



REPUBLIC OF KENYA



**Gatua v Prosecutions & another (Petition 7 of 2023)
[2024] KEHC 11015 (KLR) (23 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11015 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
PETITION 7 OF 2023
RM MWONGO, J
SEPTEMBER 23, 2024**

BETWEEN

IRENE KUTHII GATUA PETITIONER

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

PRISCILLA MUTHONI NJAGI 2ND RESPONDENT

RULING

1. The Petitioner’s application dated 13th October, 2023 filed contemporaneously, with a petition seeks the following substantive orders:
 - i. That pending hearing and determination of this suit, this Honourable court be pleased to issue conservatory orders staying criminal proceedings in Gichugu CM Criminal Case No.147 of 2020 and Criminal Case No.443 of 2023 launched by the 1st Respondent against the Petitioner.
 - ii. That pending hearing and determination of this application, this Honourable court be pleased to issue conservatory orders staying criminal proceedings in Gichugu CM Criminal Case No.147 of 2020 and Gichugu CM Criminal Case No. 443 of 2023 launched by the 1st Respondent against the Petitioner.
2. In her supporting affidavit, the applicant makes the following major averments:
 - i. That I am the accused person in Gichugu CM Criminal Case No.433 of 2023 where I am charged with the offence of obtaining money by false pretence.
 - ii. That my children Mary Wanjiku, Peterson Kamunyi, Rose Wanjiru and Tabitha Wawira and I were further charged in Gichugu CM Criminal Case No.147 of 2020 with the offence of malicious damage to property.



- iii. That the complainant in the said criminal case is the 2nd Respondent herein.
 - iv. The dispute between the 2nd Respondent and I arose out of the 2nd Respondent's claim over 2 acres out of my husband's land parcel number Ngariama/Rugeto/544.
 - v. The dispute is pending in court vide Kerugoya ELC Case No. E010 of 2021 where the 2nd Respondent is claiming 2 acres out of land parcel number Ngariama/Rungeto/544 from me through a purported sale agreement dated 13th November, 2014.
 - vi. That I did not sell the 2 acre portion of the subject land to the 2nd Respondent or any land at all.
 - vii. That I had only agreed with the 2nd Respondent that the 2nd Respondent would finance the succession cause over my husband's estate that was pending in court vide Embu CM Succession Cause No.161 of 1994, in the matter of the estate of Gatua Kamunyi and in exchange the 2nd Respondent would utilize 2 acres out of land parcel number Ngariama/Rungeto/544.
 - viii. That the 2nd Respondent filed a protest to the confirmation of Grant claiming 2 acres out of the subject land through a purported sale agreement.
 - ix. That the fall out between the 2nd Respondent and I was marked by animosity by the 2nd Respondent who has resorted to using the criminal process to harass my children and I especially after ruling in succession cause no.161 of 1994 was delivered and the 2nd Respondent's protest dismissed and the 2nd Respondent advised to seek legal redress in another court.
 - x. That 2nd Respondent subsequently instituted Kerugoya ELC Case No. E010 of 2021 claiming the 2 acre portion, which case is still pending in court.
3. The applicant/petitioner seeks the following substantive reliefs in her petition:
 1. A Declaration that the fundamental rights of the Petitioner under Articles 40 and 50 of *the Constitution* have been violated and infringed upon by the Respondents.
 2. An Order of stay of Criminal proceedings in Gichugu Criminal Case No. 147 of 2020 and Criminal Case No. 443 of 2023 pending hearing and determination of Kerugoya ELC Case No. E010 of 2021 (Priscilla Muthoni Niagi v Irene Kuthii Gatua & Peris Wanjira Mwaniki).
 3. An Order of termination of Criminal proceedings in Criminal Case No.147 of 2020 and Gichugu Criminal Case No.443 of 2023 pending hearing and determination of Kerugoya ELC Case No. E010 of 2021.
 4. The DPP as 1st Respondent did not file any response to the application or to the petition as directed by the court.
 5. In her Replying affidavit the 2nd Respondent deposed the following major averments:
 1. The Petition as filed is fatally defective, incompetent and does not pass the constitutional muster for bringing a Petition and seeking the orders sought therein for reasons that:
 - a. The Petitioner seeks orders staying proceedings in respect of two criminal cases pending at Gichugu Law Courts; Criminal Case No. E443 of 2023 Republic v Irene Kuthii Gatua and Criminal Case No.147 of 2020 Republic v Simon Wachira Gitonga & 4 others. To the extent that the Petitioner seeks orders in respect of Criminal Case No.147 of 2020, no orders can issue in her favour for the reasons that none of the accused persons in the said case is a Petitioner before this court.



