



Law Society of Kenya & 7 others v Inspector General of Police & 8 others; Independent Police Oversight Authority & 9 others (Interested Parties) (Constitutional Petition E714 of 2024) [2025] KEHC 4613 (KLR) (Constitutional and Human Rights) (10 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4613 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E714 OF 2024**

AB MWAMUYE, J

APRIL 10, 2025

BETWEEN

**LAW SOCIETY OF KENYA 1ST PETITIONER
PETER MUTETI 2ND PETITIONER
BERNARD KAVULI 3RD PETITIONER
BILLY MWANGI 4TH PETITIONER
GIDEON KIBET 5TH PETITIONER
RONY KIPLANGAT 6TH PETITIONER
STEVE KAVINGO 7TH PETITIONER
KELVIN MUTHONI 8TH PETITIONER**

AND

**INSPECTOR GENERAL OF POLICE 1ST RESPONDENT
NATIONAL POLICE SERVICE 2ND RESPONDENT
DIRECTORATE OF CRIMINAL INVESTIGATION 3RD RESPONDENT
NATIONAL INTELLIGENCE SERVICE 4TH RESPONDENT
CABINET SECRETARY, MINISTRY OF INTERIOR & NATIONAL
ADMINISTRATION 5TH RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS 6TH RESPONDENT
HONOURABLE ATTORNEY GENERAL 7TH RESPONDENT
THE NATIONAL TRANSPORT & SAFETY AUTHORITY ... 8TH RESPONDENT**



DOUGLAS KANJA KIROCHO 9TH RESPONDENT

AND

INDEPENDENT POLICE OVERSIGHT AUTHORITY INTERESTED PARTY

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS INTERESTED PARTY

ANDREW OKIYA OMTATAH INTERESTED PARTY

MARTHA KARUA INTERESTED PARTY

AMNESTY INTERNATIONAL INTERESTED PARTY

KITUO CHA SHERIA INTERESTED PARTY

INTERNATIONAL COMMISSION OF JURISTS KENYA INTERESTED PARTY

INTERNATIONAL JUSTICE MISSION KENYA INTERESTED PARTY

AFRICAN CARTOONISTS ASSOCIATION (KATUNI) INTERESTED PARTY

BLOGGERS ASSOCIATION OF KENYA (BAKE) INTERESTED PARTY

RULING

(With respect to the Petitioners' Notice of Motion Application dated 26/12/2024)

1. The Petitioners/Applicants filed a Notice of Motion Application dated 26/12/2024 which sought the following orders, verbatim:

- “1) That this Application and Petition be certified urgent and service upon the Respondents be dispensed with in the first instance. [Spent]
- 2) That this Honourable court be pleased to admit for hearing the Petitioners/ Applicants application filed during the Christmas Recess period. [Spent]
- 3) That pending the inter partes hearing and determination of this Application, an ORDER be and hereby issue in the nature of habeas corpus to the 1st Respondent to have the 2nd to 7th Petitioners/ Applicants produced immediately before this Honourable court.
- 4) That pending the inter partes hearing and determination of this application, this Honourable Court be pleased to issue summons to the 9th Respondent, Mr. Douglas Kanja Kirocho, being the oath holder of the office to appear before this Honourable court for purposes of explaining the whereabouts of the 2nd to 7th Petitioners/ Applicants.
- 5) That pending the inter partes hearing and determination of this Application, a Conservatory Order be and hereby issue restraining the Respondents from continuing holding the 2nd to 7th Petitioners in communicado without any due process as guaranteed under the law following their illegal abductions.
- 6) That pending the inter partes hearing and determination of this application, an Order be and hereby issued directing the 8th Respondent to present before



this Honourable Court the copy of records of the owners of Motor Vehicle Registration Number KCF 035M, Motor Vehicle Registration KCA 379R & Motor Vehicle Registration Number KCG 089A. [Spent]

- 7) That upon compliance with Order No. 6 above, an Order be and hereby issue compelling the 3rd Respondent to produce before this Honourable Court the Owners of Motor Vehicle Registration Number KCF 035M, Motor Vehicle Registration Number KCA 379R & Motor Vehicle Registration Number KCG 089A which were used to conduct the illegal abductions as per the copy of records.
- 8) THAT upon the Hearing and determination of this Application, an ORDER be and is hereby issued to the 1st Respondent, directing him to disclose the whereabouts of the 2nd to 7th Petitioners/Applicants.
- 9) THAT upon the hearing and determination of this Application, an ORDER be and hereby issue that directions in the nature of habeas corpus do issue directed to the 9th Respondent, Mr. Douglas Kanja Kirocho, to have the 2nd to 7th Petitioners/Applicants produced immediately before this Honourable court.
- 10) THAT upon presentation in court, this court be pleased to an ORDER be and hereby issue to the 1st to 3rd Respondents to release the 2nd to 7th Petitioners/Applicants unconditionally pending institution of any charges by the 1st, 2nd, and 6th Respondents before a court of law.
- 11) That costs of this application be provided for.”

