



Motala v Cabinet Secretary Ministry of Interior & Coordination of National Government & 2 others (Constitutional Petition E023 of 2023) [2025] KEHC 3431 (KLR) (3 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3431 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E023 OF 2023**

OA SEWE, J

MARCH 3, 2025

IN THE MATTER OF: THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 21, 22 & 47 OF THE CONSTITUTION OF KENYA

**IN THE MATTER OF: AN APPLICATION FOR A ‘G’
CLASS INVESTOR WORK PERMIT BY IMRAN MOTALA**

BETWEEN

IMRAN MOTALA PETITIONER

AND

**THE CABINET SECRETARY MINISTRY OF INTERIOR & COORDINATION
OF NATIONAL GOVERNMENT 1ST RESPONDENT**

THE DIRECTOR OF IMMIGRATION SERVICES 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. There are two pending applications herein that are the subject of this ruling. The first application is the Notice of Motion dated 5th April 2023. It was filed alongside the Petition by the petitioner, Imran Motala, pursuant to the provisions of Articles 10, 20, 21, 22, 23, 27 & 47 of *the Constitution* of Kenya, 2010 for the following orders:
 - (a) spent
 - (b) Spent
 - (c) That a conservatory order be issued against the 1st and 2nd respondents to restrain them whether by themselves, their agents, servants, employees or whosoever else from wrongfully and unlawfully interfering with the petitioner’s Visitor’s Pass Immigration Status or from



restricting his movement in and out of Kenya or within Kenya pursuant thereto and/or removing him from Kenya pending the hearing and determination of the Petition.

- (d) That the costs of the application be awarded to the petitioner.
- 2 The application was Supported by the petitioner’s own affidavit sworn on 5th April 2023. He deposed therein that he applied for a Class ‘G’ Work Permit for specific trade business or consultancy as an investor in March 2021; and that despite diligent follow up, the outcome has to date not been officially or formally notified to him as prescribed in law. The petitioner further deposed that, in the interim, he had travelled in and out of Kenya severally on a Visitor’s Pass, his latest entry having been on 30th December 2022 when the Pass was extended to 26th May 2023.
 - 3 At paragraph 5 of his affidavit, the petitioner averred that, on 30th December 2022, he received a telephone call from the Immigration Department at Mombasa through a gentleman who did not identify himself. He was informed that his application for a Class ‘G’ Permit was marked ‘not recommended’ and consequently a ‘Stop Order’ had been flagged against his name in the system. The petitioner was apprehensive that, despite having a valid and lawful Visitor’s Pass, his movement would be curtailed and he was exposed to the risk of being unlawfully removed from Kenya.
 - 4 He accordingly appealed to the Cabinet Secretary as prescribed by law and was awaiting a response by the time he filed Constitutional Petition No. E001 of 2023: Imran Motala v The Cabinet Secretary, Ministry of Interior & Coordination of National Government & 2 Others in which he obtained conservatory orders; but which was later withdrawn to facilitate consideration of his review application. The petitioner explained that the Petition was withdrawn with the leave of the Court and in good faith after he was informed that the review application could only be considered if he withdrew the Petition.
 5. He further deposed that thereafter, on the 5th April 2023, police officers raided his residence with instructions to apprehend and deport him, yet his wife is a Kenyan by birth. He added that he has a young family with school-going children who have been living in Mombasa. He explained that he held a previous working status with Milly Food Processors Limited. He contended that, his ability to travel had been curtailed by the “Stop Order” and his family risks exposure. He therefore prayed for Conservatory Orders pending the hearing and determination of the Petition.
 6. The petitioner annexed to his affidavit, copies of the Notice of Withdrawal of Petition and a copy of the Conservatory Order issued in Mombasa High Court Constitutional Petition No. E001 of 2023, among other documents, to prove the filing and subsequent withdrawal of that Petition. In addition, the petitioner annexed a copy of his Marriage Certificate and related documents to demonstrate that he is married to a Kenyan citizen and has family members who are resident in Mombasa.
 7. The application was resisted by the respondents. They relied on the Replying Affidavit sworn by Mr. Jimmy Nyikuli, a Principal Immigration Officer in the Investigations and Prosecution Section within the Immigration Department, Ministry of Interior and Co-ordination of National Government. The respondents averred that the 2nd respondent has the mandate, under Section 40(3)(b) of the *Kenya Citizenship and Immigration Act*, 2011 to issue entry/work permits to foreigner in accordance with the Act.
 8. The respondents further averred that it is a requirement for all foreign nationals who wish to apply for a work/entry permit to do so through the Electronic Foreign Nationals Service (EFNS) Portal by uploading all the requisite documents for consideration and approval. They denied the petitioner’s allegation that communication was made to him over the telephone by the 2nd respondent’s officers. At paragraph 8 of the respondents’ Replying Affidavit, it was conceded that the petitioner’s application



for Class G permit was received by the 2nd respondent through the said portal on 20th April 2021, but because the petitioner did not provide proof of sufficient funds for Class G permit, his application was rejected.

