



**Ondiba v Inspector General of Police Service & 4 others (Petition E414 of 2023)
[2024] KEHC 5154 (KLR) (Constitutional and Human Rights) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5154 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E414 OF 2023
LN MUGAMBI, J
MAY 16, 2024**

BETWEEN

SIMION NYAMANYA ONDIBA PETITIONER

AND

INSPECTOR GENERAL OF POLICE SERVICE 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

CHIEF MAGISTRATES COURT AT MAKADARA 5TH RESPONDENT

RULING

Introduction

1. By a Notice of Motion application dated 19th October 2023, the Petitioner (Mr. Nyamanya) seeks orders that:
 - i. Spent.
 - ii. Pending the hearing and determination of this application inter parte, this court be pleased to issue conservatory orders staying proceedings in Makadara Criminal Case No.2788/2016 – Republic vs Simon Nyamanya Ondiba & 4 others and Makadara Criminal Case No. E122/2021 – Republic vs Simon Ondiba.
 - iii. Pending the hearing and determination of the Petition inter parte, this court be pleased to issue conservatory orders staying proceedings in Makadara Criminal Case No.2788/2016



– Republic vs Simon Nyamanya Ondiba & 4 others and Makadara Criminal Case No. E122/2021 – Republic vs Simion Ondiba.

iv. Costs of this application be in the cause.

Petitioner's Case

2. Mr. Nyamanya swore that the named criminal cases which included Milimani Criminal Case No.2067/2016 trace their origin to a dispute over the ownership of a parcel of land- L.R. No. 209/11293/1. That he has already been acquitted in Milimani Criminal Case No.2067/2016.
3. He asserts that these criminal cases were instituted by the 2nd Respondent (Director of Public Prosecution-DPP) in collusion with the 1st Respondent's officers (Inspector General of Police-IGP) at the instigation of the complainant, Rosaline Njeri Macharia. This is after Mr. Nyamanya contested award of compensation to the tune of Ksh.1.6 billion by the National Land Commission in respect of the land in question. The contest being based on the fact that, the ownership of this land has not been determined by the Environmental and Land Court in ELC Case No.1035/2016.
4. Mr. Nyamanya is aggrieved that the IGP and the DPP have chosen to proceed with the criminal cases notwithstanding the pending land suit. In his opinion, this is a clear case of abuse IGP and DPP's power so as to arm-twist him into settling the pending land case.
5. Mr. Nyamanya observes that in one of the charges he is accused of 'procuring execution of documents by false pretenses' which is also an issue before the Environment and Land Court. Equally, he contends that being tried in two other criminal cases founded on the same facts is contrary to Article 50 of [the Constitution](#) and in breach of the principle of double jeopardy.
6. Mr. Nyamanya equally contends that when the above issue was raised by his Advocate during the mention of his case in Criminal Case No. E122/2021 on 3rd August 2023, the concern was dismissed thereby perpetuating the ongoing illegality. For this reason, the Petitioner is apprehensive that if the orders sought herein are not issued, the criminal cases will continue at great prejudice to him.

1st, 2nd and 3rd Respondents' Case

7. The 1st, 2nd and 3rd respondents' (IGP, DPP and DCI) responded by way of a replying affidavit sworn by Chief Inspector Peter Kanagi on 23rd February, 2024.
8. The deponent acknowledged that indeed that Mr. Nyamanya is an accused in Milimani Criminal Case no. 2067, Makadara Criminal Case No. 122/2021 and Makadara Criminal Case No. 2788/2016.
9. In criminal case no. 2067 of 2016; he faced a charge of conspiracy to commit a felony contrary to section 317 of the Penal Code; two counts of forgery contrary to section 350(1) of the Penal Code; uttering false document namely a certificate of title; making a false document with intent to defraud contrary to section 353 of the Penal Code namely a letter of preparation of certified copy of the deed plan purporting it to be genuine and, uttering the said letter with intent to defraud.
10. The said offences were committed between 3rd April 2014 and 24th August, 2016 and the complainants thereof being Roseline Njeri, Registrar of Land-Sarah Njuhi Mwenda, Chief Land Registrar- GSB Irundu and the Director of Survey Kenya.
11. In the Makadara Criminal case No. 122/21; Mr. Nyamanya was charged with the offence of procuring execution of documents by false pretences following a complaint lodged by National Land Commission in relation to documents in respect of compulsory land acquisition process. The investigations unearthed the following: Grant number 65859 for land parcel number 209/11293/1



