Operation Linda Jamii also known as Operation Linda Gatuzi (Suing Through its Officials) v Attorney General & 2 others; Independent Policing Oversight Authority (Interested Party) (Constitutional Petition E007 of 2023) [2024] KEHC 557 (KLR) (22 January 2024) (Ruling)

Neutral citation: [2024] KEHC 557 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CONSTITUTIONAL PETITION E007 OF 2023

RE ABURILI, J

JANUARY 22, 2024

BETWEEN

OPERATION LINDA JAMII ALSO KNOWN AS OPERATION LINDA GATUZI (SUING THROUGH ITS OFFICIALS) ..... PETITIONER

AND

THE HON. ATTORNEY GENERAL ..... 1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF INTERIOR AND NATIONAL ADMINSTRATION ..... 2ND RESPONDENT

INSPECTOR GENERAL OF NATIONAL POLICE SERVICE . 3RD RESPONDENT

AND

THE INDEPENDENT POLICING OVERSIGHT AUTHORITY .... INTERESTED PARTY

RULING

1. Vide Notice of Motion dated 8th September 2023 seeks the following orders:

    a. Spent

    b. Spent

    c. That pending the hearing and determination of the petition filed herewith, this Honourable Court be pleased to issue a mandatory conservatory order directing and/or compelling the interested party to produce before this Honourable Court a full report on all incidents of police shootings during the demonstrations reported to it by the 2nd respondents and/or his agents, employees, servants or any person claiming under the said office.

d. Spent

e. That pending the hearing and determination of the petition filed herewith, this Honourable Court be pleased to issue a mandatory conservatory order directing the interested party herein to produce before this Honourable Court all the internal inquiries, investigations and/or prosecutions if any, into the police shootings committed during the demonstrations.

f. Spent

g. That pending the hearing and determination of the petition filed herewith, this Honourable Court be pleased to issue a mandatory conservatory order directing the respondents and the interested party herein to produce before this Honourable Court all files, reports, papers, letters, books, copies of letters, electronic mail (email) and other writings and documents and any other form of evidence, in whatever medium, including but not limited to films, photographs, videotapes, radio and television broadcasts or any other recordings relating to the shooting incidents committed during the demonstrations.

h. Spent

i. That the costs of and incidental to this application be provided for; and

j. That this Honourable Court be pleased to make any other order and/or directions as to but not limited to the orders sought in the instant application which it will deem fit to grant in the interest of justice.

2. The application was supported by the grounds therein as well as the supporting affidavit of Prof. Fred Ogola.

3. It is the applicant's case that the instant petition is about police brutality meted out on the residents of Kisumu at the behest of the 2nd and 3rd respondents which was in violation of the fundamental freedoms and human rights enshrined in the *Constitution* and various Constitutional principles and further portents to the 2nd and 3rd respondents failure to train the police on how to conduct law enforcement operations during demonstrations as per the provisions of the *United Nations Code of Conduct on International Standards* regarding police use of lethal force during demonstrations.

4. The applicant further averred that during the said demonstrations, police officers used their firearms to unlawfully shoot at the demonstrators as well as persons who were not demonstrating including children of tender years and to date it was not clear whether the said officers and/or immediate superior reported the said use of firearms to the interested party as mandated by law.

5. The applicant further averred that to date, the interested party had never made public the report on all incidences of unlawful police shootings during the demonstrations and subsequent demonstrations, investigations and prosecutions if any as per the provisions of Article 35 (1) and (3) of the *Constitution*.

6. The applicant averred that the police officers also failed to provide emergency medical services to persons who were injured during the demonstrations in violations of the law and Constitution.

7. The applicant thus averred that it was just and proper that their application be allowed to prevent the furtherance of violations and infractions being meted upon the *Constitution* and the people of Kenya.

