



Nirenstein v Director of Public Prosecution & 5 others (Constitutional Petition E003 of 2025) [2025] KEHC 6439 (KLR) (23 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6439 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CONSTITUTIONAL PETITION E003 OF 2025**

CM KARIUKI, J

MAY 23, 2025

IN THE MATTER OF MCCR E1155 OF 2024(POLICE CASE NO. 781/332/2024) REPUBLIC VS NIRENSTEIN MICHELLE SCHMIDT

IN THE MATTER OF MCCR E1156 OF 2024(POLICE CASE NO. PCR 31/2024) REPUBLIC VS NIRENSTEIN MICHELLE SCHMIDT

IN THE MATTER OF ARTICLES 2,3, 10, 19, 20, 21,23,26,27, 29, 40, 47, 50, 157, 159, 165, 258 & 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF VIOLATION OF ARTICLES 10, 26, 27, 29, 40, 47, 50& 157 OF THE CONSTITUTION OF KENYA, 2010.

AND

**IN THE MATTER OF BREACH OF THE FAIR ADMINISTRATIVE ACTIONS ACT
IN THE MATTER OF BREACH OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT**

IN THE MATTER OF BREACH OF THE NATIONAL POLICE SERVICE ACT

BETWEEN

MICHELLE SCHMIDT NIRENSTEIN PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATION 2ND RESPONDENT

I G NATIONAL POLICE SERVICE 3RD RESPONDENT



ATTORNEY GENERAL 4TH RESPONDENT
CMS NAROK LAW COURTS 5TH RESPONDENT
HARRISON PEMBA TAGA 6TH RESPONDENT

RULING

Background

1. On 25/09/2024, court summons was delivered at Mara Napa Luxury Camp in Narok, where the Petitioner resides. The summons called for the Petitioner to appear at the Narok Law Courts to answer charges against her in MCCR E1155 of 2024, Republic vs Nirestein Michelle Schmidt, and MCCR E1156 of 2024, Republic vs Nirestein Michelle Schmidt.
2. The Petitioner contends that she was unaware of any complaints, investigations, or charges against her. Therefore, she engaged the services of her counsel.
3. The Petitioner was to be arraigned in Court on 26/09/2024; however, since her doctor had prescribed bed rest, she shared the note with her advocate, who presented it before the Court on the said date. The matter was then scheduled for 08/10/2024 for plea taking. The Petitioner was charged with two separate charge sheets with three individual counts. In MCCR No. E1155 of 2024, she was charged with count I- forcible entry contrary to section 90 of the penal code and count II- forcible detainer contrary to section 91 of the *Penal Code*.
4. In MCCR No. E1156 of 2024 had one count. Count I- engaging in business without being authorized by a work permit contrary to section 56(1) as read with section 56(2) of the *Kenya Citizenship and Immigration Act*—No. 12 of 2011.
5. The Petitioner contends that she is in occupation and possession of Cis-Mara/Talek/406,407, and 408 through a valid court order well within the knowledge of the 1st, 2nd, and sixth respondents. She is also a Class G work permit holder.
6. The Petitioner contends that the 6th Respondent is at the center of multiple civil disputes with the Petitioner over ownership of Cis Mara/ Talek/ 406, 407, and 408; ELCLC No. E003 of 2024 Michelle Nirenstein & Ano Vs Harrison Pemba Taga & 3 Others, and HCCC No. E001 of 2024 Friends of Maasai Mara Limited & Ano Vs Michelle Nirestein. The ELC court issued a conservatory order vide its ruling on 23/05/2024, preserving the suit property from interference by the 6th Respondent. The High Court declined to issue interim orders to the 6th Respondent in light of the orders issued by ELC.
7. The Petitioner contends that aggrieved by the conservatory orders, the 6th Respondent took it upon himself to harass the Petitioner and staff of Mara Napa Luxury Camp through intimidation and threat of violence. On 06/06/2024, the 6th Respondent raided the camp with a total of 27 police officers drawn from Talek, Sekenani, Mulot, Haitong, Nkoilel, and Mararianda police stations, who broke the gate of the camp and traversed the same, brandishing guns at the staff.
8. The Petitioner contends that her attempts to record statements at the Talek police station were futile.
9. The ELC court vide its ruling dated 28/08/2024 allowed the Petitioner's Application dated 13/06/2024 to the extent that the 6th Respondent be restrained from interfering in any manner that alters the suit properties situated on Cis Mara/Talek/ 406, 407, and 408 pending the hearing and determination of the main suit. The ELC court also allowed the 6th Respondent's Application dated



