



**Mahinda & another v Director of Criminal Investigation & 3 others (Petition E015 of 2024)
[2025] KEHC 9920 (KLR) (Constitutional and Human Rights) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9920 (KLR)

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

PETITION E015 OF 2024

LN MUGAMBI, J

JULY 10, 2025

BETWEEN

DAVIS MAINA MAHINDA 1ST PETITIONER

DALE ENTERPRISES LIMITED 2ND PETITIONER

AND

DIRECTOR OF CRIMINAL INVESTIGATION 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

CHIEF MAGISTRATE'S COURT MILIMANI 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

RULING

Introduction

1. The Petitioners herein filed a Petition dated 20th March 2024 challenging the 1st and 2nd Respondent's failure to execute their statutory and constitutional mandate in prosecuting Criminal Case number MCCR 1732/2020. That case stemmed from Criminal Case No.CR 2332/06 which is said to have also not been prosecuted to its conclusive end.
2. As a consequence, the Petitioners assert that their rights under Articles 25(c), 28, 40(1), 47, 50(1) and 159(2)(b) & (d) of *the Constitution* and Sections 4(2) (b), 9(b), 13(1) of the *Victim Protection Act* were violated by the Respondents.
3. The 2nd Respondent in response filed a Notice of Preliminary Objection dated 24th April 2024 on the grounds that:



- i. This Court lacks jurisdiction to handle this matter.
- ii. The Chief Magistrate Hon. D. Alego (SPM) already delivered a ruling on this matter on 14th March 2024 whereby the entire suit was dismissed for want of prosecution.
- iii. The conservatory order issued by this Court on the 25th March, 2024 is hereby overtaken by events.
- iv. The only remedy for the Petitioner lies by way of an Appeal before the High Court.
- v. This application is thus a clear abuse of the Court process and should be dismissed.

Petitioners' Case

4. The Petitioners' in reaction to the Notice of Preliminary Objection filed their Replying Affidavit sworn on 25th April 2024 through the 1st Petitioner.
5. The 1st Petitioner asserts that the Preliminary Objection is erroneous as they have a right to approach the Court as envisaged under Article 23(1) of *the Constitution* in light of the violated rights.
6. He depones that contrary to the 2nd Respondent's assertion the Trial Court delivered its Ruling on 25th March 2024, wherein the matter was dismissed by the 3rd Respondent for want of prosecution.
7. The 1st Petitioner asserts that the 2nd Respondent failed to prosecute the matter despite its numerous correspondence to do so and thus violated their constitutional rights.
8. Furthermore, the 1st Petitioner asserts that the 2nd Respondent was complicit in violation of their constitutional rights. Furthermore, Counsel submitted that it is the 2nd Respondent who is supposed to appeal the matter to the High Court by virtue of Section 348(a) of the *Penal Code*.
9. The 1st Petitioner as well stresses that the 2nd Respondent cannot argue that this matter is an abuse of the Court process yet they are the ones who caused the criminal suit to be dismissed for want of prosecution.
10. As such, the 1st Petitioner emphasizes that the 2nd Respondent should be held accountable for abusing the right to prosecute and their rights under Victims Protection Act and the Fair Administrative Act.

1st, 3rd and 4th Respondents' Case

11. These Respondents' response and submissions are not in the Court file and Court Online Platform (CTS).

2nd Respondent Submissions

12. The 2nd Respondent through its Counsel, Edna Ntabo filed submissions dated 30th September 2024 and underscored the issues for determination as: whether this Court has jurisdiction to entertain the Application and whether the Application is merited.
13. Counsel stated that this Court does not have jurisdiction to entertain this Petition as it was filed as a constitutional petition asserting violation of rights thus this Court is functus officio in light of the circumstances of this case.
14. Counsel pointed out that the Petitioners following the Trial Court Ruling, ought to have moved the Court by way of an appeal or revision. Counsel added that the Petition raises grounds revolving around the Trial Court's decision. Counsel informed that the Petitioners had already moved to the High Court



in the matter under HCRA E035 of 2024 Davis Maina Mahinda, Dale Enterprises Ltd Vs ODPD pending before Hon. Justice Kanyi Kimondo, which is a Court of concurrent jurisdiction.