2. On the 30/12/2024, this Court issued the following Orders, inter alia:

- “1) Pending the inter partes hearing and determination of the Application dated 26/12/2024, a mandatory order of Habeas Corpus be and is hereby issued directing the 1st Respondent (the Inspector-General of Police), the 2nd Respondent (the National Police Service), the 3rd Respondent (the Directorate of Criminal Investigations), the 4th Respondent (the National Intelligence Service), the 5th Respondent (the Cabinet Secretary of the Ministry of Interior and National Administration), the 6th Respondent (the Director of Public Prosecutions), the 7th Respondent (the Hon. Attorney General), and the 9th Respondent (Douglas Kanja Kirocho), jointly and severally, to immediately and unconditionally set at liberty and/or cause and secure the liberty of the 2nd to 7th Petitioners/Applicants.... and to produce the 2nd to 7th Petitioners/Applicants at Milimani Law Courts, High Court Wing, Nairobi City County on 31/12/2024 at 11:00AM before this Court or the Milimani High Court Criminal Duty Court, or to explain under oath the circumstances of the matter and the whereabouts of the 2nd - 7th Petitioners/Applicants in default of their production.
2. Pending the inter partes hearing and determination of the Application dated 26/12/2024, a conservatory order be and is hereby issued restraining the Respondents, jointly and severally, from arresting, detaining, continuing to detain, charging, causing plea taking, prosecuting, or continuing to prosecute



the 2nd – 7th Petitioners/Applicants with respect to any criminal offence; except with leave of the High Court or except with an order of the High Court.

3. The 9th Respondent, Douglas Kanja Kirocho, shall in his capacity as the 1st Respondent and also in his capacity as the 9th Respondent, personally secure compliance with Orders (1) and (2) above and shall consequently personally produce the 2nd – 7th Petitioners/Applicants before this Court or the Milimani High Court Criminal Duty Court on 31/12/2024 at 11:00AM in physical/open court; and summons to that effect be and are hereby issued to him.
4. The Director-General of the 8th Respondent, George Njao, or a duly authorized officer so authorized in writing, shall appear before this Court on 03/01/2025 at 11:30AM in physical/open court to produce copies of records with respect to the motor vehicles specified at Prayer 6 of the Notice of Motion Application dated 26/12/2024; and summons to that effect be and are hereby issued.”

3. Subsequently, on 08/01/2025 Kelvin Muthoni was by consent added as the 8th Petitioner/Applicant with immediate effect.
4. During the pendency of the interlocutory matters before this Court, the 2nd, 3rd, 4th, 5th, and 6th Petitioners/Applicants reemerged from what they have stated under oath was unconstitutional detention by the State or State-affiliated persons and/or groups.
5. The 7th Petitioner/Applicant, Steve Kavingo, and the 8th Petitioner/Applicant, Kelvin Muthoni, remain unaccounted for; and it is with respect to those two individuals that the Court must now determine if a writ of habeas corpus should be issued.
6. The second issue that arises from the Petitioners/Applicants’ Notice of Motion Application dated 26/12/2024 is set out at Prayer 7 of the Application in which the Applicants seek that the 3rd Respondent produce the owners of Motor Vehicle Registration Number KCF 035M, Motor Vehicle Registration Number KCA 379R, and Motor Vehicle Registration Number KCG 089A.

Habeas Corpus

7. A Writ of Habeas Corpus is a command by the High Court directed at a person, body, or authority that has detained a person to produce that person in Court for the purposes of the Court ensuring that the party’s detention or imprisonment is not illegal, or in the alternative, to show cause why the detained party may not be set at liberty forthwith.
8. Habeas Corpus is a constitutional right which has been entrenched in our Bill of Rights and is one of the few rights that cannot be limited, a position made clear under Article 25 of *the Constitution*. Article 51(2) of *the Constitution* guarantees one’s right to move the court for a writ of habeas corpus. It provides as follows:

Article 51(2)

“A person who is detained or held in custody is entitled to petition for an order of habeas corpus.”

