



Muli v Inspector General of National Police Service & 3 others; Director of Public Prosecutions (Interested Party) (Constitutional Petition E003 of 2023) [2024] KEHC 6881 (KLR) (7 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6881 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CONSTITUTIONAL PETITION E003 OF 2023**

FR OLEL, J

JUNE 7, 2024

IN THE MATTER OF SECTIONS 176, 362, 364 OF THE CRIMINAL PROCEDURE CODE, CHAPTER 275 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF THE NATIONAL PROSECUTION POLICY

BETWEEN

STEPHEN NDAMBUKI MULI PETITIONER

AND

THE INSPECTOR GENERAL OF NATIONAL POLICE SERVICE 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

JOSHUA KIMEU KIOKO 4TH RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS INTERESTED PARTY

JUDGMENT

A. Introduction

1. Vide his petition dated 22nd February 2023, the Petitioner sought for the following orders namely;



- a. A declaration that the arrest and detention of the Petitioner was illegal, unjustifiable, unreasonable and without probable cause, unlawful and a violation of the Petitioners constitutional rights guaranteed by *the Constitution*.
 - b. A declaration that the arrest and detention of the Petitioner by the 1st and 2nd Respondents without proper investigations and probable cause is unlawful and a violation of his constitutional rights guaranteed by *the Constitution* of Kenya.
 - c. A permanent injunction be and is hereby issued restraining the 1st and 2nd Respondents, either acting by themselves, or their agents, employee servants, assigns or any other person whomsoever from arresting and detaining the Petitioner with relation to his conduct as the Chairman Director and member of Wandano Matuu Company Limited while Machakos Hccc No. 2 of 2014 Wandano Matuu Company Ltd & 2 Others-Versus-Joshua Kimeu Kioko & 6 Others as well as this constitutional petition is pending determination before the High Court of Kenya at Machakos.
 - d. General damages for unlawful arrest and illegal detention.
 - e. General damages for mental anguish, emotional and psychological distress due to the illegal and unlawful detention.
 - f. General damages for failure by the officers of the 2nd Respondent to inform the Petitioner the reason of his arrest, and continued detention without informing the Petitioner the reason for his arrest and detention.
 - g. General damages for seriously denting the Petitioner repute and personality by creating the impression that the Petitioner is a criminal and cannot be trusted.
 - h. Costs of this Petition.
 - i. Am other appropriate relief. In the circumstance that this Honourable Court may deem fit and just to award.
2. The petition was supported by the grounds on the face of the said petition and the supporting affidavit of the Applicant. The Petition was opposed by all the Respondents; the 1st -3rd Respondent did file their Replying Affidavit sworn by one No. 99223 P.C Boniface Rapudo dated 26th April 2023 and the 4th Respondent too did file his Replying Affidavit dated 5th April 2023.

B) The Petition

3. The Petitioner averred that he was wrongfully arrested and detained on 18.10.2022 at around 10.00a.m in the morning without being assigned any reason whatsoever and detained for over 24 hours before being presented before Court on 19.10.2022 at 4.00p.m, where no formal charges were preferred against him, nor was he informed of the reason of his arrest. Later he learnt that he had been arrested following a complaint lodged by the 4th Respondent where his conduct as chairman and director of Wandano Matuu Company Ltd had been questioned.
4. His arrest was questionable as it was effected within the court precinct's and was timed to prevent him from testifying in Machakos in HCCC No. 2 of 2014 Wandano Matuu Company Ltd & 2 Others – Vrs-Joshua Kimeu Kioko & 6 Others, which case was scheduled for hearing on the said date, and the said act was meant to intimidate, harass and frustrate him during his day of testimony in Court.



