



**Shigoli v Director of Public Prosecution & 4 others (Miscellaneous Application E034 of 2024) [2025] KEHC 2742 (KLR) (Crim) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2742 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
MISCELLANEOUS APPLICATION E034 OF 2024  
AB MWAMUYE, J  
FEBRUARY 13, 2025**

**BETWEEN**

**ROSELYN SHIGOLI ..... APPLICANT**

**AND**

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

**DIRECTOR OF CRIMINAL INVESTIGATION NAIROBI AREA POLICE  
STATION ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY COMMANDER NAIROBI ..... 3<sup>RD</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 4<sup>TH</sup> RESPONDENT**

**ZIPPORAH KIOKO T/A RESOURCE MERCHANTS LIMITED .... 5<sup>TH</sup>  
RESPONDENT**

**RULING**

1. The Applicant instituted these proceedings by way of Notice of Motion dated 06.02.2024 pursuant to Articles 19,20,21,22,23,28,29,49,165(6) & 259 and 51(2) of *the Constitution*, Section 123 (1) part 5 of the *Criminal Procedure Code* seeking four principal reliefs:
  - i. [To restrain] the respondents from visiting the Applicant’s home or workplace.
  - ii. [To restrain] the respondents from arresting, harassing or otherwise interfering with the Applicant at her place of work, school, home and/or anywhere they normally spend time.
  - iii. [To direct] that in the event of, or anticipating charges, summons to attend court be issued against the Applicant instead of police summons.



- iv. [To direct] the respondents to finalize investigations and charges within 30 days or close the investigation.
2. The Application is anchored on the grounds on its face and further supported with the annexed affidavit of the Applicant sworn on 06.02.2024. It is averred that the 5<sup>th</sup> Respondent has been harassing the Applicant through officers attached to the 2<sup>nd</sup> Respondent who have constantly intimidated her and issued death threats.
3. The Applicant states that she has been harassed by the 5<sup>th</sup> Respondent through persistent phone calls and harassment at her workplace. She further states that she is apprehensive that she will be arrested by the respondents without any reasons for arrest.
4. The Application is opposed by the Director of Public Prosecutions through Grounds of Opposition dated 10<sup>th</sup> June 2024. The pith of those objections is that the Application lacks merit and is an abuse of the court process. That the Applicant has not demonstrated proof of violation, infringement or threat or contravention of a person's rights under *the constitution*.
5. The 5<sup>th</sup> Respondent also filed a replying affidavit sworn by Zipporah Kioko on 03.06.2024 opposing the Application. She averred that she had leased her two-bedroom apartment to the Applicant before leaving to study in the United Kingdom. Unfortunately, the Applicant never paid her rent as per the agreement and furthermore, she went ahead and sublet the house contrary to the lease agreement.
6. The 5<sup>th</sup> Respondent further stated that on the 8<sup>th</sup> December, 2023 she issued an eviction notice to the Applicant and on the following day she was informed by the caretaker that the tenant was vacating. When the 5<sup>th</sup> Respondent went to the apartment, she found other people that were not the Applicant removing things from the apartment. That is when she discovered that the Applicant never lived at the said premises rather, she had been trading with the unit. The 5<sup>th</sup> Respondent reported the matter to the DCI who consequently summoned the Applicant.
7. Further, on 19<sup>th</sup> December, 2023 the 5<sup>th</sup> respondent reported the matter to Nairobi Regional Criminal Investigation office considering that the appellant had failed to honour the summons from the DCI and had continued to threaten and issue death threats to her. A case file No. CR E611/2024 was subsequently opened and investigations commenced.
8. The Application was canvassed by way of written submissions by counsels for the Applicant and the Respondents.
9. I have considered the Application and the replying affidavit by the 5<sup>th</sup> respondent together with the Director of Public Prosecution's grounds of opposition and the the rival submissions by the respective advocates for the parties. The main issue is whether this Honourable Court has sufficiently been persuaded to issue the orders sought.
10. It is clear from the pleadings that what the Applicant herein is seeking is conservatory orders geared towards restraining the 1<sup>st</sup> to 4<sup>th</sup> Respondents from arresting, harassing or otherwise interfering with the Applicant.
11. The meaning and purpose of a conservatory order was stated in the case of *Invesco Assurance Co. v MW (Minor Suing thro' next friend and mother (HW))* [2016] eKLR to be 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.”



