicial discretion

to set aside a judgment or order, is whether in light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment or orders and if necessary, upon terms to be imposed.

64. Mr. Nyamodi argued from the bar that he has instructions that the 1st and 2nd respondents have a response. He further stated, again from the bar, that one of the possible responses could be, that the 1st and 2nd respondents do not have the 2nd to 4th petitioners in their custody. I have read the affidavits in support of the application. There is no deposition on what the 1st and 2nd respondents' response is. It is therefore not clear whether they have a response or not and what that response is, if any.

65. On his part, Mr. Kuria argued that it is in the public interest to allow the application so that the 1st and 2nd respondents can be heard. Whereas the right to be heard is a cardinal principle, counsel seemed to put more premium on the rights and interests of the 1st and 2nd respondents above those of the 2nd to 4th petitioners and the constitutional command regarding the rights of arrested persons to, among others;

> be informed of the reason for their arrest; be allowed to communicate with an advocate and other person whose assistance is necessary and be brought before court as soon as possible reasonably possible, "but not later than twenty-four hours after being arrested."

66. Mr. Nyamodi submitted, quite correctly, that the duty to justify denial of the right to be heard was on the court. Indeed, the Supreme Court observed in Shollei v Judicial Service Commission & another (Petition 34 of 2014) [2022] KESC 5 (KLR), that the burden to justify a limitation of a fundamental right or freedom lies with the person limiting the right.

67. The issue here is about competing rights. In Jack Mukhongo Munialo & 12 others v Attorney General & 2 others, [2018] eKLR, this court observed that in considering the limitation, the court must bear in mind that there is no superior right and take into consideration factors, including; the need to ensure that enjoyment of rights and fundamental freedoms by one individual does not prejudice the rights of others, which "calls for balancing of rights under the principle of proportionality because rights have equal value and, therefore, maintain the equality of rights."

68. Addressing the issue of conservatory orders in Gitirai Peter Munya v Dickson Mwenda Njoka & 2 others [2014] eKLR, the Supreme Court stated that conservatory orders 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.

69. All persons are entitled to, and enjoy equal rights under *the constitution*. No one has superior rights over the other. The court is required to apply the proportionality test, balance rights and, where necessary, give priority to the rights of the most vulnerable person. In this petition, the fate of the 2nd to 4th petitioners who were arrested by police officers on 16th December 2024 is unknown. They were not produced before court as demanded by *the constitution* and their relatives do not know where they are. Securing the lives and safety of the 2nd to 4th petitioners was and must remain of priority to this court.

70. In the circumstances, considering the facts of this petition and the constitutional command that an arrested person be produced in court within 24 hours; noting that the 2nd to 4th petitioners who were arrested by police officers under the command of the 1st respondent have not been presented to any court of law or released, in violation of clear words of *the constitution*, it will not be in public interest to allow the application. Allowing the application will also negate the essence of the conservatory orders granted and the effectiveness of habeas corpus as a constitutional remedy. The orders were intended to uphold, protect and defend *the constitution* and enforce the Bill of Rights.

71. For the above reasons, the application dated January 14, 2025 is declined and dismissed. Costs shall abide by the result of the petition.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JANUARY 2025

E C MWITA

JUDGE