



**Bubble Engineering Co. Ltd & another v Attorney General & 5 others;
 Innovative Concept Limited (Icl (Interested Party) (Petition E387 of 2022)
 [2024] KEHC 12837 (KLR) (Constitutional and Human Rights) (18 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12837 (KLR)

**REPUBLIC OF KENYA
 IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
 CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E387 OF 2022

EC MWITA, J

OCTOBER 18, 2024

BETWEEN

BUBBLE ENGINEERING CO. LTD 1ST PETITIONER

WILLIAM O. OWUOR 2ND PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL 1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATION 2ND RESPONDENT

THE OCS MUTHAIGA POLICE STATION 3RD RESPONDENT

PATRICK OMONDI PC NO. 93649 4TH RESPONDENT

BONIFACE BIRISIO 5TH RESPONDENT

VAGJIYANI HITEL VALJI 6TH RESPONDENT

AND

INNOVATIVE CONCEPT LIMITED (ICL INTERESTED PARTY

RULING

1. The petitioners have filed this application seeking orders restraining the respondents, their agents, servants or any other person acting under their authority or instructions from charging, prosecuting, threatening to arrest, arresting, continued harassment, questioning, intimidation, apprehension, summoning, threatening to kill, killing, seeking information regards to the petitioners or in any way contacting the petitioners on account of any investigations relating to payments under and the



- enforcement of the Joint Venture (JV) agreement dated 4th October 2017 until determination of the petition.
2. The 1st petitioner and the interested party entered into JV agreement through their agents, the 2nd petitioner and 6th respondent, respectively.
 3. In the JV, parties agreed at the work intervals and how payment would be made to the interested party. The 1st petitioner issued the interested party with 3 postdated cheques of Kshs. 800,000 which were to be banked upon completion of certain percentage of work.
 4. Upon partial performance, the interested party banked one of the cheques but stopped doing any further works or deliveries to the site. The 1st petitioner notified the interested party of the breach and informed it that the payments had been cancelled. The 1st petitioner also warned against banking the cheques as they would not be honored.
 5. The petitioners state that the interested party proceeded to bank the cheque which were dishonored. Following which the 4th, 5th and 6th respondents have since hatched a plan to coerce them into enforcing the contract, a misuse of the criminal process in a dispute of a civil nature.
 6. The petitioners state that the 3rd and 4th respondents arrested and detained the 2nd petitioner between 6th and 7th May 2022 with a view to intimidating and coercing him into paying the money he declined to pay under the contract. During the arrest, the 2nd petitioner was harassed, his phone, identification cards, bank cards confiscated and he was denied the right to communicate with his advocates or family.
 7. The petitioners assert that as the 2nd petitioner was taken from Boyani in Vihiga county, to Nairobi, deliberately threatened with being damped into river Yala and was also physically assaulted.
 8. Due to the harassment and intimidation, the 2nd petitioner was forced to issue three postdated cheques to secure his release. He, however, cancelled those cheques upon being released. He has since been receiving unending threatening calls from the 5th respondent demanding immediate payment of the money in those cheques otherwise he would face dire consequences.
 9. The petitioners again state that on various occasions, unknown individuals went to the 2nd petitioner's place of work and at home in Kisumu asking him to identify himself and for his whereabouts without stating the reasons for the visits.
 10. The 2nd petitioner made a report about threats to his life at Nairobi Central Police Station on 13th July 2022. On 14th July 2022, he wrote to the 3rd respondent requesting for information regarding his arrest and detention at Muthaiga police station without success.
 11. The petitioners state that the 2nd petitioner paid cash bail of Kshs. 200,000 at Muthaiga Police Station but was only issued with a receipt of Kshs. 60,000. The petitioners further suspect that the 5th and 6th respondents have been using state power to snoop into the 2nd petitioner's personal information, including bank account information.
 12. As a result of these actions, the petitioners argue, the respondents have violated and threatened to violate the petitioners' rights guaranteed under articles 26, 27, 29(1), 31 and 40 of *the Constitution*, prompting them to seek conservatory orders.
 13. The petitioners asserted that they have demonstrated that they are being persecuted by the respondents which the respondents have admitted in their responses that they arrested the 2nd petitioner and that their intention is to prosecute him, despite the dispute being of a civil nature. This necessitates grant of the orders sought to preserve the substratum of the petition.