was registered in the name of Roseline Njeri Macharia and the purported sub-division IR 161289 did not exist as per the records as confirmed by annexure PK3, letter from the Land Registrar). Certificate of title no. 161289 for L.R. No. 209/11/293/1 in favour of Simon Nyamanya Ondiba and Mary Nyamaya could not be traced at the Registry but according to Land Information Management System (LIMS), IR 161289 was in respect of LR 24641, a piece of land situated in Machakos County leased to Cadilla Limited and measured 74.20 and not 4.07 as per certificate of title that was under investigation. The documents which had been disowned by the Land Registry had been presented before the Milimani ELC JR No. 20 of 2020 -Simandi Investment Ltd vs Attorney General. Certificate of title No. 175538 for L.R. No. 209/21698 in favour of Simandi Limited showed that it was purportedly issued from sub-division of LR 209/11293/1 but the same was cancelled as per the letter annexure PK 5 of 3/11/2016. Further investigations of the deed plans supporting the above land transactions did not reveal the person who carried out the sub-division of LR 209/11293 since the computation files could not be traced (per letter annexure PK 6). According to the deponent, the investigations traced the history which confirmed that the true as the Roseline Njeri Macharia.

12. That Makadara Criminal Case No. 2788/2016 charges Mr. Nyamanya and others for the offence of malicious damage to property and is premised on the fact that on 26th September, 2016 at 11.30 P.M. at City Cabanas within Embakasi about 25 men, who included Mr. Nyamanya, armed themselves and descended upon the restaurant and started demolishing its perimeter wall.
13. The deponent swore that Makadara Criminal Case 2067/2016 and Makadara Criminal Case 122/2021 are two distinct cases and Mr. Nyamanya has neither been previously acquitted or convicted of the same facts or the same transactions as the three mentioned cases are unrelated.
14. That the Director of Public Prosecutions under Article 157 (10) acts Independently and does not require the consent of any person or authority to commence criminal proceedings, and that further, Section 193 of the Criminal Procedure Code allows concurrent of proceedings of both criminal and civil case.
15. That Petitioner is raising matters of facts that should be raised in his defence before the trial court during the trial. That the Petitioner has in paragraph 10 to 15 of the affidavit complained of the decision of the Magistrate in Criminal Case No. 122/2021 which he has not challenged by way of revision or appeal.

4th and 5th Respondents' Case

16. The Attorney General and the Chief Magistrate Court at Makadara filed their grounds of opposition dated 27th February 2024. They oppose the application on the following grounds:
 - i. The strict interpretation of Article 23(3) of *the Constitution* is that a relief for conservatory orders is prima facie only available when a party is alleging that a right or a fundamental freedom in the Bill of Rights has either been denied, violated, infringed or threatened.
 - ii. The Petitioner has not demonstrated before this Court how the 4th and 5th Respondents have violated his constitutional rights as it is well settled law that the petitioners ought to demonstrate how the respondents' conduct constitutes a violation and/or contravention of their fundamental rights and freedoms. This was established in the case of Anarita Karimi Njeri vs R (1976-1980) KLR 1272.
 - iii. The mere allegation that a right or a fundamental freedom of the Petitioner has been or is likely to be contravened is not of itself sufficient to entitle the Petitioner the remedies sought. The Petitioner must demonstrate real danger so imminent and evident, true and actual and not



fictitious; so that it deserves immediate redress by this Court as per Article 165(2)(b) of *the Constitution*.

