



REPUBLIC OF KENYA



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**Kinyanjui v Wakahiu & 3 others (Petition E051 of 2023)
[2024] KEHC 4806 (KLR) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4806 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E051 OF 2023**

OA SEWE, J

APRIL 18, 2024

**IN THE MATTER OF ARTICLES 19, 20, 21, 22, 23, 27(1), 28, 29, 31, 39, 40,
47, 50, 159(2) AND 165 OF THE CONSTITUTION OF KENYA, 2010 AND
IN THE MATTER OF ALLEGED THREAT TO AND CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 19, 20, 21, 22,
23, 27(1), 28, 29, 31, 39(1), 40(1), 40(2), 47 OF THE CONSTITUTION OF KENYA**

BETWEEN

SAMUEL MBUGUA KINYANJUI PETITIONER

AND

JUDY WAKAHIU 1ST RESPONDENT

**THE OFFICER COMMANDING STATION BAMBURI POLICE
STATION 2ND RESPONDENT**

**THE OFFICER IN CHARGE, DIRECTORATE OF CRIMINAL
INVESTIGATIONS, BAMBURI POLICE STATION 3RD RESPONDENT**

THE ATTORNEY GENERAL 4TH RESPONDENT

RULING

1.

(1) Before the Court for determination is the Notice of Motion dated 9th November 2023. It was filed pursuant to Articles 22 and 23 of the *Constitution*, Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* and Order 51 Rule 1 of the *Civil Procedure Rules* for orders that:

(a) Spent

(b) Spent



- (c) The Court be pleased to issue an order restraining the respondents, their agents, servants, employees or any other police officer from within the Republic of Kenya from investigating, arresting, arraigning in court, prosecuting and/or detaining the petitioner in relation to the complaint lodged with the 2nd and 3rd respondents on or around 3rd November 2023 by the 1st respondent against the petitioner herein in relation to a contract between the petitioner and the 1st respondent herein as Tilia Eco Gardens Limited for a project in Kwale County pending the hearing and determination of the Petition.
- (d) That the costs of the application be provided for.
2. The application was premised on the grounds that on 31st October 2023 the 1st respondent served the petitioner with a demand letter Ref:MM/JWW/151/2019 from the firm of M. Murimi & Company Advocates demanding a total of Kshs. 1,012,098.12 on behalf of the 1st respondent, trading as Tulia Eco Gardens Limited. The petitioner further stated that, on or around 5th November 2023, he received information that the 2nd and 3rd respondents had visited his place of residence at Bamburi Estate in Mombasa with the intention of arresting, detaining and charging him in relation to a contract between him and the 1st respondent.
3. The petitioner further averred that he owes the 1st respondent no such amount. He added that, even if that were the case, the issue of debt collection is one that should be referred to the civil courts of Kenya under the law of contract. He therefore contended that the 2nd and 3rd respondents are acting beyond their powers in seeking his arrest for purposes of debt collection. He further contended that his constitutional rights to freedom of movement, dignity and freedom from torture are being infringed or are threatened with violation by the respondents. It was therefore the assertion of the petitioner that, unless the orders sought are granted, the Petition will be rendered nugatory.
4. The application was supported by the affidavit of petitioner, sworn on 9th November 2023. He explicated therein the grounds aforesaid and added, at paragraph 9 of the said affidavit that on 29th April 2023, the 1st respondent sent him a warning via WhatsApp message that his place was in court or jail. He annexed a copy of that message as Annexure SMK2 to his affidavit along with a copy of the letter dated 31st October 2023.
5. In response to the application, the 1st respondent filed Grounds of Opposition dated 16th November 2023 contending that:
- (a) Both the application and Petition, as filed, are fatally defective, frivolous, vexatious, misconceived and totally devoid of merit.
- (b) Both the application and the Petition are a non-starter and an abuse of the court process.
- (c) Both the application and Petition are incurably defective and unconstitutional since by granting the prayers sought, the Court would be usurping the statutory powers vested in the 2nd and 3rd respondents.
- (d) Both the Petition and the application are not supported by any evidence in proof of the injustice and/or breach of constitutional rights.
- (e) The petitioner has not outlined with precision how the provisions of Articles 19, 20, 21, 22, 23, 27(1), 28, 29, 31, 39(1), 40(1) and 47 of the *Constitution* were or have been violated.
- (f) The petitioner has not set out particulars of the alleged infringement of the provisions of the *Constitution*.