9. The respondents also denied that they prompted the petitioner to withdraw his Petition No. E001 of 2023. They averred that, to the contrary, the petitioner withdrew that Petition out of his own volition. They put the petitioner to strict proof of any such assertions and annexed copies of the notification sent to the petitioner through the EFNS Portal and bank statements that formed the basis for rejection of the petitioner's application. They prayed that the application be dismissed and the interim orders issued herein be discharged.
10. The application was canvassed by way of written submissions. In the petitioner's written submissions dated 23rd July 2024, he pointed out that the respondents opted to respond to the Petition in their Replying Affidavit and gave no response to the application for conservatory orders. He therefore urged the Court to find that the said application is entirely unopposed. The petitioner relied on *Gatirau Peter Munya v Dickson Mwenda Kithinji* [2014] eKLR and *Wilson Kabeira v the Magistrates and Judges Vetting Board & others* [2016] eKLR, among other authorities, for the applicable principles and the established threshold for granting conservatory orders.
11. The petitioner reiterated the factual basis of his application, particularly the contention that he risks being unlawfully removed from Kenya yet he is married to a Kenyan and has a young family with school going children. The petitioner also posited that his Petition raises fundamental questions as to whether his fundamental right to fair administrative action under Article 47 of *the Constitution*. He therefore submitted that he has disclosed a prima facie case with a likelihood of success.
12. It was further the contention of the petitioner that, unless conservatory orders are issued as proposed, he is apprehensive that the substratum of the Petition will be rendered nugatory and his young family shall suffer great prejudice. On the aspect of public interest, the petitioner relied on *Isaiah Luyara Odando v Kenya Revenue Authority & 6 others; Nairobi Branch Law Society of Kenya (Interested Party)* [2022] eKLR and urged the Court to protect the sanctity of *the Constitution* and ensure all public officers carry out their duties within the confines of *the Constitution*. Thus, the petitioner was of the conviction that it is in the public interest that the orders sought be granted.
13. The respondents relied on their written submissions dated 5th September 2024 and proposed a single issue for determination in respect of the first application dated 5th April 2023, namely, whether the said application for conservatory orders should be granted. They relied on *Invesco Assurance Co. Ltd v M W (Minor suing thro' next friend and mother, H W)* [2016] eKLR for the definition of a conservatory order.
14. The respondents submitted that it is a statutory requirement for all Class G Work Permit applicants to have at their disposal sufficient capital and resources; and therefore the petitioner was required to furnish documentary proof of capital to be invested of at least USD 100,000. According to the respondents, the petitioner had only USD 9,313.25 which was less than the required minimum amount. Thus, according to the respondents, the petitioner's application was rejected for good cause. They added that, instead of remedying the shortfall, the petitioner rushed to court to seek conservatory orders.
15. The respondents further submitted, on the authority of *Centre for Rights Education and Awareness and 7 others v The Attorney General*, HCCP No. 16 of 2011 for the proposition that a party seeking a conservatory order must demonstrate that he has a prima facie case with a likelihood of success; and that unless the court grants the order, there is a real danger that he will suffer prejudice as a result of