- b. The Petitioner has not laid any basis and has further not met the requirements for grant of conservatory orders.
2. It is further curious to note that the Applicant/Petitioner herein took plea in Criminal Case No. E443 of 2023 sometime in June 2023. On the other hand, the accused persons in Criminal Case No.147 of 2020, for whom the Petitioner purports to bring the instant Petition on their behalf, pleaded to the amended charge sheet sometime in July 2021. The institution of the instant Petition is thus clearly an afterthought by the Petitioner and an attempt to interfere with the due administration of justice.
3. Further, at the time of filing the application and the Petition, the Petitioner failed to disclose to this Honourable Court that Criminal Case No. 147 of 2020 was at a very advanced stage as the trial court had made a finding that all the accused persons had a case to answer and had been placed on their defence under section 211 of the Criminal Procedure Code. Further, the Petitioner concealed from the Court the fact that defence hearing for the said matter was slated for 2nd November, 2023. The invitation therefore for this court to stay the said proceedings is a clear abuse of the court process.
4. The instant application and Petition are further hopelessly defective and is a collateral attack on the prosecutorial powers vested on the 1st Respondent. The said application and Petition are a callous scheme by the Petitioner to invite the court to supervise the exercise of discretion by the 1st Respondent through the back door, an invitation that this Court ought to vehemently decline.
5. The Petitioner has not demonstrated how the continuation of the criminal proceedings against her will infringe on her rights as the 1st Respondent bears the ultimate responsibility to prove its case beyond reasonable doubt before the trial court can return a guilty verdict.
6. In directions to the parties on 6/11/2023, the Court ordered that submissions be file within the timeframe stipulated. The applicant/ petitioner and 2nd respondent filed submissions to both the application and the petition. The DPP did not file any submissions.
7. The court will treat the submissions as relevant only to the application motion.

Petitioner's Submissions

As to whether the Petitioner has the locus standi to bring the present application

8. The Petitioner submits that she is the only accused person in Gichugu Criminal case 443 of 2023 hence has the locus standing to bring the present petition. The Petitioner is also one of the legal representatives of her husband Gatua Kamenyi, a fact not disputed by the Respondents.
9. The disputed land parcel number Ngariama/Rugeto/544 is still in the name of the said Gatua Kamenyi. The Petitioner and her children are the beneficiaries of the estate of Gatua Kamenyi comprising of land parcel number Ngariama/ Rugeto/ 544. The charges preferred against the Petitioner's children in Gichugu CM Criminal Case No.147 of 2020 are in relation to a transaction on the said land.



10. The applicant submits that Article 22(2)(b) of *the Constitution* of Kenya provides her with the for locus to bring a constitutional petition in that it states that:

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-

b. a person acting as a member of or in the interest of a group or class of persons.

11. The applicant submits that she is acting in her own interests and in the interests of a class of persons namely beneficiaries of the estate of her deceased husband. The petitioner therefore has the requisite locus to bring the present petition.

12. She cites the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR where the Court of Appeal stated as follows:

“It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or determinate class of persons is, by reason of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Articles 22 and 258 of *the Constitution*.”

Whether the petition is pleaded with a reasonable degree of precision

13. The Applicant submits that the petition has set out clearly the constitutional provisions that are contravened and the manner of contravention hence the same is properly pleaded.

Whether the Respondents have violated the Petitioner's Constitutional Rights

14. The Applicant submits that the evidence of the Petitioner is not rebutted by the Respondents. The 1st Respondent did not file a response. The 2nd Respondent did not rebut the Petitioner's evidence but only raised issues of law. As such, she argues that the institution and maintenance of criminal proceedings against the petitioner and her children is a violation of her rights to a fair trial and to property.

15. It is the Applicants case that the dispute between her and the 2nd Respondent is of a civil nature arising out of the 2nd Respondent's claim over the Applicant's land parcel number Ngariama/Rugeto/544. The 2nd Respondent herein was a protestor in Embu CM Succession Cause No.161 of 1994

16. The Applicant submits that in both the pending criminal and civil cases, the 2nd Respondent is relying on the purported sale agreement dated 13th November 2014. She argues that it beats logic for the Petitioner herein to withdraw summons purporting to give the 2nd Respondent 11/2 acres then later in 2014 enter into a sale agreement allegedly giving the 2nd Respondent a further 1/2 acre making a total of 2 acres. The said agreement could only be a forgery.