5. Upon presentation in Court on 19.10.2022, the Investigating Officer did apply for his detention for a further seven (7) days pending conclusion of the undisclosed investigations. The state counsel from the ODPP expressed her reservations about the turn of events since the file was incomplete (investigations was still pending). During the said hearing, he also expressed his reservations with the improper and unprocedural manner of his arrest and detention and finally the Court determined that the Investigating officer had not demonstrated the urgency of the matter and/or reasonable cause why he should be placed in custody as he was not a flight risk and ordered for his release.
6. The Petitioner did contend that the conduct by law enforcement officers of the 2nd Respondent to profile, arrest and detain him on mere suspicion and without evidence as to the offence committed constituted an egregious violation of his right to freedom of movement, dignity and protection from arbitrary arrest as guaranteed under *the constitution*. Further the actions of the 1st, 2nd and 4th Respondents were driven by malice with the deliberate intention of embarrassing him and denying him the right to access justice by ensuring that he does not testify in Machakos Hcc No. 2 of 2014 aforesaid.
7. The Petitioner did further contend that he held several leadership positions namely chairman – Wandano Matuu Company Limited, Chairman- Small Coffee Growers Association, Director- Auto Mobile Association of Kenya, Vice Chairman and Committee member – Nairobi Club, Chairman – Ukamba Agricultural Institution President –Kenya Amputee Football Federation, Managing director Sitina Enterprises. He was also a re-known author and a person held in high esteemed by the Public, where he served in various capacities and therefore his unlawful arrest and detention had seriously dented his repute/image and portrayed the wrong impression of his personality. As a result of his arrest, he was humiliated, suffered psychological, emotional trauma as well as reputational damage and therefore was entitled to be compensated for the violation of his fundamental rights as guaranteed under *the Constitution*.
8. Consequently, the Petitioner prayed for this Honourable Court to issue the declaratory orders sought and further deem it fit to protect him against the threat of continued violation of his fundamental rights and freedom.

C. The Responses

9. The 1st – 3rd Respondents opposed this Application through Replying Affidavit of PC Bonface Rapudo who stated that he was the Investigating officer alongside P.C.Patrick Omondi. The Directors of Wandano Matuu Company had lodged a complaint at the office of the County Criminal Investigations Officer (CCIO) – Machakos through a letter dated 10.03.2021 addressed to the County Commissioner (Ref CC/LNO/CF/5/2/VOL.V/101), where they had complained that a group of people lead by the Petitioner had removed them from the office through a Court process but using forged documents and as a result had started to sell company assets without the knowledge and consent of the members.
10. As a result of this complaint investigations commenced at the office of CCIO – Machakos and later the file was handed over to the Director of Criminal Investigation (DCI) – Nairobi Headquarters for further Investigations. Once complete, the file was forwarded to the office of ODPP – Machakos for comments and/or approval of prosecution and after perusal, the file was returned to DCI Nairobi with recommendations as to where there was need for some corrections and retrieval of further information/ evidence before charges could be approved. The further information sought they believed was in the custody of the Petitioner, who had proven to be quite elusive when called upon to assist and since he failed to cooperate in the investigations, he was arrested on 18.10.2022 and the investigating officer,



immediately thereafter filed an application seeking leave to detain him for seven (7) working days so that he could assist in concluding the investigations.