9. At the statutory level, the right to habeas corpus is contained in Section 389(1) of the *Criminal Procedure Code* which provides as follows:



Section 389(1)

“The High Court may whenever it thinks fit direct –

- a. that any person within the limits of Kenya be brought up before the court to be dealt with according to law.
- b. that any person illegally or improperly detained in public or private custody within those limits be set at liberty.”

10. Section 389(1)(b) of the *Criminal Procedure Code* is particularly apt, as it expands the application of habeas corpus in Kenya beyond the position in some other jurisdictions where habeas corpus is only available against public bodies. Section 389(1)(b) makes clear that a writ of habeas corpus may be issued with respect to a person illegally or improperly detained in private custody in Kenya, and the High Court may therefore direct that they be set at liberty.

11. The Writ of Habeas Corpus is granted when an applicant satisfies the Court that the subject person is in the unlawful custody or detention of the Respondent(s). The Writ of Habeas Corpus requires the Respondent(s) to either:

- a. produce the subject person before Court, dead or alive; or
- b. satisfy the Court that the detention of the subject person is lawful, failure to which that detention shall be found by the Court to be unlawful.

12. In the case of *Grace Struat Ibringira & others v Uganda* [1966] EA 445, the Court of Appeal for Eastern Africa had the following to say regarding this writ at page 454: -

“The writ of Habeas Corpus is a writ of right granted ex debito justitiae, but it is not a writ of course and it may be refused if the circumstances are such that the writ should not issue. The purpose of the writ is to require the production before the court of a person who claims that he is unlawfully detained to test the validity of the detention and to ensure his release from unlawful restraint should the court hold that he is unlawfully restrained. ... The writ is directed to one or more persons who are alleged to be responsible for the unlawful detention and it is a means whereby the humblest citizen ... may test the action of the executive government no matters how high the position of the person who ordered the detention.”

13. This position was echoed in the case of *Masoud Salim & Another v Director of Public Prosecution & 3 others* [2014] eKLR in which the Court cited the dicta of the Supreme Court of the Philippines in the case of *MA Estrdita D. Mortinex v Director General and Others* GR No.153795, by citing the words of that Court that:

“Habeas Corpus applies to all cases of illegal confinement or detention by which any person is deprived of his liberty or by which the rightful custody of any person is withheld from the person entitled thereto ... The ultimate purpose of the writ of Habeas Corpus is to relieve a person from unlawful restraint. It is devised as a speedy relief from unlawful restraint. It is a remedy intended to determine whether the person under detention is held under lawful authority.”

14. The general burden in a habeas corpus application must be pursuant to Section 107 of the *Evidence Act* remain with the Petitioners/Applicants. In the current case, it is incumbent on the Petitioners/



Applicants to demonstrate by adducing convincing evidence that the missing persons, the 7th and 8th Petitioners, on whose behalf the Petition was filed, are under the custody of the Respondents, or an identifiable person or persons whom the Respondents can lawfully be compelled to retrieve the missing persons from the illegal custody of that identifiable person or persons.

15. The wording of Section 389(1)(b) of the *Criminal Procedure Code* gives two possible interpretations as to its ambit. The first is that it can only apply as against a Respondent or Respondents who are detaining the subject person in illegal public or private custody, while the second is that it can also apply as against a Respondent or Respondents who do not have and did not have custody of the subject person.
16. That second interpretation, that a Writ of Habeas Corpus can also apply as against a Respondent or Respondents who do not have and did not have custody of the subject person would be to develop the law on habeas corpus in Kenya beyond the traditional framing of the writ. Such development is permissible under Article 20(3) of *the Constitution*, and that provision of our nation's supreme law reads as follows:

Article 20(3)

- “(3) In applying a provision of the Bill of Rights, a court shall-
- a. Develop the law to the extent that it gives effect to a right or fundamental freedom; and
 - b. Adopt the interpretation that most favours the enforcement of a right or fundamental freedom.”

17. This second and expanded scope of Habeas Corpus in Kenya would allow for the purpose of that constitutional and statutory writ to be upheld and remain vibrant. In essence, it would be a writ directed at law enforcement bodies ordering them to secure the liberty of a person who is in the illegal custody and/or detention of another person or body not being that law enforcement body. While it could be argued that other ordinary avenues such as judicial review to compel law enforcement to act in that regard or criminal proceedings would be more appropriate, we should not lose sight of the fact that Habeas Corpus is an emergency remedy issued in grave situations of an urgent nature. The other avenues available in law would take longer, and the question of personal liberty and the protection of the person from unlawful detention and custody is one which requires the most expeditious and powerful remedy be deployed where appropriate.
18. It is also worth considering that ultimately where a person or persons who are illegally holding another refuse to comply with court orders to release that person, law enforcement would then be called upon to enforce the court ordered release. To my mind, in appropriate cases and subject to the proper protections, the Writ of Habeas Corpus should be available as against law enforcement and security agencies even where they are not illegally detaining the subject person.
19. That second limb, compelling Respondents to lawfully retrieve the subject person from the illegal detention or custody by identifiable persons other than the Respondents themselves is directly drawn from a purposive reading of Section 389(1)(b) of the *Criminal Procedure Code*. For the same to be exercised, the Applicants would need to satisfy the Court that:
 - a. The subject person is still within the jurisdiction of the Court, in this case, within the borders of the Republic of Kenya;



