



REPUBLIC OF KENYA



**KENYA LAW**  
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**Maloba v Shiboka; Bonface & another (Interested Parties) (Criminal Petition E003 of 2024) [2025] KEHC 1597 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1597 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL PETITION E003 OF 2024  
SC CHIRCHIR, J  
FEBRUARY 20, 2025**

**BETWEEN**

**BEATRIC BETSEY MALOBA ..... PETITIONER**

**AND**

**PATRICK OPONGA SHIBOKA ..... RESPONDENT**

**AND**

**ANTONY MABONGA BONFACE ..... INTERESTED PARTY**

**BONIFACE MUSI ..... INTERESTED PARTY**

**RULING**

1. The Applicant herein, has filed a petition before this court seeking, among others, a declaration that her rights to property under Article 40 of the *constitution* are being violated through her prosecution in Butali chief Magistrate's court criminal case No. E1052 of 2024. At the same time she filed the present Notice of motion seeking orders as follows:
  1. (Spent)
  2. (Spent)
  3. That conservatory orders do issue against the Respondent halting the prosecution or further prosecution of the Petitioner on any charges in respect of Butali SPM Criminal Case No. E1052/2024; Republic v Beatrice Betsey Maloba pending the hearing and determination of the petition.
2. The Application is supported by the affidavit of the Applicant and the grounds appearing on the face of the Application.



### **The Applicant's Case**

3. It is the Applicant's case that she was arrested on 24/7/2024 following a complaint by the 1st Interested Party and later charged with conspiracy to defraud and obtaining by false pretences. She states that she does not know the people who are purportedly her accomplices, and are reported to have been charged, and have pleaded guilty, in Butali SPN Criminal Case No. E1043/2024.
4. The Applicant argues that she has a prima facie case against the respondent and therefore deserving of conservatory orders in that she is being persecuted on account of having filed suit to stop the 1st Interested Party from trespassing in her property, which suit was filed pursuant to her right to property under Article 40 of the constitution.
5. She also states that the prosecution has been mounted in breach of evidential and public interest considerations as laid down in the Guidelines on the decision to charge 2019. She argues that the criminal justice system is being used to achieve a collateral civil purpose as the Petitioner has already sued the 1st Interested Party for trespass, in the Environment and Land court at Kakamega.
6. The Applicant states that she has never received any payment of Kshs. 7,000,000 allegedly paid to her alleged agent as consideration for allegedly selling her land. She states that the prosecution is meant to intimidate a property owner who has never signed any documents of sale with the 1st Interested Party; has never negotiated with him or received money from him. That in any event the respondent has already reigned on the persons who defrauded him and which persons have been charged in Butali Criminal Case No. E1043/2024 as aforesaid.
7. The Applicant states that the issue between the parties falls under the jurisdiction of the civil court as it is clear that the 1st interested party failed to carry out due diligence, before entering into the alleged land dealings.
8. The Applicant further states that the prosecution is aimed at sanitizing an otherwise null transaction over her Land Parcel No. Kakamega / Soy/3202.
9. She states that her Petition will be rendered nugatory and she will suffer irreparable harm as she is 85 years old and in poor state of health.; that there is no need to make her keep attending a trial that has no legal foundation; that she will spend a lot of her time and money on unnecessary litigation; that there is no need for her to keep attending a trial that has no legal foundations; that she will spend a lot of time and money on unnecessary litigation, and finally that the prosecution will dent her integrity and public perception.

### **The Respondent's Case**

10. For the Respondent, the investigation officer in the criminal case, one Isaac Ogutu swore the Replying Affidavit. He states that the investigation confirmed that one Peter Kayumba Misiko (hereafter referred to as Peter) received a total of Kshs. 7,000,000 from the 1st Interested Party. That the said Peter had in his possession Bank deposit slips which show that he deposited some money to the Applicant's Account. Upon investigation of the Applicant's Account it emerged that Peter had deposited a total of Kshs. 1,200,000 to the Applicant's Account.
11. He further stated that the Applicant was aware about the fact that the 1st Interested Party had been in occupation of the land for at least two years, yet the Applicant did not raise any complaint during that period.



12. The investigator further states that the Applicant and her accomplices were well known to each other as there is evidence that the two were in constant communication when the investigation was going on.
13. The Respondent states that the applicant has failed to show how the respondent has violated her constitutional rights in the investigation and prosecution of the Applicant; that in any event the correctness and accuracy of the evidence will only be tested in the criminal trial, and stopping the prosecution at this stage will undermine the rule of law and public interest in the prosecution of criminal offences.