11. The Court upon considering the said application made a Ruling on the same day disallowing the application to detain the petitioner for a further 7 days as requested. He was thereafter released from custody before the lapse for 24 hours as required by law. Since then the Petitioner had not been arrested and there was no intention of arresting him until the Investigations were concluded and prosecution Recommended. It was therefore not necessary to grant the orders sought, as the Investigating Officer acted within his mandate and the law in arresting and seeking to detain the Petitioner and his action cannot be deemed to be unlawful or wrongful simply because the application was disallowed.
12. The 1st to 3rd respondents further deponed that the Investigations being carried out related to the offence of forgery and had nothing to do with the petitioner's position as held at Wandano Matuu Company Limited nor did they have any interest in the civil suit filed. His allegation that his arrest was instigated to stop him from giving evidence in the said civil suit as alleged was therefore not true. Preliminary Investigations had clearly established that the Petitioner had committed a cognizable offence and the Investigating officer acting within the provision of Article 49 of *the constitution*, Section 58 of the *National Police Service Act* and Section 36 of the Criminal Procedure Act had the right to arrest the Petitioner and bring him to Court before the lapse 24 hours to seek leave of the Court to detain him from a longer period for the purpose of assisting in investigations.
13. The Petitioner had therefore not proved that the 1st to 3rd respondents violated any of his rights and had not met the threshold for granting the prayers sought. They prayed that this petition be dismissed.
14. The 4th Respondent too oppose this Petition vide his Replying Affidavit dated 5th April 2023 and stated that as a concerned shareholder of Wandano Matuu Company Limited, he had a right to lodge a complaint with the 2nd Respondent, based on the ground that the Petitioner had presented a forged documents in relation to the running of Wandano Matuu Company Ltd and no evidence had been placed before Court to prove his assertion that his arrest was calculated to stop him from testifying in the civil suit filed relating to the said company. Further the decision to charge the petitioner herein was to be independently made by the Interested Party herein and not him as an individual citizen. Therefore, the petitioner's claim to being arrested without justifiable grounds was hollow, far-fetched and lacked in substance.
15. The 4th Respondent further averred that he did not participate in the arrest of the Petitioner, it was not demonstrated that he had connived with the 1st and 2nd Respondent to have the petitioner arrested nor was it proved how lodging of a complaint for investigations infringed on the petitioner's rights. It has been judicially settled that where a Petitioner alleges violation of a right, he/she must patently express the manner in which the respondent had violated his rights, as mere institution of criminal charges did prima facie constitute a violation of his rights. Further the doctrine of presumption of innocence still prevailed and the petitioner was entitled to protection under the law and fair trial process.
16. In view of the forgoing and in the interest of justice the 4th respondent urged court to find that the petition was lacking in merit and should proceed to dismiss the same.

D) Parties Submissions

i) Petitioner's Submissions

17. The Petitioner submitted that it was not contested that he and the 4th Respondent were involved in a dispute surrounding the directorship and management of Wandani Matuu Company Limited and were litigating at the High Court – Machakos over the same. On 18.10.22 while waiting to testify



in the said case, he was arrested, denied bond and ended up spending the night in police custody for undisclosed reasons. The following day when the 2nd respondents' officers, filed an application to extend his detention, is when he realized that it was the 4th Respondent, who had lodged a complaint and his arrest related to matters squarely up for determination in Machakos High Court Civil Suit No. 2 of 2014.

18. Article 29 (a) of *the Constitution* 2010 protected the Right to freedom and security of person which include the right not to be deprived of freedom arbitrarily or without just cause. It had been demonstrated that this right had been violated to the extent that his arrest was arbitrary and was not founded on a just cause. This had also been confirmed by the Replying Affidavit dated 19.10.2022 filed by the ODPP in the Misc Application (for extension of his detention) where they confirmed that the DCI had decided to charge the Petitioner contrary to provision of Article 157 (c) (a) of *the Constitution* which exclusively vests the power to institute and undertake criminal proceeding to the office of Director of Public Prosecution (ODPP). Considering the totality of the above uncontroverted facts, the inescapable conclusion had to be made that his arrest was not based on a bonafide reason.
19. The Respondents had further violated his rights under Article 27, 28 and 49 of *the Constitution* of Kenya, as he was never informed of the reason of his arrest, was detained and denied bond thereby stripping him of his dignity. Reliance was placed in the case of Rosemary Wanja Magiri 7 2 Others – Vrs-Attorney General & 3 Others (2013) Eklr Moses Tangaya Omweno –Vrs- Commissioner of Police and Another Civil Appeal No. 243 of 2011 (2018) Eklr & Mohammed Feisal & 19 Others –Vrs- Henry Kendia, Chief Inspector of Police, OCS Ongata Rongai Police Station and 7 Others; National Police Service Commission & Another (Interested Party (2018)Eklr to emphasis that it was wrong to effect arrest without informing the person being arrested the reason thereof.
20. In addition, Article 9 of The International Covenant on Civil and Political Rights, which Kenya had accented to and formed part of the laws of Kenya as established under Article 2 of *the Constitution* of Kenya, also provided that Everyone had a right to liberty and security of persons and nobody would be subject of arbitrary arrest/detention and nobody would be deprived of his/her liberty except on such procedure as established in law. As a result of his arbitrary arrest the Petitioner had suffered harm, loss of reputation and damage and was therefore entitled to be compensated.
21. Moreover, to preserve the Petitioner's right to avert future persecution, the petitioner urged the court to grant him the injunctive reliefs restraining the Respondents and their agents from arresting the him in relation to his conduct as Chairman/director of Member of Wandano Matuu Company during pendency of Machakos HCCC No. 2 of 2014 and that he be awarded Kshs.3,000,000/= for General and aggrieved damages. Reliance was placed on Mohammed Feisal & 19 Others-Vrs-Henry Kandie, Chief Inspector of Police, OCS Ongata Rongai Police Station & 7 Others; National Police Service Commission and Another, Rueben Mwangi –Vrs-Director Public Prosecution and 2 Others; UAP Insurance 7 Another (Interested Parties (2021) eKLR and Rosemary Wanja Mwangi and 2 Others – Vrs-Attorney General & 3Others.