- iv. The constitutional and statutory mandate conferred upon the 5th Respondent can only be interfered with by Court where it has been sufficiently demonstrated that they acted arbitrarily and contrary to their constitutional and statutory mandate.
- v. Both the applications and Petition are merely based on unsubstantiated apprehension since the Petitioner has not demonstrated that unless the conservatory orders and orders provided for under Article 23(3) of *the Constitution* are granted, there is real danger or irreparable harm which he may suffer.
- vi. Both the applications and Petition filed are frivolous, without merit, and an abuse of the court process.
- vii. Both the applications and Petition offend the provisions of Sections 106 and 107 of the *Evidence Act* on the burden of proof as mere generalized assertions and allegations have been made without any such supporting evidence for instance on the suffering occasioned to the petitioner and in particular by the 4th and 5th Respondents.
- viii. Judicial intervention by the High Court should be limited to acts that are manifestly in breach of the law or where the Court is satisfied that the decision maker reached a wrong decision influenced by other considerations other than the law, evidence and the duty to serve the interest of justice.

Petitioner's Submissions

17. The petitioner in the submissions dated 21st February 2024 filed by Maosa and Company Advocates submitted that what constitutes a prima facie case for grant of conservatory orders as held in *Mrao Ltd vs First American Bank of Kenya Limited and 2 Others (2003) eKLR* is one where the material presented before Court leads to a conclusion that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.
18. According to Counsel, the Petitioner established a prima facie case by outlining the arguable propositions demonstrating infringement of his rights as espoused in his affidavit. Basically, that the criminal prosecution which was commenced at the behest of the complainant, Roseline Njeri Macharia is intended to only assist her in view of the subject land. Further, having been acquitted in a similar matter, the existing suits amount to double jeopardy thus unlawful. Consequently, it is argued that the criminal suits are being used to harass and intimidate the Petitioner into abandoning the civil suit before the Environment and Land Court. As such the proceedings are alleged to be in violation of Articles 25(c) and 50(2) (o) of *the Constitution*.
19. Reliance was placed in *Nicholas Kipsigei Ngetich & 6 others vs Republic (2016) eKLR* where it was held that:
 - “(i) The "same evidence Test" bars the mounting of a second prosecution requiring the very same evidence which would have been required to convict at the first prosecution. In any situation where the same evidence would be required to sustain a conviction in any subsequent litigation, then that subsequent litigation is prohibited by the double jeopardy rule...
 - (ii) The same Transaction Test classifies as the same offence all acts which occur out of the same criminal episode. The 'same transaction' test limits piecemeal



prosecution by compelling the state to prosecute at one trial all offences which have been committed with a common motivating intent and which has a single ultimate goal."

20. Counsel further submitted that being that the alleged malicious prosecution of the two suits is continuing, the Petitioner is likely to suffer prejudice if the orders are not granted. Reliance was placed in Centre for Rights of Education and Awareness (CREAW) & 7 others vs. Attorney General Nairobi High Court Petition No. 16 of 2011 (2011) eKLR where it was held that:

"A party seeking a conservatory order only requires to demonstrate that he has a prima facie 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*."

21. Like reliance was also placed in Said Aimer vs. Mannasseh Benga & Another (2019) eKLR and Gatirau Peter Munya -vs-Dickson Mwenda Githinji & 2 Others SCK (2013) eKLR.

1st, 2nd and 3rd Respondent's Submissions

22. Ms. N. Atina argued that from a legal view-point, multiple criminal cases may arise from the same transaction and where that happens, two tests are applied to determine the issue of double jeopardy, namely:

- i. The evidence test
- ii. Same transaction test.