- the violation or threatened violation of *the Constitution*. In the respondents' view the petitioner has neither proved that he has a prima facie case with a likelihood of success nor demonstrated that he stands to suffer any prejudice if the orders sought are not granted.
16. The respondents also relied on *Gatirau Peter Munya v Dickson Mwenda Kithinji* (supra), *Damour Florian Emmeric v Director of Immigration* [2022] eKLR and *Board of Management of Uhuru Secondary School v City County Director of Education & 2 others* [2015] eKLR to buttress their submission that conservatory orders should be granted on the inherent merit of the case, taking into account the public interest, constitutional values and the proportionate priority levels attributable to the case under consideration. While conceding that the petitioner entered the country lawfully, he has not fully complied with the legal requirements with regard to his application for a Work Permit.
 17. Lastly, the respondents submitted that the orders sought by the petitioner would have the effect of restraining their ability to fully administer their constitutional mandate. They relied on *Judicial Service Commission v Speaker of the National Assembly & another* [2013] eKLR and *Suleiman v Amboseli Resort Limited* [2004] 2 KLR 589 and argued that since such orders are orders in rem, they are likely to cause more suffering to the larger public than the good that the petitioner seeks. They accordingly prayed for the dismissal of the application dated 5th April 2023.
 18. I have given careful consideration to the 1st application, and in particular, the grounds relied on by the petitioner as set out on the face of the application and in the Supporting Affidavit. I have similarly considered the response and the arguments advanced herein by the respondents in their respective written submissions.
 19. The Court has the jurisdiction to issue appropriate interim orders as sought by the petitioners should justifiable cause be shown for such orders; for Article 23(3) of *the Constitution* is explicit that:
 - (3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—
 - (a) a declaration of rights;
 - (b) an injunction;
 - (c) a conservatory order;
 - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
 - (e) an order for compensation; and
 - (f) an order of judicial review.”
 20. Rule 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules also provides that:
 23.
 - (1) Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders.”
 21. As to the nature of a conservatory order, the Supreme Court had the following to say in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR:

“Conservatory orders bear a more decided public-law connotation; for these are orders to facilitate ordered functioning within the 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 order 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 cases.”

22. Therefore, the key issue for determination is whether the petitioner has satisfied the conditions for the grant of the conservatory orders sought. At this stage, the Court need not examine the merits of the case closely. Hence, I bear in mind the caution expressed by Hon. Ibrahim, J. (as he then was) in the *Muslim for Human Rights & 2 Others v Attorney General & 2 Others* [2011] eKLR in respect of conservatory orders that:

“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-à-vis the case of either party. The principle is similar to that in temporary or interlocutory injunctions in civil matters...”

23. What amounts to a prima facie case was aptly stated in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 123 thus:

“A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in 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 latter.”

24. Similarly, in *Kevin K Mwititi & others v Kenya School of Law & others* (supra), it was held that:

“A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has been held that 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, the Court is not required-indeed it is forbidden- from making definite and conclusive findings on either fact or law.

25. With the foregoing in mind, I have considered the Petition in the light of the averments set out in the petitioner’s Notice of Motion and its Supporting Affidavit. There appears to be no dispute that the applicant is married to a Kenyan citizen and has a young family that is resident in Mombasa. He further demonstrated that he was issued with the permit before and was recommended by Milly Fruits Processors Limited. Indeed, the respondents conceded that he entered the country lawfully. The document at page 36 of the annexures attached to his affidavit also confirms that the petitioner is a registered tax payer.



26. Under those circumstances, he has demonstrated that he has a prima facie case with a probability of success; that there is a risk that if deported as proposed by the respondents, his constitutional rights might be infringed.
27. In Nairobi High Court Petition No. 16 of 2011: Centre for Rights Education & Awareness (CREAW) & 7 Others v Attorney General, it was held:
- “At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with 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*.”
28. Accordingly, I find merit in the application dated 5th April 2023. The same is hereby allowed and orders made as follows:
- (a) That a conservatory order be and is hereby granted against the 1st and 2nd respondents to restrain them whether by themselves, their agents, servants, employees or whosoever else from wrongfully and unlawfully interfering with the petitioner’s Visitor’s Pass Immigration Status or from restricting his movement in and out of Kenya or within Kenya pursuant thereto and/or removing him from Kenya pending the hearing and determination of the Petition.
- (b) That the costs of the application be awarded to the petitioner.
29. The second application is dated 19th July 2023. It was also filed by the petitioner. The application was brought under Rules 3 and 18 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules for orders that:
- (a) The petitioner be granted leave to amend his Petition in terms of the draft Amended Petition attached to the Supporting Affidavit; and in particular to include a prayer for the grant of an order of Certiorari.
- (b) The orders issued by the 1st respondent dated 4th April 2023 be stayed pending the hearing and determination of the Petition.
- (c) Costs of the application be in the cause.
30. The application was premised on the grounds that certain matters, as detailed in the petitioner’s Supplementary Affidavit sworn on 13th July 2023, had come to light, which necessitated the amendment of the Petition; and therefore that it is just and efficacious that all matter pertaining to the infringement of the petitioner’s rights be heard and determined together. The petitioner further averred that no prejudice will be caused to the respondent as a result of the proposed amendments.
31. The application was supported by the affidavit of the petitioner, sworn on 19th July 2023 to which he annexed the draft Amended Petition. The object of the amendment is to introduce an additional prayer for an order of certiorari to quash the Order the Notice issued by the 1st respondent on 4th April 2023. The petitioner explained that this proposed amendment was necessitated by the discovery of the issuance of a Deportation Order and Notice against him. He explained that he was yet to be served with the Order and Notice.
32. The respondents opposed the 2nd application. They relied on the Replying Affidavit sworn by Mr. Kipkoech Sang on the 29th September 2023. They essentially denied the existence of a Deportation Order and contended that the foundation of the intended amendment is therefore non-existent.