ii) The Respondents Submissions

22. The 1st -3rd Respondents submitted that they had acted within the law and constitution of Kenya 2010 upon receipt of an official complaint from the 4th respondent and his colleagues, and after investigations they had handed over the investigation file to the ODPP-Machakos for review. They were directed to get further evidence which they believed was in the custody of the Petitioner, and when he failed to cooperate in the investigations, they opted to arrest him and sought for his detention beyond the 24 hours permitted in law, which application was not allowed. The existence of a civil case does not affect and/or stop their investigations and reliance was placed on Grace Wairimu Sorora-Vrs-Chief Magistrate



Criminal Division Nairobi and DPP (2018)eKLR, where Justice R,E Aburili stated that the law does not bar criminal process from continuing side by side with civil proceedings. Each process is intended to achieve justice from all parties.

23. The 2nd Respondent was therefore justified in doing all within the law and their mandate to investigate the complaint reported. The Petition had also not proved that they had acted in excess of their authority and/or acted maliciously and he could therefore not be heard to allege any violation of his rights. Reliance was placed on Republic –vrs- Commissioner of Police and Another Exparte Micahel Monari and Another (2012)eKLR.
24. Further, it was not enough for the Petitioner to state that his right had been violated. He was required to demonstrate and prove the same, which he had not. Reliance was placed on Anarita Karimi Njeru – Vrs- The Republic (1976 -1980) KLR 1272 and Matiba-Vrs- Attorney General (1990) KLR 666. The 1st to 3rd Respondent therefore prayed that this Petition be dismissed with costs.
25. The 4th Respondents Counsel Mr. M Muoki informed Court that they would Rely on the Replying Affidavit and legal digest filed to oppose this Petition.

Analysis and Determination

26. I have extensively considered all the pleadings filed, to wit; the petition and its supporting affidavit, the 1st to 4th Respondents replying affidavits filed in opposition thereto and finally the submissions filed by all the parties. The issues which arise for determination are;
 - (a) Whether the arrest and subsequent detention of the petitioner was illegal, unjustifiable, unreasonable and without probable cause thus violating his rights as enshrined and protected under *the constitution*.
 - (b) Whether the orders of permanent injunction should issue to restrain the 1st and 2nd respondent and their agents from arresting and detaining the petitioner with relation to his conduct as chairman, director and member of Wandano Matuu company Ltd pending hearing and determination of Machakos HCC No 2 of 2014; Wendo Matuu Company ltd & 2 others Versus Joshua Kimeu Kioko & 6 others.
 - (c) Whether the Petitioner is entitled to be compensated, by way of General damages.
 - (d) Who should bear costs of this suit.

(I) Whether the arrest and subsequent detention of the petitioner was illegal, unjustifiable, unreasonable and without probable cause thus violating his rights as enshrined and protected under *the constitution*.