She contended that the cases against the Petitioner, Milimani Criminal Case 2067 of 2016; Makadara Criminal Case 122/2021 and Makadara Criminal Case 2788/2016 are all unrelated. That the offences did not arise from the same facts and they all arose on different dates and in different transactions. In addition, the complainants in the said cases are also different. In criminal case No. 2067, the date of the alleged offence being between 3rd April 2014 and 24th August, 2016. The complainants were Roseline Njeri, Registrar of Land Sarah Njuhi Mwanda, Chief Registrar GSB Irundu and Director of Survey Kenya. In Makadara Criminal Case 122/2021; the offences were committed on 24th November, 2020 and the complainant is the National Land Commission. In Makadara Criminal Case 2788, the offence was committed on 26th September, 2016 and the complainant is Roseline Njeri Macharia.

4th and 5th Respondents' Submissions

23. Counsel Wanjiru Wanja filed joint submissions to the Petition and Application dated 27th February 2024. The submissions with reference to the instant application are addressed as the final issue of determination.
24. Ms. Wanja on whether this Court should grant the conservatory orders, answered in the negative. It was argued that the Petitioner in view of the prayers had not established a prima-facie case with a probability of success. Equally that matters which are preserved for the Petition ought not be dealt with finally at the interlocutory stage as held in Muslim for Human Rights (Milimani) & 2 others vs Attorney General & 2 Others (2011) eKLR. Comparable sentiments were echoed in Centre for Rights Education and Awareness (CREAW) & 7 Others v. Attorney General (2011) eKLR, Platinum Distillers Limited vs. Kenya Revenue Authority (2019) eKLR and Kenya Association of Manufacturers & 2 Others vs. Cabinet Secretary - Ministry of Environment and Natural Resources & 3 Others (2017) eKLR which were also cited in support.



25. Counsel further submitted that the guiding principles for grant of conservatory orders were established by the Supreme Court in the Gatirau Peter Munya case (supra) where it was held that:

“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 courses.”

26. Moreover, the principles for consideration by the Court were outlined in Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others Nairobi High Court Constitutional Petition No. 154 of 2016 (2016) eKLR as follows:

a) An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.

b) Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and

c) The public interest must be considered before grant of a conservatory order.”

27. Counsel contended that the Petitioner had not demonstrated how the 4th and 5th Respondent had violated his constitutional rights hence failing to establish a prima facie case. This is because Article 23(3) of *the Constitution* is to the effect that a relief for conservatory orders is prima facie only available when a party is alleging that a right or a fundamental freedom in the Bill of Rights has either been denied, violated, infringed or threatened. Reliance was placed in the Mrao case (supra) where it was held that:

“... In a civil application includes but is not confined to a 'genuine and arguable case'. It is a case 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 later.”

Analysis and Determination

28. There is only one issue for determination at this stage, that is,

Whether the sought Conservatory Orders should be granted.

29. The Court in Invesco Assurance Co vs MW (Minor suing thro' next friend and mother (HW) (2016) eKLR explained the remedy of conservatory order thus:

“A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.”

30. And in Muslims For Human Rights (MUHURI) & 2 Others -vs- Attorney General & 2 Others (High Court Petition No. 7 of 2011) the Court held:

“What is clear to me from the authorities is that strictly a “Conservatory Order is not an injunction as known in Civil matters or generally in other legal proceedings but is an order



that tends to and is intended to preserve the subject-matter or set of circumstance that exist on the ground in such a way that the constitutional proceedings and cause of action is not rendered nugatory. Through a Conservatory Order the court is able to “give such directions as it may consider appropriate for the purpose of securing of ... the provisions of *the Constitution* (see – BANSRAJ above)”. A Conservatory Order would enable the court to maintain the status quo or existing situation or set of facts and circumstances so that it would be still possible that the rights and freedoms of the claimant would still be capable of protection and enforcement upon determination of the Petition and the trial was not a futile academic discourse or exercise.”

31. The Supreme Court in *Gatirau Peter Munya* (supra) gave a guide on what should be considered before issuance of a conservatory order as follows:

“(86) Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within 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 supplicant’s case for orders 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 causes.