#### **1ST Interested Party's case**

14. The Interested Party has stated that he purchased land from one Peter; that Peter had indicated to him that he had purchased it from the applicant. In the course of negotiation, he and Peter met the Applicant; that the Applicant instructed him to pay money to Peter and that he paid a total of Kshs. 7,000,000 to Peter. He further states that he had planted beans on the land which were almost due for harvesting and the Applicant was aware about his occupation of the land in question.
15. He further states that when the transaction began to falter, he approached the Applicant's Advocate, Mr Kigamwa, who advised him to enter into a fresh Agreement with the Applicant.
16. It is further stated that the investigations conducted met the legal standard; that stopping the prosecution will undermine the rule of law and public interest in the prosecution of cases. It is further submitted that the Applicant's co-accused in the criminal case are entitled to fair trial and the prosecution should therefore not be halted.

#### **Applicant's Submissions**

17. The applicant has referred to the principles upon which conservatory orders may be granted as set out in the case of *Gatirau Peter Munya v Dickson Mwenda* (2014) eKLR.
18. The Applicant reiterates that the criminal justice system is being abused to persecute the Petitioner who is exercising her right to evict the 1st Interested Party, who is a trespasser to her property through the Civil Procedure, and from violating her right to occupation and use of her property in furtherance to her right to property under Article 40 of the *constitution*.
19. That the prosecution has been mounted in breach of ethical and public interest consideration as laid down in the Guidelines On the decision to charge 2019 particularly paragraph 4 (B) (1) and 4 (b) (2) of the said guidelines, which require considerations of the admissibility of evidence and demands of public interest and whether there is a realistic prospect of conviction from the evidential perspective.
20. The Applicant further submits that the criminal justice system is being put on motion for collateral civil purpose as the Petitioner has already instituted suit before a superior court over acts of trespass by the 1st Interested Party. In this regard, the Applicant has cited the case of *Commissioner of Police & Anor v Kenya Commercial Bank & 4 Others* (2013) eKLR.
21. It is further submitted that there is no evidence showing that the alleged Kshs. 7,000,000, the subject matter of the criminal prosecution, was ever given to the Applicant. That to mount a prosecution in the absence of such evidence is not in the public interest as it would be an imprudent use of public resources.
22. The applicant further submits that the criminal justice system is being used to cause injustice to the petitioner as the respondent has already arraigned the person who defrauded the 1st Interested Party



through Criminal Case No. E1043/2024; that the said case has already been concluded and there is no need to waste judicial resources trying a concluded matter.

23. It is further argued that the 1st Interested Party is seeking to use the Criminal prosecution to sanitize dealings over Title No. Kakamega/Soy/3202 when such Title no longer exists.
24. It is contended that the Petition will be rendered nugatory on grounds that the Applicant is 85 years of age and the prosecution will dent her long record when there is no basis for it; that her health is deteriorating and there is no need for her to be subjected to the trouble of attending court; that being in court means spending a lot of money and time which can be saved and finally that prosecuting her will have unnecessary adverse consequences on her integrity and public perception.
25. The Applicant has also relied on the case of *Joram Mwendwa Acuantai v Chief Magistrate Nairobi* (Court of Appeal No. 228/2003) where it was held that where prosecution amounts to an abuse of the court process and is oppressive and vexatious the High Court has the powers to intervene and stop such abuse.

### **1st interested party's submissions**

26. On the principles that govern the issuance of conservatory orders, the interested party has relied on the cases of *Nubian Rights Forum & 2 others v AG & others* (2019) e KLR and The *Board of management of Uhuru secondary school v City county Director of Education & 2 others* (2015) e KLR
27. On whether the Applicant has established a prima facie case to warrant the orders being sought, the interested party submits that Peter has already pleaded guilty and has explained how he shared the money with the Applicant's son; that the Applicant has not made any rebuttal to the Bank statements showing that Peter deposited KSh. 1,200,000 in the Applicant's Bank Account; that the evidence available is sufficient to prosecute the Applicant and her co-accused.
28. The interested party denies that the prosecution is being set in motion for collateral civil purpose stating that the Applicant only filed the Land case at the Environment and Land court upon getting to know that a report had been made to the police on the criminal complaint.
29. On the Applicant's advanced age, it is submitted that advanced age is not a factor for consideration when one is facing a criminal charge; that it has not been demonstrated that in commencing prosecution of the Applicant, the respondent has infringed or violated any constitutional provisions.
30. It is finally submitted that allowing prosecution to proceed will only uphold the rule of law and reinforce public trust in the judicial process.
31. The respondent had not filed submissions by the time of writing this Ruling.

### **Analysis and Determination**

32. I have considered the rival pleadings and submissions of the parties. From the facts presented, the 1st Interested Party herein entered into an agreement with one Peter Khayumbe Mikiso to purchase the whole of that land parcel known as Kakamega/Soy /3202. Peter told the interested party that he had bought the land from the Applicant.
33. The transaction aborted when Peter could not complete it. It is stated that by then, Peter had received KShs. 7,000,000 from the 1st Interested Party. Peter disappeared, but was later traced and charged with some others in Butali Criminal Case no. E1043/2024, for the offence of fraud and obtaining by false pretences. They pleaded guilty to the charge.