14. They relied on the decisions in *Petit v Asanand* [1989] KLR, 241; *Giella v Cassman Brown Company Ltd* [1973] E.A 358; *Mrao Ltd v First American Bank of Kenya Ltd & others* [2003] eKLR that their application demonstrates a prima facie case with a probability of success.
15. The petitioners maintained that their petition is based on continuing violation of their fundamental rights and freedoms which are weighty and can only be determined at the hearing of the petition.
16. The petitioners further argued that the 2nd respondent's action of arresting the 2nd petitioner twice was an arbitrary denial of the right to freedom of movement. If the court does not grant the orders, the respondents will proceed to harass, intimidate, arrest, detain and even wrongly prosecute the 2nd petitioner causing them irreparable injury.
17. The petitioners again relied on the decisions in *Paul Gitonga Wanjau v Gathuthis Tea Factor Company Ltd & 2 others* [2016] eKLR and *Amir Suleiman v Amboseli Resort Limited* [2004] eKLR for the proposition that the balance of convenience is in their favor.

Responses

18. The 3rd respondent opposed the application through a replying affidavit sworn on 15th September 2022 by Chief Inspector John Muu. The 3rd respondent stated that the 2nd petitioner was booked at Muthaiga police station on 7th May 2022 OB No. 19/07/05/2022 a normal police procedure. He was however out of the station on official duties.
19. It was deposed that at the time of his arrest, the 2nd petitioner did not raise any claims of assault. He also never received any request from central police station regarding the arrest, booking or cash bail receipt.
20. The 2nd petitioner was released from custody of Muthaiga police station under the instructions of an Assistant Superintendent of Police. On 9th May 2022, the 2nd petitioner was issued with an official cash bail receipt No 1699128 for a cash bail of Kshs. 60,000.
21. The 3rd respondent asserted that this application was filed in bad faith and is an abuse of the court process. Investigations are being conducted and all parties concerned were given a chance to record statements but the 2nd petitioner declined.
22. The 4th respondent also opposed the application through a replying affidavit sworn on 6th September 2022. He deposed that the application is premised on a misrepresentation of facts and is brought with the intention to defeat justice.
23. The 4th respondent stated that on 15th March 2022, the 6th respondent lodged a complaint at Kisumu Central Police Station in relation to the offence of issuing a bad cheque contrary to section 316A (1)(c) of the Penal Code by the 2nd petitioner. The 2nd petitioner sought time to resolve the dispute but this did not happen. Subsequently, Sgt Bishar of DCI, serious crimes, made several calls to the 2nd petitioner to appear before the DCI headquarters without success.
24. On 6th May 2022, the 4th respondent was provided with a motor vehicle and a driver, the 5th respondent. They proceeded to Kisumu and reported to the Regional Criminal Investigations officer (RCIO) Kisumu who gave him an officer to help him arrest the 2nd petitioner.
25. They arrested the 2nd petitioner at Boyani area and brought him to Nairobi. They did not pass through river Yala. The 2nd petitioner was booked at Kericho police station for the night. He was picked the following morning and they left for Nairobi. The 4th respondent denied assaulting the 2nd petitioner or confiscating his items. At Muthaiga police station, they found the petitioners relatives waiting for



him as the petitioner had called and informed them earlier. One of the relatives introduced himself as the OCS Spring Valley Police Station.

