



**Butende v Office of Director of Public Prosecutions & 3 others; Mua & 2 others (Interested Parties) (Petition E052 of 2023) [2024] KEHC 8669 (KLR) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8669 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
PETITION E052 OF 2023**

**OA SEWE, J**

**JULY 18, 2024**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ENFORCEMENT OF HUMAN RIGHTS AND**

**PROTECTION OF FUNDAMENTAL FREEDOMS UNDER**

**ARTICLES 2(1), 3(1), 21, 22, 23, 27(1) & (2), 31, 47, 49, 50,**

**156, 245, & 258 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**CHRIS ALLAN BUTENDE ..... PETITIONER**

**AND**

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

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

**INSPECTOR GENERAL OF POLICE ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**JOHN MUA ALIAS KIOKO ..... INTERESTED PARTY**

**MOHAMED YUSUF ..... INTERESTED PARTY**

**YUSUF SHARIF YUSUF ..... INTERESTED PARTY**



## RULING

1. The Notice of Motion dated 10<sup>th</sup> November 2023 was filed by the petitioner, Chris Allan Butende, pursuant to the provisions of Articles 2(1), 3(1), 21, 22, 23, 27(1) & (2), 31, 47, 50, 49, 156, 245, & 258 of *the Constitution* of Kenya, 2010 and Rules 4 and 8(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The petitioner prayed for the following orders:
  - (a) spent
  - (b) that pending the hearing and determination of the Petition, the Court be pleased to issue a conservatory order staying the warrants of arrest issued on 3<sup>rd</sup> November 2023. (spent)
  - (b) That pending the hearing and determination of the Petition, the proceedings in Criminal Case No. E1515 at Mombasa Chief Magistrate's Court be stayed.
  - (c) That pending the hearing and determination of the application, the proceedings in Criminal Case No. E1515 at Mombasa Chief Magistrate's Court be stayed. (spent)
  - (d) That the hearing of the Petition be expedited.
  - (e) That the costs of the application be reserved.
- (2) The application was premised on the grounds that, on the 7<sup>th</sup> October 2023, the petitioner was informed of the issuance of warrants of arrest in Mombasa Chief Magistrates Criminal Case No. E1515 of 2023. Upon inquiry, the petitioner confirmed that indeed charges of stealing contrary to Section 268 and 275 of the Penal Code, Chapter 63 of the Laws of Kenya, had been filed against him in Criminal Case No. E1515 of 2023 at the Chief Magistrate's Court, Mombasa. The petitioner explained that the allegations arise out of his functions as a licenced auctioneer and an officer of the court. He stated that the activities complained of were performed in execution of lawful orders of the Business Premises Rent Tribunal at Mombasa in No. BPRT No. E249 of 2022. He further stated that related orders were issued in the Chief Magistrates MCCC/E1265/2023.
- (3) The petitioner alleged that his constitutional rights were infringed upon when criminal charges were filed against him in Criminal Case No. E1515 of 2023 in total disregard of orders granted by courts of competent jurisdiction. He accordingly prayed that, in order to maintain the substratum of this Petition, the proceedings in Chief Magistrate's Criminal Case No. E1515 of 2023 be stayed.
- (4) The application was supported by the detailed affidavit sworn by the petitioner on 10<sup>th</sup> November 2023 in which he explained that he is a licenced Class B Auctioneer operating within the Republic of Kenya. He attached a copy of his registration certificate as Annexure CAB/SA-2. The petitioner further averred that, in that capacity he received an Order for Distress for Rent dated 26<sup>th</sup> May 2023. He accordingly proceeded to serve a Proclamation on the tenant, advertised the goods for sale and thereafter sold the same to the highest bidder on 1<sup>st</sup> September 2023. Ultimately, he made a return to the Tribunal vide his report dated 13<sup>th</sup> September 2023.
- (5) The petitioner further averred that, in October 2023, he received a phone call requiring him to report to the RCIO, Coast, through Central Police Unit, to record a statement on allegations of stealing in which the complainant was Yusuf Sharif Yusuf (the 3<sup>rd</sup> interested party). He availed himself as required, was interrogated and released. He further stated that went about his activities until 23<sup>rd</sup> October 2023 when he got to learn that one Mr. Paul Waderu had moved to court in Chief Magistrates Civil Suit No.



