



**Kamau & 6 others v Office of the Director of Public Prosecution - Busia;  
Bungoma Line Safaris Ltd & 4 others (Interested Parties) (Constitutional  
Petition E014 of 2023) [2024] KEHC 5476 (KLR) (20 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5476 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CONSTITUTIONAL PETITION E014 OF 2023**

**WM MUSYOKA, J**

**MAY 20, 2024**

**BETWEEN**

- JOSEPH NGUGI KAMAU ..... 1<sup>ST</sup> PETITIONER**
- STEPHEN NJENGA KAMAU ..... 2<sup>ND</sup> PETITIONER**
- GEOFFREY NJOROGE KAMAU ..... 3<sup>RD</sup> PETITIONER**
- AUGUSTINE MURITHI WANGUI ..... 4<sup>TH</sup> PETITIONER**
- DAVID MUNGAI NJIBU ..... 5<sup>TH</sup> PETITIONER**
- JOSEPH MWANGI WAIRIRE ..... 6<sup>TH</sup> PETITIONER**
- JULIA NJERI NGUGI ..... 7<sup>TH</sup> PETITIONER**

**AND**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION-  
BUSIA ..... RESPONDENT**

**AND**

- BUNGOMA LINE SAFARIS LTD ..... INTERESTED PARTY**
- BUNGOMA LINE SACCO ..... INTERESTED PARTY**
- BENSON OMONDI ONGAR ..... INTERESTED PARTY**
- JAMES WAINAINA KAMAU ..... INTERESTED PARTY**
- SIMON GIKONYO KAHENYA ..... INTERESTED PARTY**



## RULING

1. The petitioners have moved this court by a petition, dated 20<sup>th</sup> November 2023. They complain that several criminal cases have been brought against them, by the respondent, with respect to the same subject-matter and cause of action, and the said cases are all founded on the same facts, although charged as different offences. The cases in question are Busia CMCCRC Nos. E1228 of 2022, E362 of 2023 and E388 of 2023.
2. Some of these cases were prosecuted and concluded, and some are yet to start, and are at the plea-taking stage, and the petitioners are being sought after for arraignment. They raise issues around the constitutionality of their being arraigned in court, on charges, that are either the same or similar to previous charges for which they were prosecuted and discharged or acquitted. They express fear that their prosecution on fresh charges, founded on the same facts as the previous charges, would infringe on or contravene their constitutional rights.
3. They filed a Motion, dated 20<sup>th</sup> November 2023, contemporaneously with the petition, for a conservatory order, in the form of stay of proceedings in 2 of the cases, to allow them prosecute their constitutional petition. The argument is that 3 of the petitioners had been prosecuted in Busia CMCCRC No. E1228 of 2022, together with the 1<sup>st</sup> and 2<sup>nd</sup> interested parties, with the offence of stealing a motor vehicle, but that case terminated with the 3 petitioners and the 1<sup>st</sup> and 2<sup>nd</sup> interested parties being acquitted. Thereafter the first 3 petitioners were re-arrested, and charged afresh, in Busia CMCCRC Nos. E388 of 2023, with a conspiracy to defraud, with respect to the same motor vehicle. Thereafter, the other petitioners, that is to say the 4<sup>th</sup> to 7<sup>th</sup>, were arrested and charged, in Busia CMCCRC Nos. E362 of 2023, with stealing the same motor vehicle and of forgery related to the same vehicle. The charges were upon a complaint by the 5<sup>th</sup> interested party, against the 1<sup>st</sup> and 2<sup>nd</sup> interested parties, but the respondent chose to go after the petitioners, who are the directors of the 1<sup>st</sup> and 2<sup>nd</sup> interested parties, instead of pursuing the 2 companies/entities instead. The argument is that the said arrests and intention to prefer charges against the petitioners was an affront to their constitutional rights, and there was abuse of the prosecutorial powers and of the court process. That background is set out on the face of the application, as well as in the affidavit, sworn in support, by one of the petitioners.
4. The respondent has reacted to the application, vide an affidavit, sworn by one of its prosecuting counsel. It is conceded that a decision has been made to prosecute 3 of the petitioners, in Busia CMCCRC No. E388 of 2023, despite their acquittal in Busia CMCCRC No. E1228 of 2022. It is argued that they were acquitted of an offence different, separate and distinct from the one charged in the new case. It is argued that the other petitioners were not party to Busia CMCCRC No. E1228 of 2022, and the charges against them would not raise the spectre of double jeopardy or abuse of process or power. It is submitted that the mere fact of acquittal for theft did not amount to an acquittal on all other charges emanating from the same incident, and it is urged that the trials ought to be allowed to proceed to their logical conclusion. It is urged that the natural persons should not seek to hide behind the artificial persons, as proposed by some of the petitioners.
5. The Motion was initially placed before me, under certificate of urgency, on 20<sup>th</sup> November 2023. It was certified urgent, and it was directed that it be served. Directions were given on 27<sup>th</sup> November 2023, for disposal of the matter by way of written submissions. Both sides complied, by filing their respective written submissions. On 22<sup>nd</sup> January 2024, I granted orders, for stay of proceedings, pending hearing and disposal of the petition.