15. To buttress this matter reliance was placed in *Jeremiah Mwita Range v Republic* [2020] eKLR where the Court held that:

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon... The Applicant is challenging the order in sentence by Hon. Kimaru, J. made on the 13th March, 2019. The learned judge is of parallel jurisdiction as this court. That means that the decision by Hon. Kimaru J. is by this court, meaning that this court has already rendered a final determination on the matter before me. That being the case, this court cannot entertain the instant application. Similarly, it was not open for the Applicant to return to this court to challenge the decision made by this court. In the result, the application is incompetent and is accordingly struck out.”

16. On this premise, Counsel emphasized that the application lacks merit since the Petitioners have a remedy before the High Court on revision as is evident under Section 364(1) of the *Criminal Procedure Code*.

17. Moreover, Counsel submitted that the Petitioners had not pleaded with precision how the 2nd Respondent had violated their constitutional rights to warrant this Court’s intervention. Nonetheless, it was argued that the Petitioners rights are not absolute and must be balanced with the rights of others and public interest.

18. Reliance was placed in *Anarita Karimi Njeru v Republic (No.1)*- [1979] KLR 154 where it was held that:

“if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

19. Like dependence was placed in *Mumo Matemo v Trusted Society of Human Rights alliance* [2014] eKLR.

Petitioners’ Submissions

20. The 1st Petitioner on 1st October 2024, filed submissions in opposition of Notice of Preliminary Objection.

21. The 1st Petitioner maintained that the Preliminary Objection is based on wrong facts and therefore should be dismissed. He further asserted contrary to the 2nd Respondent’s averment, the Petition pleads the purported violated constitutional rights chiefly violation of his right to a fair trial.

22. The 1st Petitioner argued that it was evident from the 2nd Respondent’s Preliminary Objection that the suit had been dismissed as a result of it’s want of prosecution.

23. Furthermore, the 1st Petitioner contended that the right of appeal accorded to the accused person upon conviction, is not extended to the complainant if dissatisfied with that Court’s decision, as it is herein.



This argument was made in light of Section 347 (1) of the *Criminal Procedure Code*. Instead the appeal is granted to the 2nd Respondent under Section 348(1) as follows:

When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.

24. The 1st Petitioner claimed thus that this matter was properly before this Court as it was clear that in failing to prosecute the suit, the 2nd Respondent violated his right to a fair trial. Additionally, the 1st Petitioner urged the Court to issue exemplary damages against the 1st and 2nd Respondents.

Analysis and Determination

25. It is my considered view that the key issue that arises for determination at this juncture are as follows:

Whether the 2nd Respondent's Notice of Preliminary Objection is merited.

26. What constitutes a Preliminary Objection was set out in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 69 and later emphasized by the Supreme Court in *Joho & another v Shahbal & 2 others* [2014] KESC 34 (KLR) as follows:

“(31) To restate the relevant principle from the precedent-setting case, *Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors* (1969) EA 696:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

27. Correspondingly in *Independent Electoral & Boundaries Commission v Cheperenger & 2 others* [2015] KESC 2 (KLR) the Supreme Court held as follows:

“ 15. The *Joho* decision has been subsequently cited by this Court in *Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others*, Civil Application No. 23 of 2014, [2014] eKLR; and in *Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd & 3 Others*, Application No. 50 of 2014, [2015] eKLR, in which the Court further stated [paragraph 15]:

“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts



are deemed agreed, as they are prima facie presented in the pleadings on record.”

16. It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (See Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others, Civil Application No. 14 of 2014, [2014] eKLR).”