- 10/07/2024 by only directing the Petitioner to make a full and proper account of all the camp's revenue and expenditure from 10/01/2024 to the date of the ruling.
10. The Petitioner contends that on 02/09/2024, the 6th Respondent accosted one of his staffers from Mara Napa Luxury Camp while operating a caterpillar truck registration number 426 f while at work and made away with it. The matter was reported at the Talek police station, but the police have taken no action to remedy the situation.
 11. The Petitioner contends that on 26/09/2024, the 6th Respondent invaded the camp in the company of armed youth seeking to evict the Petitioner and staff by brandishing a hand-held pistol. The police failed again to record the incident.
 12. The Petitioner contends that on 27/09/2024, two staffers went to the Talek police station to record their complaints against the 6th Respondent and his goons. However, in a twist of events, they were arrested for allegedly being the aggressors in the ordeal and charged with assaulting the 6th Respondent.
 13. The Petitioner filed an application dated 03/09/2024 seeking to cite the 6th Respondent for contempt. However, the Application is still pending before the Court.
 14. The Petitioner contends that the charges against her are malicious and lack a proper factual and evidentiary foundation. The ELC court, in its ruling dated 27/03/2025, found that it lacked jurisdiction and struck out the Petition similar to this one.
 15. The Application
 16. A notice of motion dated 27/03/2025 filed by the petitioner/applicant herein is before this Court for determination. The Application is premised on sections 1A, 1B, and 3A of the *Civil Procedure Act*, Order 51 rule 1 of the Civil Procedure Rules, and Rules 3, 4, 23, and 24 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
 17. The petitioner/applicant seeks the following orders;
 18. Spent.
 19. Spent.
 20. That pending the hearing and determination of this Petition, a conservatory order be issued staying the continued prosecution of the Petitioner in MCCR E1155 of 2024, Republic vs Nirestein Michelle Schmidt, and MCCR E1156 of 2024, Republic vs Nirestein Michelle Schmidt.
 21. Spent.
 22. That pending the hearing and determination of this Petition, a conservatory order be issued restraining the 1st, second, and third respondents, whether acting jointly or severally by themselves, their servants, representatives, or howsoever otherwise, from harassing and arresting staffers at the Mara Napa Luxury Camp on the same facts arising from MCCR E1155 of 2024 Republic Vs Nirestein Michelle Schmidt and MCCR E1156 of 2024 Republic Vs Nirestein Michelle Schmidt.
 23. Spent.
 24. That pending the hearing and determination of this Petition, a prohibitory injunction be issued restraining the 6th Respondent by himself, his servants, agents, representatives or howsoever otherwise from entering, encroaching and/ or interfering in whatsoever manner the premises of the Mara Napa Luxury Camp and/ or any moveable property including but not limited to motor vehicles situated on Cis-Mara/ Talek 406, 407 and 408.