17. The 2nd Respondent was unsuccessful in Embu CM Succession Cause No.161 of 1994 as the court vide a ruling delivered on 16th February, 2021 dismissed her protest and stayed the distribution of land parcel number Ngariama/rugeto/544 pending filing of the 2nd Respondent's claim in the appropriate court. The 2nd Respondent subsequently filed Kerugoya ELC Case no. E010 OF 2021 against the Petitioner and her co-administrator, seeking a declaration that she is the legal purchaser of 2 acres out of land parcel number Ngariama/Rugeto/544 and seeking an order of transfer of the said portion of land. While the proceedings in Embu CM Succession Cause No.161 of 1994 were pending the 2nd Respondent made a complaint of malicious damage to property against the Petitioner and her children who were charged in Gichugu Criminal case No.147 of 2020.
18. The applicant submits that although the 1st Respondent is vested with prosecutorial powers under Article 157(6) of *the Constitution*, the said powers must be exercised under the principles set out in Article 157(11) which states that:
- “In exercising the powers conferred by this article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”
19. She cites the case of Commissioner of Police & The Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others [2013] eKLR where the Court of Appeal spelt out circumstances when the Court would interfere with exercise of the 1st Respondent's powers as follows:
- “By the same token and in terms of Article 157 (11) of *the Constitution*, quoted above, in exercising powers donated by the late, including the power to direct the Inspector General to investigate an allegation of criminal conduct the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval but stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution.”
20. The applicant submits that the dispute between the Petitioner and 2nd Respondent is purely of a civil nature and the invocation of criminal proceedings by the Respondents to resolve the dispute, is a gross abuse of the criminal justice system. They submit that the institution of the criminal proceedings by the 1st Respondent at the instigation of the 2nd Respondent is only meant to intimidate and harass the Petitioner and her children and compel her to transfer the disputed portion of land to the 2nd Respondent against the petitioner's rights to property. The criminal proceedings are also intended to aid the 2nd Respondent in the pending land case and compromise the Petitioner's case.

The 2nd Respondent Submissions

Whether conservatory orders should issue as prayed for in the notice of motion application

21. The 2nd Respondent submits that the conservatory orders sought in the instant application cannot issue for the reason that the petitioner/applicant herein has not attained the threshold for grant of conservatory orders as it has nothing to do with public interest and thus is to be dismissed with costs



Whether the petition should be allowed in terms of the reliefs sought

22. In addition, the 2nd Respondent submits that the instant application should not be allowed in terms of the reliefs sought therein as the same is fatally defective. The Petitioner herein has brought the petition on her own behalf and in a representative capacity on behalf of her adult children. However, no evidence of consent by the said adult children has been furnished to court as contemplated in Articles 22 (2) and 258(2) of *the Constitution* of Kenya
23. Further to the foregoing, the 2nd Respondent submits that allowing the instant petition amounts to inviting this honourable court to stifle the prosecutorial powers of the 1st Respondent which are derived from Article 157 of *the Constitution* of Kenya and the *Office of the Director of Public Prosecutions Act*, No. 2 of 2013, and precisely Section 4 of the Act which lays down the guidelines to be followed in the cause of the 1st Respondent discharging its mandate.
24. The 2nd Respondent also submits that the Petitioner has not demonstrated that the criminal charges preferred on her together with her children have been recklessly and/or malicious brought by the 1st Respondent herein. In any event, were that to be the case, the Petitioner's recourse lies in a claim for damages for malicious prosecution and not in the instant Petition.

Issues for Determination

25. Two issues arise for determination herein:
 - a. Whether conservatory orders should issue as prayed for in the notice of motion application.
 - b. Whether the petition should be allowed in terms of the reliefs sought.

Analysis and Determination

Whether conservatory orders should issue as prayed for in the notice of motion application

26. The applicant's prayer is that pending hearing and determination of this suit, this Honourable court be pleased to issue conservatory orders staying criminal proceedings in Gichugu CM Criminal Case no.147 of 2020 and Criminal Case no.443 of 2023 launched by the 1st Respondent against the Petitioner.
27. This court notes that Article 20 (2) of *the constitution* provides that:

“every person shall enjoy the rights and fundamental freedoms in the bill of rights to the greatest extent consistent with the nature of the right or fundamental freedom.”
28. Further, the court agrees with the applicant that under Article 22 (1)

“every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed or is threatened.”
29. The jurisdiction and reliefs which may be granted in proceedings filed and brought pursuant to Article 22 are provided for under Article 23. They include: Declaratory rights, an injunction, conservatory order, an order for compensation, an order for judicial review.
30. The petitioner has argued in both the notice of motion and the petition that her right to own property guaranteed under Article 40 has been violated, threatened and infringed by the respondents. Further, her right to fair hearing under Article 50 of *the constitution* has been violated by the respondents.