- (g) The petitioner has not demonstrated before the Court how the 1st respondent has violated his constitutional rights.
 - (h) The petitioner has not disclosed how the 1st respondent instigated or supported the alleged violations and hence his allegations remain unsupported.
 - (i) The petitioner has not met the threshold for the grant of the injunctive and/or conservatory orders sought.
 - (j) The application is therefore bad in law, an abuse of the court process and ought to be dismissed with costs to the 1st respondent.
6. In addition, the 1st respondent filed a Replying Affidavit, sworn on the 21st November 2023, in which she explained that the petitioner was contracted by her company to undertake the construction of an infinity pool on a property in Diani, Kwale County; and that he shoddily undertook the works, thereby necessitating additional repairs and reconstruction at an additional expense. Consequently, the company demanded for full reimbursement through its advocates, with no involvement whatsoever of the 2nd or 3rd respondents. According to the 1st respondent, the petitioner is merely out to undermine her constitutional right of access to justice notwithstanding his acknowledgement of having done substandard works.
7. The 2nd, 3rd and 4th respondents also opposed the application. They relied on their joint Grounds of Opposition dated 21st November 2023. They posited that:
- (a) The application and the Petition are misconceived, frivolous, vexatious and an abuse of the court process.
 - (b) The 2nd and 3rd respondents are empowered by law to investigate and prosecute criminal offences pursuant to the provisions of Section 24 of the [National Police Service Act](#) and Articles 242 and 245 of the *Constitution*.
 - (c) The petitioner has not demonstrated how the respondents are not going to respect his constitutional rights.
 - (d) It is incumbent upon the petitioner to demonstrate before this Court that the intended police investigations are hinged on illegality or bad faith.
 - (e) There is no bar to the 2nd and 3rd respondents from instituting criminal proceedings by dint of the provisions of Section 193A of the [Criminal Procedure Code](#) that allows concurrent criminal and civil proceedings.
 - (f) The petitioner has merely alluded to constitutional provisions and has not shown with exactitude how his rights and fundamental freedoms will be infringed to meet the threshold for the Court's intervention.
 - (g) The 4th respondent is only responsible for defending the Government in civil litigation and has nothing to do with investigations and prosecution in criminal cases.
 - (h) For the Court to interfere it would have to be satisfied that the criminal process which has been initiated is being used with a view of forcing the petitioner to settle the civil claim, which evidence has not been brought before this Court.
 - (i) The petitioner has failed to bring forth before the court any scintilla of evidence to show that he will not be accorded fair trial.



- (j) The petitioner has failed to identify the police officers and/or police stations he claims have been harassing, threatening and intimidating him through arrest, which amounts to material non-disclosure.
- (k) The petitioner has failed to establish a *prima facie* case with the probability of success and therefore the injunctive orders sought should not be granted.
- (l) The Petition offends the doctrine of constitutional avoidance and therefore should not be entertained.
8. The application was canvassed by way of written submissions, pursuant to the directions given herein on 28th November 2023. In his written submissions dated 16th December 2023, the petitioner made reference to Articles 23 and 165 of the *Constitution* as the provisions that clothe the Court with jurisdiction to entertain the Petition as well as the instant application. He relied on *Kennedy Mwaura Kibebe & 3 Others v Anne Wanjiru Kibe & 3 Others* [2021] eKLR and *Kuria and 3 Others v Attorney General* [2002] eKLR in urging the Court to find that the ongoing investigations by the 2nd and 3rd respondents in relation to the complaint lodged by the 1st respondent with a view of his arrest and prosecution will undoubtedly violate his right to freedom of movement and liberty. He therefore prayed that the respondents be restrained pending the hearing and determination of the Petition.
9. On behalf of the 1st respondent written submissions dated 11th January 2024 were filed herein by learned counsel, Mr. Murimi. He proposed the following issues for determination:
- (a) Whether the alleged constitutional violations against the petitioner were perpetrated against him by the 1st respondent; and if they have been pleaded with specificity and precision;
- (b) Who should be awarded costs?
10. Counsel proceeded to submit that both the Petition and the application are untenable in so far as the alleged violations have not been pleaded with the requisite specificity. He relied on *Humphrey Mutegi Burini & 9 Others v Chief of the Kenya Defence Forces & Another* [2017] eKLR in this regard and urged for the dismissal of both the Petition and the Notice of Motion dated 9th November 2023. On the authority of Party of *Independent Candidates of Kenya & Another v Mutula Kilonzo & 2 others* [2013] eKLR, the 1st respondent urged that she be awarded costs of the Petition for the time and expense employed in defending the Petition.
11. I have given due consideration to the application. 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.”
12. 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...”