25. Spent.
26. That pending the hearing and determination of this Petition, a prohibitory injunction be issued restraining the 6th Respondent by himself, his servants, agents, representatives, or howsoever otherwise from approaching, accosting, threatening, and/ or intimidating the petitioners to evict her from Cis-Mara/ Talek 406, 407, and 408. That the cost of this Application be provided for.
27. The Application is based on the grounds set out on its face and the supporting affidavit sworn by Michele Schmidt Nirenstein on 27/03/2025.
28. In response by the 2nd Respondent opposed the Application herein. The 2nd Respondent filed a replying affidavit sworn by IP Elvis Odhiambo on 07/04/2025. The 2nd Respondent contends that the Petitioner changed her passport number from 555273729 to A35471221, which she used to depart the country on 14/12/2024 from Nairobi to JFK Airport (USA).
29. The 2nd Respondent confirmed a civil ELC dispute between the Petitioner and the 6th Respondent. Due to the dispute, the 6th Respondent issued a temporary closure notice effective 19/01/2024 to the employees of the suit camp, except for a few, to maintain the camp. The Petitioner took advantage of the closure period, assumed the management role, and fired the retained employees affiliated with the 6th Respondent. The 2nd Respondent compelled the Petitioner to record her statement in vain. On 22/05/2025, the 2nd Respondent visited the suit camp; the Petitioner acknowledged recording her statement. According to her statement, she agreed with the 6th Respondent to live in the suit camp on a retiree permit class K as a major donor and chief designer. She declined to operate the said business and did not require a work permit.
30. The 2nd Respondent contends that in their subsequent investigations, they established that the Petitioner made an online application for a work permit class G on 20/05/2024, which she was later issued.
31. The second Respondent contends that they completed their investigations and submitted the inquiry file number 8/2024 to the first Respondent for perusal and advice. The first Respondent recommended the charges against the Petitioner.
32. The 2nd Respondent contends that they later established that the Petitioner had mobilized the local community to prevent the 6th Respondent from accessing the premises and further made it difficult for law enforcers to investigate the matter.
33. The 2nd Respondent contends that despite the court direction that the Petitioner does not leave the jurisdiction of the Court pending the hearing and determination of an application made to ELC that granted a stay of criminal proceedings, the Petitioner, in total contempt of Court, left the jurisdiction of the Court under a different passport.
34. The 2nd Respondent contends that the 6th Respondent then visited the suit camp on 21/12/2024 to secure the property and take asset inventory awaiting court determination. There was an altercation between the Petitioner's and the 6th Respondent's employees. The parties lodged complaints at Talek police post and Nkoilale police station vide OB 5/21/12/2024 and 4/21/12/2024 respectively.
35. The 2nd Respondent contends that OCS Nkoilale police station visited the scene vide talek police posts OB 5/21/12/2024 and follow-up report OB 7/21/12/2022 where she indicated they were blocked from entering the suit camp.
36. The second Respondent contends that the purported signature on the applicant's supporting affidavit dated 27/03/2025, with her previously signed documents, shows that she did not sign the said



- document, given that she departed the country on 14/12/2024. The second Respondent urged this Court to direct investigations into its validity and reliability, and where there is an established breach of professional conduct, action be taken accordingly.
37. The 2nd Respondent contends that the applicant holds two passports, and her affidavit does not indicate how she was identified.
 38. The 2nd Respondent vide a replying affidavit sworn by IP Kennedy Odhiambo on 08/04/2025
 39. The 2nd Respondent contends that a report was made vide Talek police post by an employee of the 6th Respondent vide OB 7/10/1/2024 and the 6th Respondent on 11/01/2024. The 6th Respondent complained that the Petitioner had closed down the camp registered under the 6th Respondent without his authority on 09/01/2024 at around 2 p.m. He also stated that the Petitioner was one of his donors and had expressed her intention to take over the entities from the 6th Respondent as a result of a disagreement between them.
 40. The 2nd Respondent averred that the Petitioner, in her statement, stated that she had sensed that the 6th Respondent was planning to kick her out of the camp despite having invested millions of dollars in the project that they had undertaken together.
 41. The 2nd Respondent averred that their investigations indicated that the property in question is registered in the name of the 6th Respondent. Further, the Petitioner denied the 6th Respondent access to the entities without any valid reasons, leading to severe aggression.
 42. The 2nd Respondent averred that after completing investigations, they forwarded the inquiry file No. 01/2024 to the 1st Respondent for perusal and advice. The 1st Respondent recommended charges of forcible entry and detainer.
 43. Further affidavit
 44. The Petitioner filed a further affidavit sworn by Michelle Schmidt Nirenstein on 24/04/2025
 45. The applicant averred that at the camp's inception; she worked closely with the 6th Respondent to establish the camp on the suit property as a charitable organization to benefit the local community. She came in as a donor and invested heavily in the project but never worked or operated the camp as the owner. Therefore, she did not require a work permit.
 46. The applicant averred that following the fallout with the 6th Respondent, she sought a class G work permit, valid from 13/06/2024 to 13/06/2026. The charges against her were instituted five months after she had obtained a valid work permit. She has also, at all material times, been in possession and occupation of the premises in Cis-Mara/Talek/ 406, 407, and 408 in her capacity as the beneficial owner.
 47. The applicant contends that there is no order by the subordinate Court directing that she should not leave the Court's jurisdiction. She left the country in apprehension of her safety, and she could not count on the authorities to protect her, as she was advised by authorities.
 48. The applicant averred that her original passport was destroyed during the unprecedented Mara floods, and the American embassy issued her a temporary passport while they worked on replacing it.
 49. The applicant contends that she executed the affidavit at the advocates' chambers in the presence of a commissioner with room for amendment. However, the absence or invalidity of a valid affidavit in support of the Application or Petition does not invalidate or vitiate the proceedings.
 50. Directions of the Court