33. The 2nd application was likewise canvassed by way of written submissions. The petitioner reiterated his averments in the Supporting Affidavit and relied on Rule 18 of the Mutunga Rules as well as the cases of Humanity Action Knowledge Integrity in Africa Trust & 19 others v Attorney General & 3 others [2020] eKLR and Geyser International Assets Limited v Attorney General & 3 others [2019] eKLR to support their submission that good cause has been shown for the proposed amendment; and that the amendments are necessary for the Court to effectually determine the issues in controversy between the parties.
34. In response to the 2nd application, the respondents submitted on the applicable principles as enunciated by the Court of Appeal in Ochieng’ and others v First National Bank of Chicago, Civil Appeal No. 147 of 1991, namely:
- (a) the amendment should be timeously applied for;
 - (b) the power to amend can be exercised by the court at any stage of the proceedings;
 - (c) That however later the amendment is sought it should be allowed if made in good faith provided costs can compensate the other side;
 - (d) The plaintiff will not be allowed to reframe his case or his claim if by an amendment of the Plaintiff the defendant would be deprived of his right to rely on Limitation Act, subject however to the powers of the Court to still allow an amendment notwithstanding the expiry of current period of limitation.
35. The respondent also relied on Kipng’eno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR and Institute for Social Accountability & another v Parliament of Kenya and 3 others [2014] eKLR to emphasize the point that the purpose of an amendment is to facilitate the just determination of the real question in controversy between the parties to the proceedings. They submitted that the alleged Deportation Order was never issued to the petitioner and therefore was illegally obtained. Accordingly, the respondents urged for the dismissal of the 2nd application.
36. I have given due consideration to the 2nd application dated 19th July 2023. I have also considered the affidavits filed in respect thereof as well as their annexures and the written submissions filed on behalf of the parties. Rule 3(8) of the Mutunga Rules provides that:
- “Nothing in these rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”
37. In the same vein, Rule 18 of the said Rules states:
- “A party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the Court.”
38. In connection with the above provision, it was held in Humanity Action Knowledge Integrity in Africa Trust & others v Attorney General & others (supra) that:
- “Rule 18 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 ... allows parties to amend their pleadings, and in particular, the Petition, with leave of the Court at any stage of the proceedings. Amendment of petitions once filed can only be done with the permission of the court. Additionally the permission and consequent amendment may be granted and made respectively at any time



or stage of the proceedings...it is trite law that an amendment ought to be allowed as long as the same is not frivolous...”

39. In the instant application, the amendment sought by the petitioner seeks to include an additional prayer for an Order of Certiorari. He explained that when the Petition was filed, the state of affairs in connection with the proposed amendment had not been brought to his attention. Although the respondents were of the view that the document that forms the basis of the proposed amendment was not asked for in accordance with Article 35 and the relevant provisions of the *Access to Information Act*, at this stage, the Court is not expected to look at the merits or otherwise of the pleadings presented by the parties. Indeed, in *Institute for Social Accountability & another v Parliament of Kenya & 3 others* (supra) it was held:

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed but rather; on the basis of the state of facts which the parties really and finally intend to rely on. The power to amend makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action and proceedings.”

40. Moreover, in *JMK v MWM & another* [2015] eKLR, the Court of Appeal held:

“...This Court adopted the same approach in *Central Kenya Ltd. V. Trust Bank & 4 Others*, CA NO. 222 OF 1998, when it affirmed that the guiding principle in amendment of pleadings and joinder of parties is that:

“all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

41. In the premises, I find merit in the petitioner’s application dated 19th July 2023. The same is hereby allowed and orders granted as hereunder:

- (a) Leave be and is hereby granted to the petitioner to amend the Petition in accordance with the draft Amended Petition annexed to the application.
- (b) The Amended Petition be filed and served within 14 days from the date hereof.
- (c) Leave be and is hereby granted to the respondents to file a Further response, if need be, within 14 days of service of the Amended Petition.
- (d) The costs of the application be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF MARCH 2025

OLGA SEWE

JUDGE