8. In response, the interested party filed a replying affidavit deposed on the 27th October 2023 by one Emmanuel Lagat in which he deposed that on its own motion, it investigated cases of alleged police misconduct during the demonstrations subject of this suit, which investigations are currently underway.

9. It was further deposed that the petitioner had failed to produce any iota of evidence to demonstrate failure on its part to conduct independent and effective investigations on the alleged police misconduct and thus failed to establish the inherent merit of its case.

10. The interested party further averred that provision of the information sought by the petitioner was exempted under section 6 (1) (b) and (c) of the *Access to Information Act* as it would endanger the life of the victims and possible witnesses and/or impede the due process of the law were the Interested Party to recommend any action against the concerned police officers.

11. Further to the aforementioned, it was the interested party's case that the reports and records sought are confidential pursuant to section 24 of the *Independent Police Oversight Authority (IPOA) Act* and remain so until the Authority in writing determines otherwise.

12. It was deposed that the petitioner stood to suffer no prejudice if the conservatory orders sought are denied and instead the court proceeds to deal with the substantive issues, if any, raised in the petition and further that the petitioner having joined the Authority in the suit as an Interested Party, could then not seek adverse orders against it.

13. The interested party contended that the petitioner's application was baseless and did not meet the established threshold for issuance of conservatory orders and thus ought to be dismissed with costs to it.

The Petitioner's Submissions

14. It was submitted that the issues raised in the Petition dated 8th September, 2023 raise serious weighty Constitutional issues, specifically that the acts of the officers under the direct control and command of the 2nd and 3rd Respondents violated the *Constitution* and further the Interested Party's failure to publish its investigative mandate and monitoring obligation provided for under Section 6 (j) & (l) of the *Independent Policing Oversight Authority Act* No. 35 of 2011, thus evidencing that the petitioner has established a prima facie case.

15. The petitioner submitted that that there exist special circumstances in the present case to warrant the issuance of the mandatory conservatory orders sought in that the prayers of mandatory conservatory order sought in the said application seek to compel the Respondents and the Interested Party to comply with the provisions of Section 6 (j) & (l) of the *Independent Policing Oversight Act* and the Sixth Schedule to the *National Police Service Act* No. 11A of 2011 and further considering the fact that the reports sought to be produced form part of the substratum of the Petitioner/Applicant's case in the present case, failure to produce the said reports before this

    Honourable Court, will render the said petition an academic exercise in futility.

16. It was submitted that that public interest in the instant case requires that the Interested Party should make public its monitoring and investigative mandate conferred by section 6 (j) and (l) and that this Honorable Court would be failing in its mandate as the custodian of justice and fidelity to the law by reaching a contrary determination

17. As regards costs, the petitioner whilst referring the court to section 27 of the Civil Procedure Rules urged the court to look into the conduct of the parties herein, particularly the Respondents and the Interested Party who have failed to comply with the Court's directions and orders of 20th September, 2023 and proceed to award costs of the application to the Petitioner/Applicant.

The Interested Party's Submissions

18. It is submitted that their objection to the disclosure of the information sought is based upon the clear realization that disclosure of the information sought would not only impede the due process of the law but will also endanger the safety and life of victims and possible prosecution witnesses thus placing at risk the lives of those who the instant petition and application purports to protect.

19. The interested party submitted that the reports and data which the petitioner seeks falls squarely within the exception envisaged in sections 6 (1) (b) and (c) of the *Access to Information Act* and further that the information sought falls under confidential information that is protected under Section 24 (15) of the *IPOA Act* and as such the orders sought are untenable and cannot be granted.

20. It is submitted that the aforementioned averments by the Authority have not been controverted and thus hold true.

21. Further, it is submitted that the disclosure of the information sought by the applicant will endanger the safety and lives of the victims and possible prosecution witnesses since persons considered to be of interest to the cases under the interested party's investigations may feel compelled to eliminate victims and/or witnesses who give testimony that is averse to their innocence.