27. It is not in dispute that the Petitioner was arrested on 18.10.2022, and presented before court on 19.10.2022, where the investigating officer filed a Misc. Application seeking for leave to detain him for seven working days, to enable them complete investigations. The same application was rejected and the petitioner released from custody. He has never been arrested since, though investigations presumable are ongoing.
28. The petitioner averred that his arrest and subsequent detention was malicious effected to prevent him from testifying in Machakos High court civil suit No 2 of 2014 (where the 4th respondent was a defendant), which suit was coming up for hearing on the same day. It was therefore evident that his arrest and detention was maliciously engineered to settle personal scores between the parties. The respondents on the other hand averred that there was a valid complaint lodged through the county



commissioner -Machakos on allegations of forgery of documents by the petitioner, they undertook investigations and forwarded the file to the ODPP-Machakos, who made recommendations on areas which they needed to tie loss ends and that necessitated the petitioner's cooperation. The petitioner was called upon to assist in the investigations but became elusive and was therefore arrested as they believed he could provide crucial evidence, which could be obtained from his private residence, business premises and mobile phones.

29. After the petitioner arrest, he was presented before the magistrate before the lapse of 24 hours and released from custody, once their application to extend the detention was denied. The petitioner had since not been arrested again and they had no intention of arresting him until investigations are complete. The 4th respondent also averred that he had a right to lodge a complaint in relation to the forged documents and that the 1st and 2nd respondent's agents could not be faulted for carrying out their mandate.
30. There can be no dispute that the National police service is charged with inter alia the duty to carry out investigations into suspected criminal activities and to apprehend those culpable. It is also not in dispute that the Director of public prosecutions, exercises the state's power of prosecution of criminal cases. However, in carrying out their respective obligations/mandate, both are subject the adherence to *the constitution*'s provisions and the relevant law which guide the same. In Investments & Mortgages Bank Limited (I&M) Vs Commissioner of police and The dorector of criminal investigations Department & DPP & 2 others, Nairobi HCC Petition No 104 of 2012 (2013) Eklr, Justice Majanja remarked as follows

“I agree with the respondents that it is within their mandate to investigate crimes where there is reasonable basis of commission of an offence and that in performance of their duties, they are independent institutions. The office of the Director of public prosecutions established under Article 157 is an independent office which is empowered to conduct its duties free from any influence or control by any authority. Its actions must be within the law and in accordance with what *the constitution* dictates. One such dictate is that in the exercise of their powers, it is to “have regard to the public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process.” Article 244 enjoins the National police service to ampngst other things “ comply with constitutional standards of human rights and fundamental freedoms.”

31. Further in Kenya commercial Bank Ltd and 2 others Vs Commissioner of police and Another, Nairobi Petition No 218 of 2011 (unreported), Majanja J also observed that

“The office of the Director of public prosecutions and Inspector General of the National police service are independent offices and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within limits provided for by the law. But these offices are subject to *the constitution* and the bill of rights contained therein and, in every case, the high court as the custodian of the bill of rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedom guaranteed under *the constitution*.”

32. Secondly, having determined that the 2nd respondent had power to investigate and arrest the petitioner, the court has to determine the question whether in the circumstances of this case, the arrest of the petitioner was unlawful resulting in false arrest and detention. The starting point would be what



constitutes a false arrest. In Daniel Waweru Njoroge & 17 others Vrs Attorney General Civil Appeal No 89 of 2010 (2015) eKLR it was held

“False arrest, which is a civil wrong consists of an unlawful restraint of an individual’s personal liberty of freedom of movement by another person purporting to act according to the law. The term false arrest is sometimes used interchangeably with the tort of false imprisonment, and a false arrest is one method of committing a false imprisonment. A false arrest must be perpetuated by one who asserts that he or she is acting pursuant to legal authority, whereas false imprisonment is any unlawful confinement. This where a police officer arrests a person without probable cause or reasonable basis, the officer is said to have committed a tort of false arrest and confinement. Thus, false imprisonment may be defined as an act of the defendant which causes the unlawful confinement of the plaintiff. False imprisonment is an intentional tort.”