34. The respondent then proceeded to prefer charges against the Applicant herein on grounds that she was an accomplice to peter. She has been charged with the 2nd interested party who is said to have been her surveyor during the transaction for fraud and obtaining by false pretences.
35. It also emerged from the evidence that the Applicant has sued the 1st interested party for trespass in Kakamega ELC case No. E007 of 2024.
36. The Applicant has this petition pleading violation of her rights under Article 47,56 and 157, of the *constitution*, and she has filed the present Application seeking for conservatory orders, staying of criminal proceedings in Butali Chief Magistrate’s court Criminal case No. E 1043 pending the hearing of the aforesaid petition. It is her plea that she has a prima facie case and that her petition will be rendered nugatory if the criminal trial in Butali is not stayed.
37. Conservatory orders are injunctive in nature but as held by the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kethingi* (2014) eKLR Conservatory orders bear more decided public connotation. The court stated: “Conservatory orders bear a more decided public- law connotation; for these are orders to facilitate ordered functioning within public Agencies, as well as to hold the adjudicating authority of the court, in the public interest. Conservatory orders therefore, are not, unlike Interlocutory Injunctions linked to such private party issues as “the prospect of irreparable harm” occurring during pendency of a case; or “ high probability of success in the Applicant’s case for orders of stay. ,consequently should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitude and priority levels attributable to the relevant causes”. ( Emphasis added) .
38. The same principles were set out in the case of *Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others* (2015) eKLR cited by the 1st Interested Party where the Judge held that the Applicant must;
  - a. Demonstrate a prima facie case with likelihood of success.
  - b. That in the absence of conservatory orders the Applicant will be prejudiced;
  - c. Whether granting or denial of the orders will enhance constitutional values and object of a specific right or freedoms.
  - d. whether if the conservatory orders is denied, it will render the petition nugatory.
  - e. The court should consider public interest and relevant material facts in exercising its discretions.

### **Prima Facie Case**

39. It is common ground that there is a land case going on in Kakamega Environment and Land court. The suit is between the Applicant and two others verses the 1st interested party herein. The documents filed show that the said case, being Kakamega ELC 007/2024 is founded on trespass. The Applicant seeks an eviction order against the 1st Interested Party and damages for trespass.
40. The issues raised in the various documents in the ELC case are the same as the ones being raised in Criminal trial. This can be observed from the Affidavit of the Investigation officer and the various statements attached to the interested party’s Affidavit in this Application.
41. I have also seen a Notice of Motion by the 1st Interested Party, filed in the ELC suit , where the 1st interested party is seeking for maintenance of the status quo, pending the hearing of the suit. In one of the grounds supporting the Notice of Motion the 1st Interested Party has stated that he will be seeking



for an order of Specific performance. I believe the 1st interested party is seeking for an order of specific performance based on a strong conviction that there was a validly enforceable contract between him and the Applicant herein.

42. I hasten to remind myself that at this stage of the proceedings ,I am not supposed to inquire into the facts and the law. The inquiry of whether the two cases are intertwined and whether they should be allowed to run parallel are issues for the main petition.
43. Thus based on the fact that the Applicant and the first interested party have admitted to resorting to the civil court and each has forwarded issues to be considered; and to the extent that the Applicant considers the criminal prosecution as both a deterrent to securing her proprietary interest in Title No. Kakamega /soy/3202, and finally bearing in mind that indeed the findings in a criminal case can be used as evidence in a civil case then the Applicant 's apprehension is not baseless. Am satisfied that the Applicant has established a prima facie case with reasonable chance of success.

#### **Whether the Petition will be rendered nugatory**

44. In arguing that the Petition will be rendered nugatory, the applicant has stated that at 85 years of age, she should not be facing prosecution; that her frail health may be aggravated by unnecessary court attendance ;that prosecution will adversely affect her integrity and public perception of her. However, all the above are not grounds that could be said to render the petition nugatory.
45. However, allowing the trial court to proceed with the trial when it may eventually turn out to have been unnecessary would be to perpetuate an injustice ( Ref: Ref: *Meme & Ano v Republic* ( 2004) e KLR.
46. In the end, the Application succeeds. Consequently, a conservatory Order is hereby issued suspending the prosecution of the Applicant herein in Butali SPM Criminal Case No. E1052 of 2024 *Republic v Beatrice Betsey Maloba* pending the hearing and determination of the Petition herein.

**DATED, SIGNED AND DELIVERED AT ISIOLO, VIA MICROSOFT TEAMS THIS 20TH DAY OF FEBRUARY, 2025.**

**S. Chirchir**

**Judge**

In the presence of:

Godwin – Court Assistant

Ms. Kagai for the Respondent

Ms. Odeck for the 1st interested party.