22. The interested party further submitted that there was no requirement in law for the court to compel production of such information. It is submitted that just like th police should not disclose information to those who organize crime, it should not be compelled to disclose anything that may give useful information to those it considers to be of interest to its investigations.

23. It is submitted that a party is bound by its pleadings as held in a number of cases including the Supreme Court in *Raila Amolo Odinga & Another v IEBC & 2 Others* [2017] eKLR, *Rose Owira & 23 Others v Attorney General & Another; Kenya National Commission on Human Rights & 4 Others (Interested Parties)* [2020] eKLR and thus the alternative included in the applicant's submission ought not to be considered by the court.

24. Further, it was submitted that the alternative proposed in the applicant's submission was not tenable as the same is not possible in our legal system that lacks specially vetted counsel appointed to receive confidential information similar to those in the UK and further our legal system does not provide for a procedure for submission of confidential records ex parte to courts for examination before determination on disclosure.

Analysis & Determination

25. I have the application which is the subject of this ruling, the various responses thereto, the submissions made on behalf of the parties and the authorities cited. This Court is vested with the power to interpret the *Constitution* and to safeguard, protect and promote its provisions as provided for under Article 165 (3) of the *Constitution* and is under an obligation to intervene in actions of Government, State and non-state actors as well as state organs where it is alleged or demonstrated that the *Constitution* has either been violated or threatened with violation.

26. Accordingly, the issue pending before this court is whether the conservatory orders should issue pending the determination of the main petition.

27. The guiding principles upon which our Courts make findings on interlocutory applications for conservatory orders within the framework of Article 23 of the *Constitution* are now fully settled. The Law is that, in considering an application for conservatory orders, the Court is not called upon and is

indeed not required to make any definitive finding either of fact or Law as that is the province of the Court that will ultimately hear the petition.

28. The jurisdiction of the Court at this point is limited to examining and evaluating the material placed before it, to determine whether the applicant has made out a primafacie case to warrant grant of conservatory orders.

29. The Court is also required to evaluate the pleadings and determine whether denial of conservatory orders will prejudice the applicant as was stated in the case of the *Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General* [2011] eKLR:

> " At this stage, a party seeking a conservatory order only requires to demonstrate that he has a primafacie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the *Constitution*."

30. The issue in contention in this application is whether the applicant has established a strong primafacie case that warrants the grant of conservatory orders. As it has been held in various decisions, a primafacie case is not a case which must necessarily succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, an applicant has to show that he or she has a case which discloses serious and arguable Constitutional issues to be tried or a case alleging violation of rights. In this regard, I am comforted with the Judgment of Odunga J (as he was then) in *Kevin K. Mwiti & Others v Kenya School of Law & Others* [2015] eKLR stated:

> " The first issue for determination is whether the petitioner has established a primafacie case. A primafacie 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 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 primafacie case with a likelihood of success." (emphasis is mine)
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> Furthermore, the Court in *Kenya Association of Manufacturers & 2 others v Cabinet Secretary – Ministry of Environment and Natural Resources & 3 others* {2017} eKLR had this to say about the grant of conservatory orders:
>
> > "in an application for a conservatory order, the Court is not invited to make any definite or conclusive findings of fact or Law on the dispute before it because that duty falls within the jurisdiction of the Court which will ultimately hear the substantive dispute. The jurisdiction of the Court at this point is limited to examining and evaluating the materials placed before it, to determine whether the applicant has made out a primafacie case to warrant grant of a conservatory order. The Court is also required to evaluate the materials and determine whether, if the conservatory order is not granted, the applicant will suffer prejudice. Thirdly, it is to be borne in mind that conservatory orders in public Law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the court in the public interest." (emphasis is mine)

31. It is my view that, for the petitioner to raise a primafacie case with a probability of success, he needs at least to demonstrate that the failure of the interested party to publish and produce before this court the full report on all incidents of police shootings during the demonstrations, the internal

inquiries, evidential documentation in all forms, investigations and/or prosecutions if any, into the police shootings committed during the demonstrations amounts to a violation of the *Constitution* and their human rights.