33. A determination on whether or not there is false imprisonment is predicated on the circumstances of each case. The learned judge in the case of Daniel Waweru Njoroge & 17 others Vrs Attorney General (supra) adopted the holding in Jorgensen Vs Pennsylvania R.R. 38 N.J Super 317 (App Div. 1995) where it was held that; “The gist of action for false imprisonment is unlawful detention without more”.
34. In O’hara Vs chief constable of The Royal Ulster Constabulary (1997) A.C.286 Lord Hope of Craighead stated at page 14 that

“The reasonableness’ of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in article 5(1) (c) { section 5(1) (e)}. The court agrees with the commission and the government that having a “reasonable suspicion” presupposes the existence of facts or information which would justify an objective observer that the person concerned may have committed the offence. What may be regarded as ‘reasonable’ will however depend upon all the circumstances.”

Further Lord Steyn in the said O’hara case (supra) observed that;

“certain general proposition about the powers of the constables under a section such as section 12(1) can now be summarized.

- (1) in order to have a reasonable suspicion the constable need not have evidence amounting to a prima facie case. Ex hypothesi one is considering a preliminary stage of the investigations and information from an informer or a tip-off from a member of the public may be enough; Hussien Vs Chong Fook kam (1970) A.C 942, 949.
 - (2) Hearsay information may therefore afford a constable a reasonable ground to arrest. Such information may come from other officers: Hussain’s case, ibid
 - (3) The information which causes the constable to be suspicious of the individual must be in existence to the knowledge of the police officer at the time he makes the arrest”
35. Therefore for the arrest of the petitioner to be deemed lawful, the court must find that the arrest was for a cognizable offence and that the respondents had reasonable grounds to believe the petitioners had committed such offence. It is therefore also necessary to seek out what “probable and reasonable



cause” ought to entail. In the case of Hicks Vs Faulkner, (1978), 8 Q.B.D 167 at para 171 Hawkins.J defined probable and reasonable cause as follows;

“ Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances which assuming them to be true, would reasonably lead an ordinary prudent and cautious mand placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed”

36. Ruud. J in Kagame vs Attorney General & Another, (1969) E.A 643 aligned himself with the Hicks definition by reiterating that:

“ Reasonable and probable cause is an honest belief in the guilt of the accused based upon all a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probable guilty of the crime imputed.”

37. Applying the above succinctly captured legal provision to this petition, it has been proved that there was an official complaint lodged at the office of the CCIO-Machakos, vide a letter dated 10.03.2021 ref CC/LND/CF/5/2/VOL.V/101, lay out a reasonable and probable basis/suspicion that the petitioner had committed an offence. The same was investigated by the DCI office in Machakos and DCI Nairobi headquarters, the investigations file was sent for approval at the ODPP -Machakos office and further recommendations made, which necessitated the impute of the petitioner. The Investigating officers called him severally to assist in the investigations, but he ignored the same, and was therefore arrested on 18.10.2022. Immediately thereafter on 19.10.2022 the investigating officer filed an application seeking leave to detain him for 7 working days but the same was rejected and the petitioner released.

38. The petitioner was not held in custody beyond the 24 hours permitted in law and subsequently as confirmed by the respondents he has not been charged, as investigations are still on going. The 1st to 3rd respondent therefore cannot be said to have acted in an ultra vires manner and did no wrong as the investigating officer had powers under section 29 of the criminal procedure Code, Cap 75 to arrest the petitioner, where there was reasonable suspicion of commission of an offence. The arrest and subsequent detention of the petitioner therefore cannot be said to have been effected in an illegal, unjustifiable, unreasonable manner and/or without probable cause nor were his rights as enshrined and protected under the constitution violated.

39. The petitioner also imputed that his arrest was maliciously timed to prevent him from testifying in Machakos High court civil suit No 2 of 2014, but that averment has not been proved as there was a valid basis for his arrest. Secondly in his own averments the petitioner confirms that despite his arrest, at the intervention of his counsel he was allowed to access court and therefore cannot be said to have suffered any loss. For whatever its worth, it could be noted that the timing of his arrest within court precinct was untimely, but not wrong as he had proved to be elusive.

40. Finally on a balance of probability the petitioner further has not proved that he was not informed of the reason for his arrest and did not know why he had been arrested until presented in court the following day. The petitioner did not deny the investigating officer’s averment that he had been called severally to assist in the ongoing investigations but refused to do so. This implies that he had prior knowledge that he was being investigated and therefore cannot be heard to feign ignorance over the ongoing investigation process and the basis of his arrest.