51. On 30/04/2025, this Court stated that it will rule on the competence of the notice of motion for conservatory orders and the affidavit in support. Secondly, directions on cross-examination of the advocate for the Petitioner. Meanwhile, the prosecution of criminal case MCCR No. E1155 of 2024 and E1156 OF 2024 are hereby stayed until further orders of the Court on 23/05/2025.
52. Analysis and Determination.
53. This Court has considered the Application, the supporting affidavit, the replying affidavits, and the further affidavit.

Issues

54. The main issues for determination: -
 - i. Whether this Application has met the legal threshold for the grant of conservatory orders.
 - ii. Whether this Application has met the legal threshold for granting prohibitory orders.
 - iii. Conservatory orders and prohibitory orders
55. The applicant has sought a conservatory order be issued staying the continued prosecution of the Petitioner in MCCR E1155 of 2024, Republic vs Nirestein Michelle Schmidt, and MCCR E1156 of 2024, Republic vs Nirestein Michelle Schmidt.
56. The applicant has also sought a conservatory order restraining the 1st, 2nd, and 3rd respondents, whether acting jointly or severally by themselves, their servants, representatives, or howsoever otherwise, from harassing and arresting staffers at the Mara Napa Luxury Camp on the same facts arising from MCCR E1155 of 2024 Republic vs Nirestein Michelle Schmidt and MCCR E1156 of 2024 Republic vs Nirestein Michelle Schmidt.
57. I will begin with the orders sought relating to the first, second, and third Respondents. The Petitioner contends that the first, second, and third Respondents have been harassing and arresting staffers at Mara Napa Luxury Camp on the same facts in the criminal charges.
58. The 1st, 2nd, and 3rd Respondents draw their authority from *the Constitution* and the law. In exercise of this authority, they are functionally independent. Article 157(6) of *the Constitution* vests state powers of prosecution on the 1st Respondent, which power is restated in Section 5 of the *Office of the Director of Public Prosecutions Act*. In the discharge of its mandate, the 1st Respondent is required to do so without seeking the consent or direction from any person or authority. Under Article 157(10), the 1st Respondent shall not require the consent of any person or authority for the commencement of criminal proceedings and, in exercising his or her powers or functions, shall not be under the direction or control of any person or authority.
59. The power of the 2nd and 3rd Respondents to investigate offences is derived from Article 245 of *the Constitution* and Section 35 of the *National Police Service Act*. Their independence is constitutionally insulated from any form of interference or directional command. Indeed, under Article 245(4), not even the cabinet secretary responsible for police services may give a direction to the Inspector-General of Police concerning the investigation of any particular offence or offences or the enforcement of the law against any particular person or persons. Only the 1st Respondent has power under Article 157(4) to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct, and the Inspector-General shall comply with any such direction.
60. I now turn to the prayers for an order of prohibition. The applicant has sought a prohibitory injunction be issued restraining the 6th Respondent by himself, his servants, agents, representatives or howsoever



otherwise from entering, encroaching and/ or interfering in whatsoever manner the premises of the Mara Napa Luxury Camp and/ or any moveable property including but not limited to motor vehicles situated on Cis-Mara/ Talek 406, 407 and 408. The applicant has also sought a prohibitory injunction to be issued restraining the 6th Respondent by himself, his servants, agents, representatives, or howsoever otherwise from approaching, accosting, threatening, and/ or intimidating the petitioners to evict her from Cis-Mara/ Talek 406, 407, and 408.

61. The applicant's prosecution arises from the ELC dispute, which also led to the prosecution of the Petitioner in the criminal case. The Petitioner argues that the prosecution is malicious and a means by the 6th Respondent to get an upper hand in the civil cases. She now seeks conservatory orders prohibiting her prosecution and threats of eviction against her.
62. Article 23 of *the Constitution* has conferred upon this Court the authority to uphold and enforce the Bill of Rights and grant appropriate relief as follows:

The High Court has jurisdiction, by Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

63. Article-23...COK,2010;
- i. In any proceedings brought under Article 22, a court may grant appropriate relief, including--
 - ii.
 - (a) a declaration of rights.
 - iii.
 - (b) an injunction.
 - iv.
 - (c) a conservatory order.
 - v.
 - (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.
 - vi.
 - (e) an order for compensation; and
 - vii.
 - (f) An order of judicial review.
 - viii. A conservatory order is one of the appropriate reliefs available to a party who alleges and proves denial, violation, or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. The purpose of conservatory orders is to preserve the substratum of a petition before the Court, pending the hearing and determination. Rule 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 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.