28. The Court concluded as follows:

“21. The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits... In the instant matter, we consider the objector to have moved her motion, more as a sword than a shield. Such a course is not to be permitted, as it is apt to occasion an injustice to the applicant, and indeed, to the wider public interest.

29. The 2nd Respondent submitted that the substantive determination in which the Magistrate dismissed aforesaid criminal case for want of prosecution was rendered meaning that the substratum of the Petition upon which conservatory orders were based had been already overtaken by events and the appropriate remedy for is now is for Petitioners to pursue an appeal or a revision before the High Court and not invoke the Constitutional jurisdiction of this Court.

30. A challenge premised on the Court’s jurisdiction is a point of law and only relies on uncontested pleadings to raise and if successful can dispose the suit hence it meets the threshold of a Preliminary Objection.

31. The Supreme Court addressing its mind on the issue of a Court’s jurisdiction in *Macharia & Another vs. Kenya Commercial Bank Limited & others* [2012] KESC 8 (KLR) opined as follows:

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”



32. The uncontested fact in this case is that the assertion made by the 2nd Respondent that the substantive criminal case was dismissed by the Trial Court for want of prosecution. The Petitioners while not denying this fact maintained that the Petition hinges on violation of Constitutional rights hence should be heard so that the Respondents can be held accountable.
33. The Petitioners seek the following relief in the Petition:
- a. An order directing the 3rd Respondent to arrest its ruling, due for delivery on 25th March 2024, pending the hearing and determination of the Petition.
 - b. An order directing the 1st, 2nd and 3rd Respondents' to proceed with the criminal case to its logical conclusion.
 - c. An order the directing the 3rd Respondent to compel the 1st Respondent's Investigating Officer, and the State witnesses to attend court.
 - d. A declaration that the rights in the Kenya Constitution (2010) and the [Victim protection Act](#) have been violated by the 1st and 2nd Respondents'.
 - e. An order directing the 3rd Respondent, to allow the Petitioners to bring evidence left out by the 1st Respondent, pursuant to the Victims Protection Act 13(1).
 - f. Costs of this suit and General damages.
 - g. Any further Relief or Orders that this Court may deem just and fit to grant after 18 years pursuing the matter.
34. It is manifest from the above reliefs that the Petition is founded on criminal case which the Petitioners want this Court make an order for its prosecution to conclusion. The said criminal case as it were has been terminated through a judicial determination in the lower Court.
35. Under the [Criminal Procedure Code](#) Cap 75 Laws of Kenya, the High Court under Section 362 is given the following powers:
- “The High may call and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentences or order recorded or passed; and as to the regularity of any proceedings of any such subordinate court.”
36. Under Section 364 which deals with the powers of the High Court on revision, Section 364 (b) states that the High Court may ‘In case of any other order other than an order for acquittal, alter or reverse the order’
37. The Petitioner argued that the provisions of the [Criminal Procedure Code](#) only grant the DPP the right to appeal. Indeed, Section 348A states:
- Section 348A: Right of appeal against acquittal, order of refusal or dismissal
- Section 348A(1) When an accused has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or order dismissing a charge has been made by a subordinate court or High Court or the Court of Appeal as the case may be; the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.



38. While I agree the right of appeal is limiting in that under Section 347 and 348 it only grants this right to appeal to a convicted person and the DPP; in regard to order of acquitted, refused to accept a change or dismissal order for revision under Section 362 this limitation does not apply hence I believe any person that may demonstrate sufficient interest in the matter, for instance a victim of the offence or even to the High Court on its own motion can invoke the revisionary jurisdiction. Indeed, this is implicit from the reading of Section 364 (5) which states:

“When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

39. It means that it implicitly recognizes that any other person not having the right of appeal can move the Court under the revision powers of the High Court but those that have the right of appeal may not do so where an appeal lies for they ought to pursue an appeal first. Clearly, the Petitioners as victims could avail to themselves this statutory remedy of revision to challenge the decision of the lower court under the legislation governing the criminal trial in which they had an interest.