(ii) Whether the orders of permanent injunction should issue to restrain the 1st and 2nd respondent and their agents from arresting and detaining the petitioner with relation to his conduct as chairman, director and member of Wandano Matuu company Ltd pending hearing and determination of Machakos HCC No 2 of 2014; Wendo Matuu Company ltd & 2 others Versus Joshua Kimeu Kioko & 6 others.

41. The law on concurrent civil and criminal proceedings is set out in Section 193 A of the Criminal Procedure Code, Cap 75:

“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.”

42. The Court of Appeal in Commissioner of Police & The Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others [2013] eKLR stated that Section 193A should be exercised responsibly, lawfully and in good faith. The court stated as follows:

“While the law (Section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that that power must be exercised responsibly, in accordance with the laws of the land and in good faith.”

43. In Alfred Lumiti Lusiba v Pethad Ranik Shantilal & 2 others [2016] eKLR, Ngaah J opined as follows with respect to the applicability of Section 193 A of the *Civil Procedure Act*:

“But even so, the viability of a cause of action in a civil claim does not necessarily stem from the conviction of a defendant in a criminal trial. Further still, the success or failure of a civil suit based on facts similar to those that a criminal prosecution is mounted does not necessarily depend on the conviction or acquittal of the defendant in the criminal trial; the outcome of a civil suit is independent from that of a criminal trial largely because the standard of proof required of a prosecutor in criminal prosecution is higher than that required of a claimant in a civil suit. To sustain a conviction, the prosecution must discharge the burden of proof beyond all reasonable doubt that the accused committed the offence with which he is charged. On the other hand, the claimant in a civil suit will only need to demonstrate on a balance of probability that the defendant is the tortfeasor and as a result of his tortious act or omission, the claimant suffered some sort of loss or damage that would warrant a remedy...The law is clear that the pendency of a civil suit is not a bar to criminal proceedings; it acknowledges the fact that the trial of the tortfeasor in a criminal prosecution need not be affected by the pending civil action against him. It is implied, therefore, that a civil suit cannot be stayed because of the prosecution of the tortfeasor for the obvious reason that the cause of action is neither rooted in the prosecution of the tortfeasor nor in his subsequent conviction.... the conclusion that one can draw from Section 193A of the Criminal Procedure Code together with the decisions of the learned judges in aforementioned cases is that both civil and criminal jurisdictions can run parallel to each other and that neither can stand in the way of the other unless either of them is being employed to perpetuate ulterior motives or generally to abuse of the process of the court in whatever manner.”



44. The law is clear that the pendency of a civil suit is not a bar to criminal proceedings and at this stage there is no basis to interfere with the prerogative of the police to investigate a crime. The court, can only reiterate that that power must be exercised responsibly, in accordance with the laws of the land and in good faith. In the current instance, no criminal charges has been instituted in court as against the petitioner and no basis has been laid out to show any violation of powers exercised by the 1st and 2nd respondent to enable the court intervene. The prayer for a permanent injunction as sought is therefore not merited.

(iii) Whether the Petitioner is entitled to be compensated, by way of General damages.

45. Having found that the petitioner's rights have not been violated by the respondents as claimed, his prayer to be compensated by way of general damages does not arise and cannot succeed

Disposition

46. The upshot considering the totality of all the facts herein, I do find that the petitioner has failed to prove on balance of probability that the respondents acted in an ultra vires manner and/or infringed on his rights. This petition therefore fails and is dismissed with costs.

47. The costs of the petition are hereby assessed at Ksh.400,000/= (four hundred thousand shillings) (all inclusive) to be paid independently/ separately to the 1st to 3rd respondents and the 4th respondent respectively.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 7TH DAY OF JUNE, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 7th day of June, 2024.

In the presence of: -

Ms Muheyi holding brief for Omari for Petitioner

No appearance for 1st to 3rd Respondent

No appearance for 4th Respondent

Sam Court Assistant

