



**Bandika & another v County Criminal Investigation Officer, Kwale & another  
(Petition 12 of 2022) [2024] KEHC 2161 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 2161 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
PETITION 12 OF 2022  
OA SEWE, J  
FEBRUARY 8, 2024  
(FORMER MOMBASA ELC PETITION NO. E021 OF 2022)  
IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 2(1), 3(1),  
27(1) & (2), 35(1)(B), 39(2), 40, 47, 156, 157 AND 258 OF THE CONSTITUTION**

**BETWEEN**

**PETER DECHE BANDIKA ..... 1<sup>ST</sup> PETITIONER**

**ANTHONY TSUMA NDEWA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**COUNTY CRIMINAL INVESTIGATION OFFICER, KWALE .... 1<sup>ST</sup>  
RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The petitioners moved the Court vide their Chamber Summons dated 27<sup>th</sup> May 2022 seeking various interlocutory orders pending the hearing and determination of their Petition of even date. In particular, they relied on Articles 2(1), 3(1), 27(1) & (2), 29, 35(1)(b), 39(2), 40, 47, 156, 157 and 258 of *the Constitution* of Kenya as well as Sections 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Order 40 of the Civil Procedure Rules. Some of the orders sought are now spent. The outstanding prayers are:
  - (a) That pending the hearing and determination of the Petition, the Court be pleased to issue a restraining order against the 1<sup>st</sup> respondent, whether by itself, its agents and servants and whomsoever acting under his authority or instruction, from charging, prosecuting, arresting,



continued harassment, questioning, intimidation or apprehension of the applicants on any matter concerning their ownership of land parcel Number Kwale/Waa/2027 and Kwale/Waa/2028 (the suit property) or on account of any investigations relating to any alleged fraud in connection with the suit property.

- (b) That pending the hearing and determination of the Petition, an order of injunction be granted restraining the 1<sup>st</sup> respondent, whether by itself, its agents, privies and servants, acting for and on their behalf, whether jointly or severally, from harassing in any manner whatsoever, intimidating, causing the arrest/prosecution, threatening to arrest or prefer criminal charges and/or interfering with the petitioners' fundamental rights and freedoms in respect to any matters under investigation by the 1<sup>st</sup> respondent, or further interfering with the petitioners' enjoyment of their fundamental rights as guaranteed by *the Constitution*.
  - (c) That pending the hearing and determination of the Petition an order of injunction restraining the 1<sup>st</sup> respondent from in any manner whatsoever harassing, intimidating, causing the apprehension of the petitioners, considering and/or preferring any criminal charges against the petitioners in matters under investigation by it.
  - (d) That the costs of the application be provided for.
2. The application was premised on the grounds that, the petitioners bought the suit property, measuring approximately 4 acres, from the administrators of the estate of Hamisi Tabu (deceased) at a purchase price of Kshs. 280,000/= and made payments for the property on diverse dates through several hand-written agreements which were witnessed by the area chief, one Mr. Gakuria. That one of the beneficiaries now claims that the said purchase price was for only one acre; and consequently, the 1<sup>st</sup> respondent, under the instructions of the administrators and the beneficiaries of the estate of Hamisi Tabu, have been harassing, intimidating, threatening, provoking, inciting, investigating and/or threatening to arrest the petitioners on allegations of fraud.
3. Thus, the petitioners averred that, unless restrained by this Court, the 1<sup>st</sup> respondent intends to continue the harassment, intimidation, threats and investigations. They added that the acts complained of amount to abuse of public office for collateral purposes motivated by spite and malice; hence the instant application. The application was supported by the Supporting Affidavit sworn by the 1<sup>st</sup> petitioner on 27<sup>th</sup> May 2022 to which he annexed several documents. The 1<sup>st</sup> petitioner averred that, jointly with the 2<sup>nd</sup> petitioner, they bought the suit property, Plot No. KWALE/WAA/2028 measuring 3 acres, from the administrators of the estate of Hamisi Tabu and made full payment of the purchase price of Kshs. 280,000/=.
4. The petitioners further averred that, the administrators of the deceased transferred the suit property to them along with vacant possession, and thereafter caused the property to be subdivided into two plots for each of them. They moved into occupation and have since built permanent structures thereon. The petitioners were therefore aggrieved that one of the beneficiaries has turned round to claim that the purchase price paid by them was for only one acre, and has therefore been using the 1<sup>st</sup> respondent to harass and intimidate them on allegations of fraud. Accordingly, they filed this Petition with a view of vindicating their right to peaceful enjoyment of the suit property without any hindrance or restriction.
5. The petitioners further stated that they have filed a substantive suit for injunction against the administrators of the deceased's estate in the Magistrate's Court at Kwale, being Kwale Chief Magistrate's ELC No. E023 of 2022 which is pending determination. In support of their averments, the petitioners exhibited several documents as annexures to their affidavit. The documents include copies of the pertinent land sale agreements, application for the consent of the Land Control Board,



transfer documents, as well as copies of the Title Deeds and Certificates of Search, confirming that they are the registered owners of the suit properties. The petitioners also annexed copies of the pleadings filed in Kwale Chief Magistrate's ELC No. E023 of 2022 to demonstrate that they have filed a substantive suit which is pending hearing and determination. They accordingly prayed that their application be allowed and the orders sought granted in the interim period.