40. The doctrine of Constitutional avoidance asserts that *the Constitution* should not be invoked in resolution of ordinary disputes whose remedies are available in statutes or regulatory regimes or any other authorized forms.

41. Black’s Law Dictionary Tenth Edition defines ‘Constitutional avoidance rule’ as follows:

“The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion”

42. In *Faraj & 3 others v Police & 2 others* [2022] KEHC 287 (KLR) the Court explained the doctrine as follows:

“Constitutional avoidance has been defined as a preference of deciding a case on any other basis other than one which involves a constitutional issue being resolved... The doctrine of avoidance was fortified in *Sports and Recreation Commission v Sagittarius Wrestling Club and Anor* in which Ebrahim JA said the following: -

...Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights...”

26. Also relevant is the decision in *S v Mhlongu*¹⁴ which laid out constitutional avoidance as a general principle in the following terms: -

I would lay it down as a general principle that where it is possible to decide any case, criminal or civil, without reaching a constitutional issue, that is the course which should be followed.”



43. Similarly, in *C O D & another vs Nairobi City Water & Sewerage Co. Ltd* (2015) eKLR the Court held as follows:

“ 15. *The Constitution* cannot be used as a general substitute for the normal procedures. The mere allegation that a human right has been contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the High Court under Article 165 of *the Constitution*: See *Harrikissoon v A-G* [1979] 3 WLR 62. Where it is possible to decide any case or dispute, civil or criminal, without reaching a constitutional issue then that is the course that should be followed. The court sitting as a constitutional court must through the doctrine of avoidance steer clear of determining such disputes as if there were constitutional questions being raised: see *S v Mhlungu* [1995] 3 SA 867 (CC) and also *Ashwander v Tennessee* 297 US 288.”

44. Further, the Court in *Ibrahim Wakhanyanga & 2 others v Chief Magistrate’s Court Kakamega & 2 others; Attorney General for Land Registrar Kakamega (Interested party)* [2022] eKLR held as follows:

“ 17. One of the instances in which a constitutional court loses jurisdiction is through the doctrine of constitutional avoidance. Thus, where there exist ample statutory avenues for resolution of a dispute, the constitutional court will defer to the statutory options and decline to entertain such a dispute. A party seeking relief in a matter that can be addressed through interpretation of statutes and rules made thereunder must seek relief through an ordinary suit as opposed to a constitutional petition. In that regard, the Court of Appeal stated in *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR as follows:

... where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on *the Constitution* without challenging the legislation in question. That principle has been reinforced by the Supreme Court in *Communications Commission* case (supra)...”

45. In my view, the Petitioners remedy lies in filing revision proceedings before the High Court and not pursuing Constitutional litigation because there is already an available statutory remedy under the Statute that governs regulation of criminal trials. I adopt the following dictum from the Indian Supreme Court in the case of *Seth Ratan Chand v Pandit Durga Prasad* AIR 2003 SC 2736: (2003)5 SCC 399 where the Court said:

“ ... When a party has had statutory remedy of assailing the order passed by the District Court by filing an appeal to the High Court itself, he could not bypass the said remedy and take recourse to proceedings under Article 226 and 227 of *the Constitution*...”

46. To reinforce this position, I am further guided by the case of *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR; where the Court held thus:

“ ... Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with



in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation...”

47. The Respondent informed this Court that in fact the Petitioners had in moved the High Court through of revision vide HCRA No. E035 of 2024 Davis Maina Mahinda, Dale Enterprises v DPP which matter was before Justice Kanyi Kimondo. It is my humble view that the Petitioners should have stuck to this remedy as this was the proper legal approach.

48. In the circumstances, I find that the Preliminary Objection has merit and is thus upheld. The Petition offends the doctrine of constitutional avoidance. I strike out the same with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF JULY, 2025.

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L N MUGAMBI

JUDGE