12. The principles to be taken into account in deciding whether an Applicant is deserving of a conservatory order were summarized in *Wilson Kaberia Nkunja v Magistrates and Judges Vetting Board & another* [2016] eKLR as follows:

- “ 25. It therefore follows that an Applicant must satisfy three key principles in order to make out a case for the grant of conservatory orders that is:
- 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 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.”

13. The first test is whether the Applicant has established a prima facie case with a likelihood of success. The Applicant’s contention is that she has received several calls from officers claiming to be attached to the 2<sup>nd</sup> respondent and that she was summoned to appear before the Directorate of Criminal Investigations of which she did. That she is apprehensive that she will be arrested by the respondents without any divulgence of reasons why.

14. The 5<sup>th</sup> Respondent stated that the Applicant was summoned by the Directorate of Criminal Investigations on 14<sup>th</sup> December, 2023 but failed to honour the summons and instead alleged that the 5<sup>th</sup> respondent was intimidating and threatening her and sending people to issue death threats. This necessitated the 5<sup>th</sup> respondent to make another report on the 19<sup>th</sup> December, 2023 to the Nairobi Regional Criminal Investigation Office who opened a file No. CR E611/2024 and commenced investigations into the matter.

15. Section 52 of the *National Police Service Act* empowers the police to summon anybody to assist in investigations. It is clear that the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents acted upon a report that was made by the 5<sup>th</sup> respondent.

16. It is to be noted that it is not a violation of one’s right for a police officer to summon or arrest a person where there is lawful cause to do so. In *Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 others* [2016] eKLR the court held that;

“Is threat of arrest or arrest with reasons given a violation or threatened violation of fundamental rights and freedoms? We think not. What the law seeks to prevent is arbitrary arrest without probable cause. An objective justification must be shown to validate arrest of any individual. The Kenya Constitution recognizes that if a criminal offence is committed, investigation arrest and prosecution might ensue. In this context, *the Constitution* anticipates arrest of individuals and that is why Articles 49 and 50 (2) make provision for the rights of arrested persons. In our view, a threat of arrest or any arrest per se is not unconstitutional so long as due process of law is followed and the rights of the arrested person are observed.”



- 17. The Applicant herein has not established that the summons were issued out of malice as she alleged. The 2<sup>nd</sup> & 3<sup>rd</sup> Respondents were therefore right to summon the Applicant in view of the fact that a complaint had been lodged against her.
- 18. Furthermore, under Article 157 (10) of *the Constitution*, the DPP “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”. The only caveat is that he must 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. I am not persuaded from the materials before me that the DPP has fallen into that exception.
- 19. From the pleadings placed before the court, the Applicant has not established that she has a prima facie case with a likelihood of success and neither has she shown that there is imminent danger of arrest. In my view the submission that the rights of the Applicant will be violated through employment of a procedure that she has not yet even been subject to is indeed merely speculative and premature.
- 20. It is clear to me that if this Court were to grant the conservatory orders sought by the Applicant, the Court would be imposing a restriction on the constitutional powers of the independent offices to investigate, arrest, and prosecute. It is in the public interest that those who have committed crimes be taken through the due process of the law. The petitioner has not established that it is in the public interest that the orders sought be issued. Neither has he shown that if the orders are not issued, the suit will be rendered nugatory.
- 21. The power to issue conservatory orders at interim stage can only be exercised in clear cases backed with evidence. It follows therefore that this court can only intervene if there are cogent allegations of violation of constitutional rights; or threat to violation of the rights; or in clear circumstances where it is evident that the accused will not be afforded a fair trial; or where the prosecution is commenced without a factual basis. The allegations cited by the Applicant does not pass this threshold.
- 22. Consequently, I find that the Applicant has failed to satisfy the tests for granting the conservatory orders sought. The upshot is that the Applicant’s Application dated 6<sup>th</sup> February, 2024 is unmerited and the same is dismissed with costs to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents.

**DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 13TH DAY OF FEBRUARY, 2025.**

.....  
**BAHATI MWAMUYE**  
**JUDGE**