6. In response to the application, the respondents relied on the Replying Affidavit attributed to the County Criminal Investigation Officer at the Kwale County Criminal Investigation Headquarters, Mr. Kirui Koske, though purportedly signed by one Diba Halake. He confirmed that they are conducting the subject investigations into an alleged offence of obtaining land registration by false pretences, contrary to Section 320 of the Penal Code, which was reported to Kwale Police Station vide OB No. 17 on the 10<sup>th</sup> August 2021 by Binti Sudi Hamisi Tabu, among others. He further deposed that upon conclusion of investigations, the file will be forwarded to the Director of Public Prosecutions for directions.
7. Thus, it was the contention of the respondents that the application has been made maliciously with the sole intention of derailing the investigations so as to deny justice to the elderly complainants. Mr. Koske added that he carried out his investigations in accordance with the applicable procedures governing such investigations. He therefore urged the Court to dismiss the application dated 27<sup>th</sup> May 2022 with costs.
8. Directions were thereafter given on 10<sup>th</sup> May 2023 that the application was canvassed by way of written submissions. It is noteworthy however that whereas the applicants filed their written submissions dated 1<sup>st</sup> May 2023, no submissions were filed by or on behalf of the respondents. Thus, the petitioners took issue with the respondent's Replying Affidavit and especially with regard to the fact that the name of the affiant, Kirui Koske, as appears in the opening paragraph is different from the name of the deponent, Diba Halake, as shown in the jurat at page 4 thereof. In the premises, the petitioners submitted that the Replying Affidavit was signed by a stranger known as Dida Halake while the facts were supplied by Kirui Koske. On that account, the petitioners urged that the Replying Affidavit be struck out.
9. On the merits of the application, the petitioners took the posturing that there is a real danger or threat to their constitutional rights unless the Court intervenes in the interim, pending the hearing and determination of their Petition. They proposed two issues for consideration which in my view belong to the Petition itself, namely:
  - (a) Whether their right to equality and freedom from discrimination, freedom and security and fair administrative action have been infringed;
  - (b) Whether they are entitled to the reliefs sought.
10. Counsel for the petitioners then made submissions at length in respect of the two issues, on the basis whereof he urged the Court to find that the petitioners stand to suffer irreparable damage and prejudice unless the Court steps in with the orders sought. He acknowledged that the object of the instant application is not to stop police investigations but to restrain the respondents from harassing and intimidating the petitioners in the process. Reliance was placed on the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR at paragraphs 93 and 95.
11. I have given careful consideration to the application, and in particular, the grounds relied on by the petitioners as explicated on the face of the application and in the supporting. I have likewise considered the response filed on behalf of the respondents as well as the written submissions filed herein. A technical objection was raised by the plaintiff as to the validity of the 1<sup>st</sup> respondent's Replying



Affidavit. It is indeed true that the impugned affidavit is purported to have been sworn by the County Criminal Investigation Officer at the Kwale County Criminal Investigation Headquarters, Mr. Kirui Koske. Its jurat however shows that that it was signed by one Diba Halake; such that it is not clear who exactly made the deposition. For this reason, the petitioners submitted that the affidavit, though made by the proper officer was sworn by a stranger.

12. In the light of that glaring discrepancy, there is no gainsaying therefore that the Replying Affidavit is defective. Indeed, Order 19 Rule 4 of the Civil Procedure Rules stipulates that:

“Every affidavit shall state the description, true place of abode and postal address of the deponent, and if the deponent is a minor shall state his age.”

13. It was therefore imperative for the deponent to be truthfully described in the affidavit. That said, the pertinent question to pose is whether the defect is fatal; and my straightforward answer is, no. I say so having given thought to the matters adverted to in that affidavit. The respondents, particularly the 1<sup>st</sup> respondent, simply confirmed thereby that they are conducting the subject investigations into an alleged offence of obtaining land registration by false pretences, contrary to Section 320 of the Penal Code, which was reported to Kwale Police Station vide OB No. 17 on the 10<sup>th</sup> August 2021 by Binti Sudi Hamisi Tabu, among others. He further deposed that upon conclusion of investigations, the file will be forwarded to the Director of Public Prosecutions for directions.