- b. The subject person is under the illegal custody and detention of a specified or identifiable person or persons not being the Respondent or Respondents whom the Writ of Habeas Corpus is sought against;
 - c. The Respondent or Respondents can lawfully be directed by the Court to retrieve the subject person from the illegal custody and detention of those specified or identifiable person or persons; and
 - d. The ensuing Writ of Habeas Corpus would be capable of enforcement by the Respondents and would not be in vain.
20. Whether under the first or the second limbs, a Writ of Habeas Corpus cannot be issued where the matter involves a mere disappearance of a person or their abduction or kidnapping by a person or persons unknown. For a Writ of Habeas Corpus to be issued the Court must be satisfied that the Respondent has or had custody of the subject person or that it is just and proper that the Respondent should be ordered to secure the liberty of the subject person because the fourfold criteria set out at Paragraph (21) above have all been met.
21. It follows that in the present case the Writ of Habeas Corpus could properly issue against one, multiple, or all the Respondents if the Applicants successfully demonstrate to the required standard that either:
- a. The 7th and 8th Petitioners are in the custody of the Respondents; or
 - b. The fourfold criteria set out at Paragraph (21) above have all been met.
22. At this juncture, it is important for this Court to state that this Ruling comes at the interlocutory stage where five of the seven Petitioners/Applicants who were unaccounted for at the time of the filing of the Petition and Application are now alive and accounted for. It would not be proper at this stage and with the Petition yet to be heard and determined for this Court to embark on an extensive analysis of the facts, assertions, denials, and counter-assertions between those who support the Application and Petition on one hand and those who oppose it on the other. Such an analysis would prejudice the fair hearing and determination of the pending Petition, much in the same way that a Ruling on Case to Answer in a Criminal Trial similarly avoids such an analysis.
23. However, this Court has no hesitation in stating that after considering the various affidavits filed and exchanged in this matter, as well as the written submissions filed and exchanged by the parties, the following findings can be and are made:
- a. The Applicants and the Interested Parties in support of the Application have failed to satisfy the Court to the required legal standard by discharging their burden of proof that the 7th and 8th Petitioners/Applicants were or are in the custody of the Respondents, jointly or severally; and
 - b. The Applicants and the Interested Parties in support of the Application have failed to satisfy the Court to the required legal standard by discharging their burden of proof that the 7th and 8th Petitioners/Applicants are within the jurisdiction of this Court, and are being illegally detained by a specified or identifiable persons not being the Respondents, with respect to which the Respondents can and should be ordered by this Court to free the 7th and 8th Petitioners/Applicants from that illegal custody and detention by those specified or identifiable persons not being the Respondents, and that the issuance of such a Writ would not be in vain.
24. It is important to note that on 30/12/2024 this Court issued ex parte mandatory orders in the nature of habeas corpus pending the hearing and determination of the Petitioners/Applicants' Notice of Motion Application dated 26/12/2024. By framing those orders as pending the hearing and determination of



that Application, the Court was alive to the urgency of matters concerning liberty and alleged illegal detention; and it was still incumbent on the movers of the Application to prove their interlocutory case. With the two persons with whom habeas corpus is still sought and available, the Petitioners/Applicants have failed to meet the required threshold for the issuance of the writs as sought.

25. Before moving onto the second and final issue for determination, it is important for this Court to stress that the fact that the Petitioners/Applicants have been unsuccessful in terms of the Habeas Corpus aspect of the Notice of Motion Application dated 26/12/2024 does not affect their chances of success in the Petition stage. Most of the issues contained in the Petitioners' List of Issues dated 24/01/2025 are better determined in the main stage rather than the interlocutory one, which is why the Court has refrained from determining them within this Application. The findings of the Court in respect to Habeas Corpus are limited to that issue, and the Court has deliberately refrained from an analysis of the facts to ensure that all parties in this matter will have a fair hearing and determination of their relative positions in the main stage of this case.

Production In Court of the Owners of the Motor Vehicles stated in the Application.