64. The threshold for the grant of conservatory orders was established by the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR as follows:

“(86) “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within 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 supplicant’s case for orders 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 causes.

(87) The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant a stay of execution have been crystallized through a long line of judicial authorities at the High Court and the Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

the appeal or intended appeal is arguable and not frivolous; and that

Unless the order of stay sought is granted, the appeal or intended appeal would be rendered nugatory if it were to succeed eventually.

(88) These principles continue to hold sway at the lower Courts and this Court. However, in the context of *the Constitution* of Kenya, 2010, a third condition may be added, namely:

(iii) It is in the public interest that the order of stay be granted.

(89) This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that runs through *the Constitution*.”

65. A party seeking conservatory orders must demonstrate to the Court that the Petition is arguable and not frivolous. Second, that unless the orders sought are granted, the suit, were it to succeed, would be rendered nugatory. Though linked to injunctions in private party matters, these two limbs also apply in public law. The Supreme Court added the third test in the context of *the Constitution*, namely, that it is in the public interest that the orders sought are granted.

66. The prayers that the Petitioner seeks herein are that pending the hearing and determination of the Petition, the Court stay the continued prosecution of the Petitioner Pending the hearing and determination of this Petition the Court hereby prohibits the 6th Respondent by himself, his servants, agents, representatives or howsoever in the criminal case. she further seeks that the 1st, 2nd and 3rd Respondents be restrained from harassing and arresting staffers at the camp.

67. It is well settled that constitutional and statutory bodies such as the 1st -3rd Respondents herein must be given the space to discharge their mandate and exercise their discretion. A court will only intervene where it is demonstrated that such an institution or organ has acted ultra vires or breached *the Constitution* or the law. This was the holding of Ngugi, J. (as she then was) in the case of *Kipoki Oreu Tasur v Inspector General of Police & 5 others* [2014] eKLR. The learned Judge stated:



68. The criminal justice system is a critical pillar of our society. *The Constitution* underpins it, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated.
69. Additionally, a stay of proceedings is a serious judicial action that inevitably interferes with a litigant's right to conduct their litigation. It undermines the right of access to justice, the right to be heard without delay, and, overall, the right to a fair trial. The discretion to stay proceedings should, therefore, be exercised cautiously and only in cases where the Court is satisfied that proceedings ought not to be allowed to continue.
70. In the case of *Katangi Developers Limited v Prafula Enterprises Limited & another* [2018] eKLR, the Court of Appeal stated as follows:
- “What is in issue before us is simply an application for stay of proceedings under Rule 5(2) (b) of the Court Rules. As noted in Halsbury's Laws of England 4th edition volume 37 at paragraph 330: "the stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial based on the substantive merits of his case, and, therefore, the Courts general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue".
71. The Petitioner challenges the constitutionality and legality of the Respondents' actions and, more specifically, the propriety of the criminal proceedings against her. She contends that the charges against them aim to intimidate her in the civil disputes with the 6th Respondent. She seeks that the charges be halted. At this preliminary stage, the Court may only examine and evaluate the material placed before it to determine whether the Petitioners have made out a prima facie case to warrant a grant of conservatory orders.
72. In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, the Court of Appeal defined a prima facie case to mean:
73. A prima facie case in a civil application includes but is 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 a right has been infringed by the opposite party to call for an explanation or rebuttal from the latter.
74. In the case of *Free Kenya Initiative & 6 others v Independent Electoral & Boundaries Commission & 4 others; Kenya National Commission on Human Rights (Interested party)* [2022] eKLR, Mrima, J. stated:
- “32. therefore, in determining whether a matter discloses a prima facie case, a Court must examine the case as a whole. It must weigh, albeit preliminarily, the pleadings, the factual basis, the respective parties' positions, the remedies sought, and the law. In so doing, a Constitutional Court must be guided by Articles 22(1) and 258(1) of *the Constitution* which provisions are on the right to institute Court proceedings whenever a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened



or the when the Constitution has been contravened, or is threatened with contravention."