- E1265 of 2023 seeking restraining orders against Yusuf Sharif Yusuf. In response, Yusuf Sharif Yusuf filed a complaint against him, culminating in the filing of Mombasa Chief Magistrate's Criminal Case No. E1515 of 2023.
- (6) It was the contention of the petitioner that, in preferring and maintaining charges against him, the 1<sup>st</sup> respondent abused his constitutional powers under Article 157 and Section 5(4) of the *Office of the Director of Public Prosecutions Act*. It was on that account that the petitioner prayed for conservatory orders pending the hearing and determination of his Petition.
  - (7) The respondents opposed the application. To that end, a Replying Affidavit was filed herein, sworn on 28<sup>th</sup> November 2023 by PC Lamech Okari, a police officer attached to Regional Headquarters, Directorate of Criminal Investigations, Coast Region. He averred that a complaint of fraud, destruction and theft of property was made on 14<sup>th</sup> September 2023 by one Yusuf Sharif Yusuf through the law firm of Lughanje & Co. Advocates; and that he was one of the investigating officers tasked to investigate the allegations.
  - (8) PC Okari further conceded that it was reported to them that the offending acts were committed by the petitioner who was allegedly levying distress for rent in respect of Mombasa BPRT case No. BPRT/E249/2022 against one Mohamed Yusuf. Thus, according to the respondents, investigations revealed that the petitioner levied distress against an innocent party, one Yusuf Sharif Yusuf in spite of being informed that the said Yusuf Sharif Yusuf had nothing to do with the BPRT/E249/2022 and was not the person named in the court order.
  - (9) At paragraphs 13 and 14 of the Replying Affidavit, PC Okari deposed that it emerged that the apart from the containers, the petitioner seized a motor vehicle Registration No. KAP 672D which has not been availed or accounted for to date; and that upon questioning the petitioner, he conceded that the said motor vehicle did not belong to Mohamed Yusuf. They accordingly caused the petitioner to be charged with the offence of stealing contrary to Section 268 as read with Section 275 of the Penal Code. He posited that no justification has been made for the issuance of the conservatory orders sought.
  - [10] Directions were thereafter given on 29<sup>th</sup> November 2023 that the application be canvassed by way of written submissions. While there is no indication of compliance on the part of the petitioner, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents complied and had their written submissions dated 11<sup>th</sup> December 2023 filed herein by Mr. Penda. They proposed a single issue for determination, namely, whether conservatory orders should be granted pending the hearing and determination of the Petition.
  - (11) The respondents relied on Petition No. 230 of 2015: Michael Sisitu Mwaura Kamau v Ethics and Anti-Corruption Commission and Peter Gatirau Munya v Dickson Mwendwa Githinji as to the prerequisites for the issuance of conservatory orders and submitted that those prerequisites have not been established in this instance.
  - (12) As to whether stay of proceedings ought to issue, the respondents relied on Stephen Nganga Mbira v Inspector General of Police & 2 Others [2022] eKLR, Nicholas Mwaniki Waweru & another v Attorney General & 5 others [2017] eKLR and Chris Ochieng & 3 others v Director of Public Prosecutions & another; Jude Anyiko (Interested Party) [2021] eKLR to augment their argument that no exceptional circumstances have been shown in this instance to warrant stay of proceedings.
  - (13) 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 response and the arguments advanced herein by the respondents. Although one of the prayers was that, pending the hearing and determination of the Petition, the Court be pleased to issue a conservatory order staying the warrants of arrest issued on 3<sup>rd</sup> November 2023, that prayer has



apparently been overtaken by events; granted that the petitioner has already presented himself before the lower court and taken plea.

- (14) In the premises, the outstanding prayers are that pending the hearing and determination of the Petition, the proceedings in Criminal Case No. E1515 at Mombasa Chief Magistrate’s Court be stayed; that the hearing of the Petition be expedited and that the costs of the application be reserved.
- (15) Needless to mention that the Court has the jurisdiction to issue appropriate interim orders as sought by the petitioners should justifiable cause be shown for such orders; for Article 23(3) of the Constitution is explicit that:
- (3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—
- (a) a declaration of rights;
  - (b) an injunction;
  - (c) a conservatory order;
  - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
  - (e) an order for compensation; and
  - (f) an order of judicial review.”
- (16) Although the application is expressed to have been brought under Rule 8 of the Mutunga Rules, the appropriate provision is Rule 23 which provides that:
23. (1) 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.”
- (17) Therefore, the key issue for determination is whether the petitioner has satisfied the conditions for the grant of the conservatory orders sought by way of stay. 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 v 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...”
- (18) 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.”



(19) Similarly, in *Kevin K Mwititi & 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.

[20] 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 stay his prosecution for an offence of stealing in Mombasa Chief Magistrate’s Criminal Case No. E1515 of 2023.

(21) While the petitioner contended that he was simply exercising his lawful duties as an auctioneer, the respondents averred that he went beyond what was lawful by not only levying distress against a third party, but also by taking away properties that he is yet to account for. In those circumstances, it would not be apt for this Court to intervene.

(22) Authorities abound to show that the best forum for testing the validity of a charge and assessing evidence in proof thereof 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...”

(23) 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.”

(24) 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 the question whether the petitioner acted within the confines of the law or not. Indeed, Article 50(2) of *the Constitution* is explicit as to the rights of an accused person to the end that fairness prevails at the petitioner’s trial.



(25) In the premises, I underscore what was stated in *Michael Sistu Kamau & 12 Others v 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 ... “

(26) 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. His application dated 10<sup>th</sup> November 2023 is accordingly dismissed. Costs thereof to be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 18<sup>TH</sup> DAY OF JULY 2024**

**OLGA SEWE**

**JUDGE**