31. The question to answer is whether the applicant has made out a prima facie case to entitle her with the relief of conservatory order under Article 23 of *the Constitution*.
32. The minimal criteria required to prove a prima facie case in cases of this nature has been set out by the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others eKLR* as follows:

“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 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 applicant’s case for orders of stay. Conservatory orders consequently should be on the inherent merits of the case, bearing in mind the public interest, the constitutional values and the proportionate magnitude and priority levels attributable to the relevant causes.”
33. The petitioner submits that the institution and maintenance of criminal proceedings against the petitioner and her children is a violation of the petitioner’s rights to a fair trial and right to property.
34. The 2nd Respondent submits that the conservatory orders sought in the instant motion cannot issue for the reason that the petitioner/applicant herein has not attained the threshold for grant of conservatory orders as it has nothing to do with public interest and thus is for dismissal with costs
35. However, the petitioner submits that the institution of the criminal proceedings by the 1st Respondent at the instigation of the 2nd Respondent is only meant to intimidate and harass the Petitioner and her children and compel her to transfer the disputed portion of land to the 2nd Respondent against the petitioner’s rights to property. The criminal proceedings are also intended to aid the 2nd Respondent in the pending land case and compromise the Petitioners case.
36. There is need for conservatory orders to allow the petitioner to attend to the dispute pending in court vide Kerugoya ELC Case No. E010 of 2021.
37. Issuing the conservatory orders will prevent the 2nd Respondent from interfering with the civil matter in Kerugoya ELC Case No. E010 of 2021 to the disadvantage of the petitioner.

Whether the petition should be allowed in terms of the reliefs sought

38. The petitioner seeks for an order of stay or termination of Criminal proceedings in Criminal Case no.147 of 2020 and Gichugu Criminal Case no.443 of 2023 pending hearing and determination of Kerugoya ELC Case no. E010 of 2021.
39. It is the Petitioner’s/Applicants case that the dispute between her and the 2nd Respondent is of a civil nature arising out of the 2nd Respondent’s claim over the Applicant’s land parcel number Ngariama/Rugeto/544. The 2nd Respondent herein was a protestor in Embu CM Succession Cause No.161 of 1994
40. The petitioner submits that in both the pending criminal and civil cases, the 2nd Respondent is relying on a purported sale agreement dated 13th November 2014. The same matter is pending in court hearing and determination in Kerugoya ELC Case No. E010 of 2021.
41. The applicant exhibited the charge sheets for both criminal cases. In the first case the applicant Irene Kuthii Gatua, the complaint is the applicant intended to defraud by pretending to sell property



- Ngariama/Rungeto/544. The complainant is Priscilla Muthoni Njagi. In the second case the charge is that the applicant and others (including four of her children) unlawfully destroyed the perimeter post barbed wire the property of the 2nd respondent. The 2nd respondent is indicated as the complainant.
42. Further the applicant exhibited amended originating summons in ELC Case No E010of2021 in which the 2nd respondent (complainant in the criminal cases) seeks declarations/orders that she is the legal purchaser of 2 acres in LR No Ngariama/Rungeto/544, the disputed land.
43. The petitioner submits that although the 1st Respondent is vested with prosecutorial powers under Article 157(6) of *the Constitution*, the Court of Appeal spelt out circumstances when the Court would interfere with exercise of the 1st Respondent's powers. This was in the case of Commissioner of Police & The Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others [2013] eKLR. The Court stated as follows:
- “By the same token and in terms of Article 157 (11) of *the Constitution*, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval but stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution.”
44. The 2nd Respondent submits that allowing the instant petition amounts to inviting this honourable court to stifle the prosecutorial powers of the 1st Respondent which are derived from Article 157 of *the Constitution* of Kenya.
45. The court notes that for curious and unexplained reasons the DPP has not filed any responses or submissions to either the application or petition in this matter. This is despite the AG, on 6th November, 2023, having filed a Notice of Appointment to act for the DPP. In this regard, the court takes the view that the state has taken no position on the dispute before the court. In essence the state has not defended its actions which are challenged by the applicant.
46. From all the foregoing, it is clear that the dispute between the applicant/petitioner and the 2nd respondent relates to land parcel number Ngariama/Rungeto/544. The dispute concerns whether the portion of that land allegedly sold to the 2nd respondent lawfully belongs to her. Thus, in very simple terms the criminal case on fraud concerns the very same issues; and the criminal case on destruction of perimeter fence on the said property deals with the same issue.
47. In absence of any response by the DPP in support of the state's position, this court is of the view that the dispute as to ownership of the property must first be resolved in a civil court and not be prosecuted as a criminal offence.
48. Accordingly, the application succeeds to the extent herein. The Court grants the following orders which are hereby issued:
1. That pending hearing and determination of this suit, this Honourable court hereby issue conservatory orders staying criminal proceedings in Gichugu CM Criminal Case No.147 of 2020 and Criminal Case No.443 of 2023 launched by the 1st Respondent against the Petitioner.



2. That no declarations of violation may issue herein pending the determination of the civil suits.

49. Orders accordingly.

DATED AT KERUGOYA THIS 23RD DAY OF SEPTEMBER, 2024

R. MWONGO JUDGE

Delivered in the presence of:

Rugaita for the Petitioner

Chomba for 2nd Respondent

Muchira holding brief for Kiongo for 1st Respondent

Murage, Court Assistant