(87) The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

- i. the appeal or intended appeal is arguable and not frivolous; and that
- ii. unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.
- iii. that it is in the public interest that the order of stay be granted.”

32. What amounts to a prima facie case was discussed in the *Mrao* case (supra) where the Court rendered itself as follows:

“So what is prima facie case? I would say that in civil 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”.



The Court further observed:

“...it is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case”

33. In the present case, it is the view of this Court that to succeed in securing a conservatory order pending the hearing of the Petition, the Petitioner ought to have demonstrated that there was indeed a real threat to the violation of *the Constitution* and the law in respect to the complaint raised.

34. The Petitioner bases his Petition on the right against double jeopardy. Simply put, it the right not to be subjected to double trial for the same offence or a criminal offence having the same ingredients as that former offence. Article 50(2) of *the Constitution* provides for the right against double jeopardy as follows:

“Every person has the right to a fair trial which includes the right not to be tried for an offence in respect of an act or omission for which accused has previously been either acquitted or convicted.”

Statutorily, the right against double jeopardy is provided for in section 138 of the Criminal Procedure Code Cap. 75 which states;

“A person who has been once tried by a court of competent jurisdiction for an offence and convicted or acquitted of that offence shall, while the conviction or acquittal has not been reversed or set aside, not be liable to be tried again on the same facts for the same offence.”(Emphasis added)

35. A reading of the above Constitutional and statutory provisions discloses the requirements that must be fulfilled for a successful plea of double jeopardy to be raised. They are:

- a. There must have been a criminal trial against the accused
- b. The trial must have been before a Court of competent jurisdiction
- c. The trial must have ended with a conviction or an acquittal
- d. The offence of which the accused is now being charged must be the same or have the same ingredients as the first offence for which he was tried.

36. A cursory glance at the facts shows that the offences in question are scattered in time in regard to the date of their alleged occurrence and place. Further, the Petitioner is pitted against different individuals who are named as the complainants in the offences comprised in the different cases he is facing. For instance, Roseline Njeri Macharia, whom the Petitioner alleges is the person behind his tribulations is only in one of the cases, being Makadara Criminal Case No. 2788/2016 in which the Petitioner is charged with malicious damage to property. The case relates to a singular incident that is alleged to have taken place on 26th September, 2016 at 11.30 P.M. The ingredients of malicious damage to property are quite different and distinct from the ingredients of a charge of conspiracy to defraud, forgery, making a false document or uttering a false document which are the charges that were the subject of the Milimani Criminal Case No. 2067/2016 which the Petitioner was acquitted.



37. The other issue raised by the Petitioner is that the offences are founded on similar facts. In Connelly Vs DPP (1964) AC 1254 Lord Morris explained the double jeopardy jurisprudence as follows:

. “...What has to be considered is whether the crime or offence in the later indictment is the same or is in effect substantially the same as crime charged (or in respect of which there could have been a conviction) in a former indictment and that it is immaterial that the facts under examination or witnesses being called in the later proceedings are the same as those in later proceedings.”

38. A cursory look at the offences charged in the three files show different dates and places of their alleged commission and as against different persons. The offences are different (in terms of their distinguishing legal characteristics (ingredients). On the face of it, the Petitioner has not demonstrated the sameness of the crime previously charged and when he was acquitted of.

39. The other ground relied upon is that there is the pending civil suit before the ELC Court. The Petitioner contends that the criminal case is intended to pile pressure on him to compromise the civil case. A reading of Section 193A of the Criminal Procedure Code shows that a civil suit is not a bar to a criminal prosecution. It provides thus:

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

40. In view of the above observations, it is the finding of this Court that the Petitioner has not demonstrated a prima facie case to warrant the issuance of a conservatory order stopping the hearing of the criminal cases against him at this stage.

41. The application is hereby dismissed. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY MAY, 2024.

L N MUGAMBI

JUDGE

