



**Odongo v Director of Public Prosecutions & 2 others (Constitutional  
Petition E003 of 2024) [2024] KEHC 17014 (KLR) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 17014 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION E003 OF 2024**

**OA SEWE, J**

**MAY 16, 2024**

**IN THE MATTER OF ARTICLES 22(1), 23 AND  
258 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF CONSTITUTIONAL  
PRINCIPLES, RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES  
3(1), 10, 19, 20 50(2), 157 AND 238 THE ONSTITUTION OF KENYA,**

**AND**

**IN THE MATTER OF ARTICLES 23(3)(F), 48, 50(2)  
AND 157(11) OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**LEON OTIENO ODONGO ..... PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 2<sup>ND</sup> RESPONDENT**

**CHIEF MAGISTRATE'S COURT, MOMBASA ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before the Court for determination is the Notice of Motion dated 2<sup>nd</sup> February 2024. It was brought by the petitioner, Leon Otieno Odongo, under Articles 10, 22, 23(3)(c), 48, 50(1) and 157(11) of the [Constitution](#) of Kenya and Rule 23 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#) and Part III of the [Fair Administrative Action Act](#), No. 4 of 2015. He essentially prayed for the following orders, the other prayers having been spent:



- (a) That the Court be pleased to call for the record and proceedings of the trial magistrate, Hon. Gladys Ollimo, in Mombasa Criminal Case No. E1770 of 2023: *Republic v Leon Otieno Odongo*.
  - (b) That pending the hearing and determination of the Petition, a conservatory order be issued staying the continuation of proceedings in Mombasa Criminal Case No. E1770 of 2023: *Republic v Leon Otieno Odongo*.
  - (c) That costs of the application be provided for.
2. The petitioner complained that the 1<sup>st</sup> and 2<sup>nd</sup> respondents, in wanton abuse of their investigative and prosecutorial powers under Articles 243 and 157, mounted a contrived, malicious and unfounded criminal prosecution against him on a charge of obtaining money by false pretences contrary to Section 313 of the *Penal Code*. In his view, there is absolutely no factual or legal foundation for the charge. He therefore asserted that it is designed to assist the complainant to intimidate and put pressure on him as a retaliatory measure for ending the love relationship that existed between him and the complainant.
  3. The application is premised on the petitioner's affidavit, sworn on 2<sup>nd</sup> February 2024, and a Further Affidavit sworn on 15<sup>th</sup> February 2024. He annexed several documents to the Further Affidavit to buttress his assertion that, in the course of the love relationship between him and the complainant, they would send money to each other via M-pesa. In particular, he annexed a set of documents as Annexure LO-2 to prove the assertion. He reiterated his contention that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are intent on weaponizing the criminal justice process for purposes of intimidation and revenge, in blatant abuse of their investigative and prosecutorial powers under Articles 243 and 157, respectively, of the *Constitution*.
  4. The application is unopposed as no response was filed thereto by any of the respondents. In the same vein, although directions were given for the filing of written submissions, only the petitioner complied and filed written submissions dated 15<sup>th</sup> February 2024. He endeavored to demonstrate that the decision to charge and prosecute him was made without any legal or factual foundation. He relied on *Republic v Attorney General, Ex Parte Kipngeno Arap Ngeny*, High Court Civil Application No. 406 of 2001 for the proposition that a criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose.
  5. It was therefore the submission of the petitioner that there will be continued violation should he be subjected to a trial in violation of the *Constitution*. He relied on *Njuguna S. Ndung'u v Ethics & Anti-Corruption Commission & 3 Others* [2018] eKLR and urged the Court to halt his prosecution in Chief Magistrate's Criminal Case No. E1770 of 2023 pending the hearing and determination of this Petition.
  6. I have given careful consideration to the application, and in particular, the grounds relied on by the petitioner as set out on the face of the application and in the Supporting Affidavit. I have similarly considered the arguments advanced herein by counsel for the petitioner.
  7. It is worth stating at the outset 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 respect of conservatory orders that:

“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...”

8. 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.”

9. Similarly, in *Kevin K Mwiti & 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.

10. With the foregoing in mind, I have considered the Petition in the light of the averments set out in the petitioner’s Notice of Motion and its Supporting Affidavit. The petitioner is seeking a conservatory order to stop his prosecution for an offence of obtaining money by false pretences. It is alleged that on diverse dates between 30<sup>th</sup> October 2023 and 10<sup>th</sup> December 2023, jointly with others not before the court, with intent to defraud, he obtained Kshs. 790,000 in cash from Jacqueline Walubwa Achwoka by falsely pretending that he was in a position to secure for her a motor vehicle, namely, Toyota land cruiser V8 from Kenya Ports Authority.

11. The petitioner denied those allegations and contended that they were lovers with the complainant; and that when he terminated the relationship, the complainant resorted to the criminal justice system out of spite and revenge. He added that, had the respondents exercised their constitutional mandate properly, they would have realized that there was no truth to the allegations. He claims that his constitutional rights have been violated and are in the process of being violated unless conservatory orders are granted by the Court.

12. Authorities abound to show 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...”



13. This is in line with 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.”

14. 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 sort complained of herein. It is for the trial court to inquire into questions to whether the petitioner’s mobile phone will be used as an exhibit or whether there is any justification for the continued retention thereof by the investigating officer. Similarly, issues to do with witness statements and trial documents and the whole regime of pretrial disclosure are well within the jurisdiction of the trial court.

15. Indeed, Article 50(2) of the *Constitution* is explicit as to the rights of an accused person; such that it would be pre-emptive for the petitioner to jump the gun, as it were, by seeking the intervention of the Court before exhausting the available avenues for redress. I hasten to mention that it is immaterial at this point that the charge before the lower court is hopeless; or that the petitioner’s prosecution is bound to fail.

16. In the premises, I underscore what was stated in *Michael Sistu Kamau & 12 Others vs. Ethics and Anti-Corruption Commission & 4 Others* [2016] eKLR, by a three-judge bench 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 ... “

17. In the premises, it is my considered finding that no justification has been shown as to why the Court should intervene in the prosecution of the petitioner by way of a conservatory order. The application is accordingly dismissed. Costs thereof to be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 16<sup>TH</sup> DAY OF MAY 2024**

**OLGA SEWE**

**JUDGE**