6. The petitioners argue that they have an arguable case, given that they are being charged of inchoate offences, of an offence in respect of which they have been acquitted, and *Wainaina & another v Republic* [2023] KECA 727 (KLR)(Makhandia, Murgor & Kantai, JJA), is cited in support. It is further argued that the petitioners would suffer prejudice, should the current cases go on, given that the charges they currently face are inchoate to the offences in respect of which they had been charged, and acquitted, and their petition would, thereby be rendered nugatory. *Reliance Bank Limited v Norlake Investments Limited* [2002] EA 227 (Omolo, Bosire & Owuor, JJA), *Ian Gakoi Maina & 3 others v Republic & another* [2020] eKLR (Makhandia, Kiage & Odek, JJA), *Republic v Director of Public Prosecutions & 3 others; CWW & another (Exparte)* [2021] KEHC 372 (Mshila, J) and *Wainaina & another v Republic* [2023] KECA 727 (KLR)(Makhandia, Murgor & Kantai, JJA) are cited in support.
7. The respondent argues that the petitioners do not have a solid case, given that the fresh charges are distinct from the charges for which they were acquitted. In any event, it argues, that it is an independent office, whose decisions are based on evidence, and under Article 157(6) of the *Constitution*, it is not subject to anyone, when it comes to its decisions on whether or not to charge, or take over prosecutions, or to discontinue them. *Republic v Attorney General & another Ex-Parte Kipng'eno Arap Ng'eny* [2001] eKLR (K. Mulwa, J), is cited, in that regard. It is further argued that the principles of autrefois acquit and autrefois convict did not apply to the targeted cases, as the charges had been brought properly. It is submitted that there was enough evidence to charge the petitioners for the offences alleged. *Republic v Commissioner of Police and another ex parte Michael Monari & another* [2012] eKLR (Warsame, J) is cited on that. Section 23 of the *Penal Code*, Cap 63, Laws of Kenya, is cited, with regard to the relationship between the petitioners, and the 1<sup>st</sup> and 2<sup>nd</sup> interested parties, on how charges are to be initiated where such a relationship exists. It is argued that the petition has been initiated to defeat justice, by delaying the criminal proceedings, and *Julius Meme v Republic & another* [2004] eKLR (Rawal, Njagi & Ojwang, JJ) and *Nicholas Mwaniki Waweru & another v Attorney General & 5 others* [2017] eKLR (Mativo, J). It is further submitted that the issues raised in the petition can also be raised and determined within the criminal cases themselves, and *Wambua v Attorney General & 2 others* [2004] eKLR (Wendoh, J) is cited on that proposition.
8. Going by the directions given on 27<sup>th</sup> November 2023, I am called upon to determine the Motion, and not the petition. My call is to assess whether I should confirm the interim orders that the petitioner was granted on 22<sup>nd</sup> January 2024, pending the final determination of the petition.
9. On the nature of conservatory orders, *Muslim for Human Rights (Muburi) & 2 others v Attorney General & 2 others* [2011] eKLR (Ibrahim, J) and *Judicial Service Commission v Speaker of the National Assembly & another* [2013] eKLR (Odunga, J), caution that the court ought to proceed with care, to obviate determining the petition finally at the interlocutory stage. On the principles which guide grant of interim orders, *Board of Management of Uburu Secondary School v City County Director of Education & 2 others* [2015] eKLR (Onguto, J), *Naftali Ruthi Kinyua v Patrick Thuita Gachure & another* [2015] eKLR (Nambuye, Musinga & Murgor, JJA) *Wilson Kaberia Nkunja v the Magistrates and Judges Vetting Board and Others* [2016] eKLR (Lenaola, J) and *David Ndii & others v Attorney-General & others* [2021] eKLR (M. Ngugi, Odunga, Ngaah, J. Mulwa & Mwita, JJ) are relevant. They set out the principles upon which interim conservatory orders may be granted. These include demonstration of a prima facie case, whether failure to grant conservatory orders would render the petition nugatory, and the incidence of public interest.
10. I am careful not to make a determination that will dispose of the petition, at this preliminary stage, where I am only determining the interlocutory application. The application was initially placed before me, and I was persuaded, on 22<sup>nd</sup> January 2024, that, *prima facie*, the petition established a probable case, and granted interim relief. From the material on record, it would appear that there is an arguable



case. If temporary relief is not granted, the criminal proceedings, relating to the new charges may go on. It would prejudice the petitioners, should it turn out, at the end of the trial, that the charges ought not have been brought in the first place, being inchoate to the offences in respect of which the petitioners had already been acquitted. If the criminal prosecutions continue, during the pendency of the petition, the petition herein would be rendered otiose. The matter is of public interest. It is about the possibility of the constitutional rights of citizens, guaranteed under the Constitution, being violated or contravened, should they be prosecuted in circumstances where they ought not to, in view of previous proceedings. No prejudice would be suffered by the respondent, for a prosecution could still be mounted, should the court ultimately find that the issue of double jeopardy does not arise in these circumstances.

11. I am persuaded, from the material on record, that a prima facie case has been established, for confirmation of the interim relief, that was granted on 22<sup>nd</sup> January 2024. I hereby, therefore, confirm grant of the said orders, and direct that they shall remain in force until the petition herein is heard and determined.
12. On the disposal of the petition itself, directions have not yet been given, but I have noted that the parties have already filed their comprehensive written submissions, where they have argued the issues in the petition exhaustively. However, I shall not close them out of filing other or further or supplementary submissions, on the issues in controversy, inclusive of lists and copies of the authorities that they shall be relying on. That should be done within 21 days. The matter shall be mentioned, thereafter, on 4<sup>th</sup> July 2024, for compliance, and allocation of a date for judgement. It is so ordered.

**RULING DELIVERED BY EMAIL, AND DATED AND SIGNED IN CHAMBERS AT BUSIA ON THIS 20<sup>TH</sup> DAY OF MAY 2024.**

**W. MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Anwar, instructed by Anwar & Company, Advocates for the petitioners.

Mr. Nyauma, instructed by the Attorney-General, for the respondent.

Mr. Malala, instructed by Malalah & Company, Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> interested parties.