26. The Petitioners/Applicants were clear that no adverse orders in the Petition are sought against the 8th Respondent, the National Transport and Safety Authority; and at the interlocutory stage the adverse orders sought against the 8th Respondent were limited to the National Transport and Safety Authority producing the official copy of records with respect to the stated motor vehicles.
27. The 8th Respondent availed the official copies of records sought by the Petitioners/Applicants through Prayer 6 of the Application dated 26/12/2024 by annexing the same to the 8th Respondent's Replying Affidavit dated 23/01/2025 sworn by Collins Kipkorir Kieng, the Acting Manager in Charge of Registration within the National Transport and Safety Authority (NTSA). The annexures CKK-02, CKK-03, and CKK-04 are not contested by any party and accordingly Prayer 6 of the Application dated 26/12/2024 became spent.
28. What remains alive is Prayer 7 of the Application, which seeks that the 3rd Respondent produce the owners of Motor Vehicle Registration Number KCF 035M, Motor Vehicle Registration Number KCA 379R, and Motor Vehicle Registration Number KCG 089A with respect to whose vehicles the annexures CKK-02, CKK-03, and CKK-04 respectively were produced by the 8th Respondent before Court.
29. Granting Prayer 7 of the Application would require that this Court issues what would in effect be warrants of arrest with respect to the three persons who are stated as the registered owners of the stated motor vehicles. It is the Petitioners/Applicants' contention that officers of the 2nd and 3rd Respondents, or officers serving within affiliated public bodies, allegedly abducted the 2nd to 8th Petitioners using motor vehicles that bore fake number plates, as expressly stated at Ground Number 7 of the Application, which states:

“7. THAT the abductions have been conducted by men who conceal their identities by wearing civilian clothes, hoodies and face masks with motor vehicles normally linked to police operations. The said motor vehicles bear fake number plates, a clear ploy to disguise and conceal their identity as they whisk away their victims to unknown destinations.”

30. Ground Number 7 of the Application dated 26/12/2024 is reproduced verbatim at Paragraph 10 of the Supporting Affidavit of Florence W. Muturi, the Chief Executive Officer of the 1st Petitioner/



Applicant, dated 26/12/2024. That sentiment is shared by other Petitioners and the Interested Parties who support the Application and the Petition.

31. It is therefore safe to say that there may be a better way for the Petitioners to assert and prove their contention on the alleged use of fake number plates on motor vehicles allegedly by the Police or associated bodies in the alleged abductions of the 2nd to 8th Petitioners and other persons who are not within these proceedings other than the method prayed for at Prayer 7 of the Application; particularly in light of the official copies of records having been produced by the 8th Respondent.
32. The Petitioners, if they determine that the three persons are necessary for their case in the Petition stage, may either reach out to the persons and convince them to give witness testimony in the matter, or the Petitioners may at that stage take other appropriate steps. Whatever the Petitioners may elect later in these proceedings, at this stage the Petitioners have failed to satisfy the Court that there is good and just cause for the 3rd Respondent to bring the owners of the three motor vehicles before this Court in the manner prayed in the Application.

Conclusion

33. For the foregoing reasons, it is the finding of this Court that the prayers sought and contained in the Petitioners/Applicants' Notice of Motion Application dated 26/12/2024 that were not spent are without merit and the same are dismissed accordingly, with each party bearing its own costs in the Application.
34. The Court shall separately issue directions on case management with a view of an expedited hearing and determination of the Petition.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 10TH DAY OF APRIL 2025.

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BAHATI MWAMUYE

JUDGE

In the presence of:

1st, 2nd, 4th, 5th, 6th, 8th Petitioners/ Applicants: Mr Mangu h/b Mr Evans Ogada, Mr Ndegwa Njiru

3rd Petitioner/ Applicant: Ms Waithera h/b Mr Shadrack Wambui

7th Petitioner/ Applicant: Mr Kamau , Mr Ochiel

1st, 2nd, 3rd & 9th Respondent: Mr Barasa h/b Mr Nyamodi

4th Respondent: Mr Kehara, Mr Ogolla

5th Respondent: Mr Danstan Omari

6th Respondent: Mr Barasa

7th Respondent: Mr Thande Kuria

1st Interested Party: Ms Boke h/b Mr Kinoti

2nd Interested Party: Mr kamau h/b Ms Omtimba

3rd Interested Party: Mr Okiya Omtatah in person

4th Interested Party: Mr John Maina



6th Interested Party Dr Khaminwa (SC),

8th Interested Party: Mr Mwangi K.M, , Mr Kipngetich

Court Assistant: Ms Neema