13. 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.”

14. Accordingly, the issues as framed by counsel for the 1st respondent are somewhat premature; for the Court is not, here, concerned with whether sufficient evidence has been availed to prove the petitioner’s allegations or the suitability of the prayers sought by the petitioner in his Petition. In my considered view, the single issue for determination is whether the petitioner is entitled to the conservatory orders prayed for.

15. The exact nature of conservatory orders was aptly discussed by the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR thus:

“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.”

16. Hence, it is now settled that an applicant for 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 likelihood of success;
- (b) That the Petition will be rendered nugatory;
- (c) That public interest weighs in the applicant’s favour.

17. 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.”

18. Similarly, in *Kevin K Muwiti & 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.

19. With the foregoing in mind, I have considered the Petition in the light of the averments set out in the petitioners' Notice of Motion and its Supporting Affidavit. It is common ground that the petitioner was engaged by the 1st respondent to construct an infinity pool and that a dispute arose as to whether the work was satisfactorily performed. It is also common ground that the 1st respondent instructed her advocates to send, and the advocates did send, a demand letter to the petitioner, demanding a total of Kshs. 1,012,098.12 on behalf of the 1st respondent, trading as Tulia Eco Gardens Limited. The petitioner further stated that, on or around 5th November 2023, he received information that the 2nd and 3rd respondents had visited his place of residence at Bamburi Estate in Mombasa with the intention of arresting, detaining and charging him in relation to a contract between him and the 1st respondent.
20. The petitioner contends that he owes the 1st respondent no such amount; and that even if the said amount was due and owing to the 1st respondent, the issue of debt collection is one that ought to be referred to the civil courts of Kenya under the law of contract. The petitioner was therefore of the conviction that the 2nd and 3rd respondents are acting beyond their powers in seeking his arrest for purposes of debt collection. It was on that account that he contended that his constitutional rights to freedom of movement, dignity and freedom from torture are being infringed or are threatened with violation by the respondents; and that unless the orders sought are granted, the Petition will be rendered nugatory.
21. It appears therefore that the petitioner is apprehensive of an intended prosecution for what, in his view is purely a civil claim. It is now settled however that that the best forum for testing the validity of a charge is the trial court itself. For instance, in *Erick Kibiwott & 2 Others v Director of Public Prosecution & 2 Others* [2014] eKLR it was held that:

“...In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial court. Dealing with the merits of the application, it is trite that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings...”
22. It is also premature, granted the provisions of Article 50(1) of the *Constitution* that:

“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”
23. Thus, the Constitution itself recognizes that the subordinate courts, being its own creatures pursuant to Article 162 and 169, have the mandate and competence to hear and determine allegations of the nature complained of herein. It is for the trial court to inquire into questions, even at a preliminary stage if need be, whether the intended charge against the petitioner herein is tenable; and resolve issues



as to whether the dispute is an entirely civil dispute. It is therefore immaterial at this point that the intended charge is hopeless; or that the intended criminal prosecution is bound to fail.

24. In the premises, I entirely agree with position taken in *Michael Sistu Kamanu & 12 Others v Ethics and Anti-Corruption Commission & 4 Others* [2016] eKLR, wherein a three-judge bench held that:

“The trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words, unless the Petitioners demonstrate that the circumstances of the impugned process render it impossible for them to have a fair trial, the High Court ought not to interfere with the trial ... “

25. Needless to mention that the conduct of investigations is the basic mandate of the 3rd respondent and is provided for under Section 24 of the *National Police Service Act*; and therefore it cannot be said that simply because a matter presents itself as a civil claim no criminal investigations ought to be carried out in respect of the same facts with a view of prosecution. Indeed, Section 193A of the *Criminal Procedure Code*, Chapter 75 of the Laws of Kenya, is explicit that:

“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

26. In the premises, I am not convinced that a justification has been shown as to why the Court should, at this early stage of the proceedings, intervene in the criminal investigative process or the intended prosecution of the petitioner. The application is accordingly dismissed with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 18TH DAY OF APRIL 2024

OLGA SEWE

JUDGE