14. These are facts that were conceded to by the petitioners; and therefore no prejudice will be occasioned to the petitioners by the aforementioned defect. More importantly, Rule 7 of Order 19 of the Civil Procedure Rules gives the Court the discretion to ignore some of the defects, especially where no prejudice is anticipated. It provides that:

“The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in title or other irregularity in the form thereof.”

15. Accordingly, I do not consider the defect aforementioned to be the sort that warrant striking out of the impugned affidavit. The petitioner’s objection in that regard is accordingly overruled.

16. On the merits of the Petition, there is no gainsaying that, under Rule 23(1) of the Mutunga Rules, the Court has powers to grant such interim measures as may be necessary to meet the ends of justice. The provision states:

“Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders.”

17. It is trite that at this stage, the Court need not examine the merits of the case closely. Hence, I bear in mind the caution expressed by Hon. Ibrahim, J. (as he then was) in the Muslim for Human Rights & 2 Others vs. Attorney General & 2 Others [2011] eKLR in connection with conservatory orders. Here is what the learned Judge had to say:

“The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-à-vis the case of either



party. The principle is similar to that in temporary or interlocutory injunctions in civil matters...”

18. Similarly, in Nairobi High Court Petition No. 16 of 2011: Centre for Rights Education & Awareness (CREAW) & 7 Others v Attorney General, it was held:

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

19. As to the nature of a conservatory order, the Supreme Court had the following to say in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR:

“Conservatory orders bear a more decided public-law connotation; for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as “the prospects of irreparable harm” occurring during the pendency of a case or “high probability of success” in the Applicant’s case for order of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant cases.”

20. Hence, it is now settled that an applicant for injunctive or conservatory orders for purposes of Articles 22 and 23(3)(c) of *the Constitution* must satisfy the Court as to the following three elements:

- (a) A prima facie case with a high likelihood of success;
- (b) That the Petition will be rendered nugatory;
- (c) That public interest weighs in the applicant’s favour.

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

“A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

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

“A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. Accordingly in



determining this application, the Court is not required- indeed it is forbidden- from making definite and conclusive findings on either fact or law.

23. With the foregoing in mind, I have considered the Petition in the light of the averments set out in the petitioners' Chamber Summons and its Supporting Affidavit. There appears to be no dispute that there was a land sale agreement between the two petitioners and the legal representatives of the estate of Hamisi Tabu, now deceased. The annexed documents indicate that purchase price was paid in instalments before the area chief; whereupon the vendors made an appropriate application for transfer of the sold portion to the petitioners. Thus, the petitioners have exhibited copies of their respective title deeds for Kwale/Waa/2027 and Kwale/Waa/2028, respectively.
24. From the material presented before the Court, I am therefore satisfied that a prima facie case has been made out by the petitioners; and that, for purposes of upholding constitutional values, their prosecution ought to await the hearing and determination of the Petition. As to whether the titles were fraudulently obtained is a matter beyond the scope of the instant application. The parties are in agreement that criminal investigations are ongoing and should the petitioners be charged as proposed, the trial court will be best placed to consider and determine the allegations of fraud.
25. In the premises, I find merit in the petitioner's application dated 11<sup>th</sup> July 2023. As some of the prayers re either spent or otiose, the application is allowed and orders granted as hereunder:
  - (a) That pending the hearing and determination of the Petition, a conservatory order be and is hereby issued against the 1<sup>st</sup> respondent, whether by himself, his agents and servants and whomsoever acting under his authority or instruction, restraining the 1<sup>st</sup> respondent from arresting, charging, prosecuting, continued harassment or questioning on any matter concerning the applicants' ownership of land parcel Number Kwale/Waa/2027 and Kwale/Waa/2028 (the suit property) or on account of any investigations relating to any alleged fraud in connection with the suit property.
  - (b) That pending the hearing and determination of the Petition, an order of injunction be and is hereby granted restraining the 1<sup>st</sup> respondent, whether by itself, its agents, privies and servants, acting for and on their behalf, whether jointly or severally, from harassing in any manner whatsoever, intimidating, causing the arrest/prosecution, threatening to arrest or prefer criminal charges and/or interfering with the appellants' fundamental rights and freedoms in respect to any matters under investigation by the 1<sup>st</sup> respondent, or further interfering in the petitioners' enjoyment of their fundamental rights as guaranteed by the Constitution.
  - (c) That pending the hearing and determination of the Petition an order of injunction be and is hereby issued restraining the 1<sup>st</sup> respondent from in any manner whatsoever harassing, intimidating, causing the apprehension of the petitioners, considering and/or preferring any criminal charges against the petitioners in matters under investigation by it.
  - (d) That the costs of the application be provided for.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 8<sup>TH</sup> DAY OF FEBRUARY 2024**

**OLGA SEWE**

**JUDGE**