32. In response to the application by the petitioner, the Interested Party in their replying affidavit deposed and admitted that the incidences of alleged police misconduct during the demonstration were made to them and that it initiated investigations, on its own motion, into the same.

33. However, the interested party further deposed that investigations into the said cases were currently underway and that by granting the said orders sought by the petitioner, this court would be endangering the lives of the victims and possible witnesses and thus impeding the due process of the law.

34. The Interested Party referred the court to section 6 (1) (b) and (c) of the *Access to Information Act* that exempts it from providing the information sought by the Petitioner and section 24 of the IPOA Act which deems the information sought as confidential and only to be produced with written authority of the interested party.

35. The right of access to information held by the state is guaranteed under Article 35(1) of the *Constitution*: -

    (1) Every citizen has the right of access to—

        (a) information held by the State; and

        (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

36. The question that this court must resolve is whether this application surmounts the exceptions provided under section 6(1) (b) and (c) of the *Access to information Act* and the formidable barrier erected by section 24 of the *IPOA Act*.

37. The *Access to Information Act* was enacted to give effect to Article 35 of the *Constitution* and the Act provides a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the Constitutional principles.

38. Section 4 provides that access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost. More important is the wording of subsection (4) which provides that the Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6 of the Act which stipulates as follows:

    6. Limitation of right of access to information

        (1) Pursuant to Article 24 of the *Constitution*, the right of access to information under Article 35 of the *Constitution* shall be limited in respect of information whose disclosure is likely to—

            (a) undermine the national security of Kenya;

            (b) impede the due process of law;

            (c) endanger the safety, health or life of any person;

            (d) involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;

(e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;

(f) cause substantial harm to the ability of the government to manage the economy of Kenya;

(g) significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;

(h) damage a public entity's position in any actual or contemplated legal proceedings; or

(i) infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession."

39. A reading of section 6 of *IPOA Act* reveals that there are situations where reasonable and justifiable limitations on the right of access to information are allowed. The purpose of section 6 is to protect from disclosure certain information that, if disclosed, could cause material harm to, amongst other things: the defence, security and international relations of the republic; the economic interests and financial welfare of the republic and commercial activities of public bodies; and the formulation of policy and taking of decisions by public bodies in the exercise of powers or performance of duties conferred or imposed by law.

40. However, the burden of establishing that the refusal of access to information is justified rests on the state or any other party refusing access as was held in the case of *President of the Republic of South Africa & others v M & G Media Limited* (CCT 03/11 {2011} ZACC 32) quoted in the case of *Commission for Human Rights & Justice (CHRJ) & another v Chief Officer, Medical Services County Government Of Mombasa & 3 others* (Constitutional Petition E003 of 2022) [2022] KEHC 12994 (KLR) (21 September 2022) (Judgment).

> " The imposition of the evidentiary burden of showing that a record is exempt from disclosure on the holder of information is understandable. To place the burden of showing that a record is not exempt from disclosure on the requesting party would be manifestly unfair and contrary to the spirit of... the *Constitution*. This is because the requester of information has no access to the contents of the record sought and is therefore unable to establish that it is not exempt from disclosure under the Act. By contrast, the holder of information has access to the contents of the record sought and is able to establish whether or not it is protected from disclosure under one or more of the exemptions ... Hence ...the evidentiary burden rests with the holder of information and not with the requester."

41. In order to discharge its burden under section 6, the State must provide evidence that the record in question falls within the description of the statutory exemption that it seeks to claim. The proper approach to the question whether the state has discharged its burden under section 6 is therefore to ask whether the state has put forward sufficient evidence for a court to conclude that, on the probabilities, the information withheld falls within the exemptions claimed.