75. I have considered all the issues raised by the Petitioner concerning the institution of the criminal proceedings against her. I am keenly aware I cannot delve into the merits of the case, which must await the full hearing of the Petition. Suffice it to say however, the Petition raises critical issues, namely, whether the issues arising from any complaint by the 6th Respondents on the suit camp should be the subject of criminal investigations and charges or civil proceedings, is critical, whether the continued investigations and prosecution of the Petitioners will result in violation of her constitutional rights. There is also the question of whether the 1st, 2nd, and 3rd Respondents exercised their mandate in line with the law. These are matters that can only be dealt with at the main hearing of the Petition. In light of the foregoing, I have no difficulty finding that the Petitioner has established a prima facie case with a probability of success.

76. Further, since the main Petition is pending, I must caution myself not to make definite and final findings on the issues raised before parties have been heard substantively, which would prejudice the main suit. In this regard, I follow the reasoning of Ibrahim, J. (as he then was) in the case of Muslims for Human Rights (Muhuri) & 2 others v Attorney General & 2 Others [2011 eKLR where he stated:

"The Court must be careful not to reach conclusions 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 not conclusively or finality arising that will or may operate adversely vis-à-vis the case of either party. This principle is similar to that in temporary at or interlocutory injunctions in civil matters.

This is a cardinal principle and happily makes my function and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side."

The cited authority clearly states that at this stage; the Court must resist the temptation to make any conclusive findings of fact or law on the matter before it.

In *Prasul Jayantilal Shah v Republic, Joseph Karuoro Claudio (Interested Party)* [2022] eKLR, Odunga, J. (as he then was) considered a similar case and in granting conservatory orders stated:

"In the premises, I find that it is only just to temporarily hold further proceedings in the criminal case in abeyance to avoid a situation where the Applicant might lose his liberty when the subject matter's status is yet to be determined and this Court is yet to determine the propriety of the criminal proceedings."

77. I concur with the learned Judge. The propriety of the criminal proceedings in question is yet to be determined. Further, given the nature of the matter herein, I find that if the substratum of the Petition is not preserved by having in place conservatory orders, there is imminent danger of rendering the Petition nugatory and a mere academic exercise, as the investigations and criminal case will have proceeded. Indeed, a determination in favour of the Petitioner will be of no use to her if, in the meantime, she is subjected to the investigations and criminal proceedings under challenge. Therefore, the said proceedings must be stayed pending the hearing and determination of the Petition.

78. Accordingly, I do allow the Application dated 27/03/2025 on the following terms:



- i. Pending the hearing and determination of this Petition, the Court hereby prohibits the 1st, 2nd, and 3rd Respondents from continuing to prosecute the Petitioners in Narok MCCR E1155 of 2024, Republic vs Nirestein Michelle Schmidt, and Narok MCCR E1156 of 2024, Republic vs Nirestein Michelle Schmidt.
- ii. Pending the hearing and determination of this Petition, the Court hereby prohibits the 1st, 2nd, and 3rd Respondents and their officers from harassing and arresting staffers at the Mara Napa Luxury Camp on the same facts arising from MCCR E1155 of 2024 Republic Vs Nirestein Michelle Schmidt and MCCR E1156 of 2024 Republic Vs Nirestein Michelle Schmidt.
- iii. Pending the hearing and determination of this Petition the Court hereby prohibits the 6th Respondent by himself, his servants, agents, representatives or howsoever otherwise from entering, encroaching and/ or interfering in whatsoever manner the premises of the Mara Napa Luxury Camp and/ or any moveable property including but not limited to motor vehicles situated on Cis-Mara/ Talek 406, 407 and 408.
- iv. Pending the hearing and determination of this Petition the Court hereby prohibits the 6th Respondent by himself, his servants, agents, representatives or howsoever the 6th Respondent by himself, his servants, agents, representatives or howsoever otherwise from approaching, accosting, threatening and/ or intimidating the petitioners to evict her from Cis-Mara/ Talek 406, 407 and 408.
- v. Costs in the main cause.
- vi. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH THE TEAMS APPLICATION,
THIS 23RD DAY OF MAY, 2025.**

.....

CHARLES KARIUKI

JUDGE