42. From the affidavit deposed on behalf of the interested party, it was stated that the information sought relate to ongoing investigations which if disclosed or adduced to court would endanger the lives of victims and witnesses thus hampering the due course of the law.

43. The Interested Party further sought refuge in Section 24 of the *IPOA Act*. Section 24 (15) provides that:

> " Notwithstanding any other written law, any document or statement drafted or made or taken during an investigation shall remain confidential until the Authority in writing determines otherwise."

44. In the circumstances, I am not persuaded that the petitioner has demonstrated a prima facie case.

45. The petitioner herein argues that failure to grant the orders sought will render the petition an academic exercise in futility. From a reading of the application and the petition, it is evident that the issue in contention is the misconduct of the police during the demonstrations following the enactment of the *Finance Act 2023* and the alleged failure of the interested party to report on the investigations on the alleged misconduct. This issue cannot be decided at this interlocutory stage as there is uncontroverted affidavit evidence by the interested party that investigations are currently ongoing and any disclosure would jeopardize the said investigations and even endanger the lives of victims. Further, the alleged misconduct of the respondents' agents, the police, or the interested party can only be interrogated in full at the hearing of the petition.

46. In addition, in considering whether or not to grant conservatory order, the principle of proportionality plays a very central role. Dealing with the circumstances under which the Court would grant conservatory orders the Supreme Court in *Gitaru Peter Munya v Dickson Mwenda Kithinji & 2 others* {2014} eKLR expressed itself as follows:

> " Bearing in mind the nature of the competing claims, against the background of the public cause, we have focused our perception on the public interest, and the concept of good governance, that runs in tandem with the conscientious deployment of the scarce resources drawn from the public. Proper husbandry over public monetary and other resources, we take judicial notice, is a major challenge to all active institutions and processes of governance; and the Courts, by their established attribute of line-drawing, must ever have an interest in contributing to the safeguarding of such resources.... By our sense of responsibility, the Court's contribution to good governance in that context, takes the form of an expedited hearing for the appeal. Just that." (emphasis added)

47. As was held in *Centre for Rights Education and Awareness (CREAW) & 7 Others* (*supra*), a party seeking a conservatory order only requires to demonstrate 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*.

48. What amounts to real danger was dealt with by Mwongo J in *Martin Nyaga Wambora v Speaker of the County of Assembly of Embu & 3 others* {2014} eKLR, where the learned Judge expressed himself as follows:

> " To those erudite words I would only highlight the importance of demonstration of "real danger." The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the Court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention."

49. Therefore, the burden is on the petitioner to show that there is real danger which is imminent and evident, true and actual and fictitious and which danger deserves immediate remedial attention or

redress by the Court. A remote danger will not do. In other words, the petitioner must show that the probability as opposed to mere possibility of the danger occurring is real and imminent.

50. Consequently, the question that arises is whether in the circumstances of this case, that burden has been discharged. In other words, the petitioner must show that the probability as opposed to mere possibility of the danger occurring is real and imminent. However, this must be weighed against the public interest.

51. From the affidavits sworn by the parties herein, there is completely no allusion as to that imminent danger. It is my view that there is no iota of evidence tending to show any prejudice or danger that the petitioner faces in the event that the documents sought are not published or released to court or the full report on the investigations to the alleged police misconduct during the demonstrations not being released especially in light of the fact that the said investigations are currently ongoing.

52. Therefore, the petitioner having failed to aver and prove that it faces imminent, evident, true and actual danger that it will suffer prejudice and that it is in the public good, as a result of the violation or threatened violation of the *Constitution*, the petitioner has failed the test for the grant of conservatory order.

53. The application dated 8th September 2023 is thus found to be not allowable and the same is hereby dismissed with no orders as to costs.

54. I so order.

DATED, SIGN ED AND DELIVERED AT KISUMU THIS 22ND DAY OF JANUARY, 2024

R.E. ABURILI

JUDGE