26. The 2nd petitioner was booked at the station. He requested to talk to the complainant and was temporarily removed from the custody and allowed to talk. They afterwards informed the 4th respondent that they had agreed to resolve the matter amicably.
27. The 2nd petitioner was released on a police cash bail of Kshs. 60,000 and asked to collect the cash bail receipt on a Monday once the OCS had signed it. On 19th May 2022, the OCS issued an official cash bail receipt No. 1699128 which was collected by one, James Swaka Nesabo.
28. The 4th respondent stated that from the time of arrest to the time of booking the 2nd petitioner at both at Kericho and Muthaiga police stations, the 2nd petitioner never complained of assault to any of the OCS at both stations or any police officer or any authority.
29. The 4th respondent denies threatening the 2nd petitioner after his release or visiting his place of residence. He stated that investigations were on going and all parties concerned were given a chance to record statements but the 2nd petitioner declined.
30. On his part, the 5th respondent opposed the petition through replying affidavit sworn on 6th September 2022. He deposed that on 6th May, 2022 under the instructions of 6th respondent, he accompanied the 4th respondent to Kisumu where he was required to identify the petitioner, which he did.
31. The 5th respondent denied harassing or physically assaulting the 2nd petitioner or confiscating his phones, identification or banks cards as alleged. The 5th respondent confirmed that they drove to Kisumu central police station where the 4th respondent spoke to the in charge and was given another officer. They then proceeded to Boyani area where he identified the 2nd petitioner. They drove back to Kisumu police station before embarking on their journey to Nairobi with the 2nd petitioner who willingly entered the vehicle without being hand cuffed.
32. The 5th respondent denied taking part in the 2nd petitioner's arrest as the arrest was done by the police officers. He confirmed that they made a stop at Kericho police station where the 2nd petitioner was booked overnight before proceeding to Muthaiga police station, Nairobi the following day.
33. The 5th respondent asserted that upon being release from Muthaiga police station, the 2nd petitioner went back to Kisumu and after three days, issued 3 new cheques which he delivered to the Kisumu offices on his own volition as he had promised.
34. The 6th respondent and interested party opposed the application through a replying affidavit sworn by the 6th respondent. The 6th respondent stated that the 2nd petitioner approached him to help him fund a construction project. The interested party, (his company), entered into a JV with the 2nd petitioner through the 1st petitioner for a construction project of a proposed apartment at Kisumu.
35. The 6th respondent stated that they discharged their obligation under the agreement, including supply of labour and building materials. Later, the 2nd petitioner informed him that his company had got some funding and, therefore, opted out. They calculated the amounts they had expended on the project which came to Kshs. 2.4 million. The 2nd petitioner issued 3 cheques for Kshs. 800,000 each. However, only one cheque of Kshs. 800,000 was paid. The 2nd petitioner stopped the rest.
36. Despite several demands for payment, the 2nd petitioner refused to pay which necessitated the lodging of a complaint with the police at Kisumu. The 2nd petitioner was summoned and pleaded for time to



make the payments but did not. A decision was made to arrest him and the 5th respondent helped in identifying him.

37. He denied harassing, intimidating, issuing death threats, or colluding with the 2nd, 4th and 5th respondents to coerce the 2nd petitioner into paying the money. He also denied violating the petitioner's constitutional rights.
38. The respondents relied on several decisions in support of their position. These included *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR and *Board of Management of Uhuru Secondary School v City County Director of Education and 2 others* [2015] eKLR, that there is no indication that the alleged death threats were ever reported to any police station or to the Independent Policing Oversight Authority or Internal Affairs Unit of the Police Service. There is also no evidence that the alleged misconduct was escalated through the chain of command.
39. The respondents contended that granting conservatory orders will curtail the 2nd respondents mandate and deny the 6th respondent and interested party an opportunity to pursue justice and are against public interest. They urged that the interim conservatory orders be vacated to allow the investigations to be completed.
40. The respondents relied on section 36 of the Criminal Procedure Code, that the 2nd petitioner was lawfully arrested and the criminal charges against him are justified. Reliance was placed on *Hicks v Faulkner*, (1878), 8 Q.B.D 167; *Republic v Dakes* 1986 1 SCR 103; *Daniel Waweru Njoroge & 17 others v attorney General* [2015] eKLR; *O'hara v Chief Constable of The Royal Ulster Constabulary* (1997) A.C.286 and *Republic v Council of Legal Education & another Ex-parte Mount Kenya University* [2016] eKLR.
41. They again relied on *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* (supra); *Board of Management of Uhuru Secondary School v City County Director of Education & 2 others* (supra) and *Centre for Rights Education and Awareness (CREAW) & 7 others* [2011] eKLR to urge that the court should not grant conservatory orders.

Determination

42. I have considered the reference, arguments by parties and the decisions relied on. The petitioners sought conservatory orders to restrain the respondents from arresting and prosecuting the 2nd petitioner, pending determination of the petition. The petitioners' case is that the intended arrest and prosecution is a threat to violate their rights and fundamental freedoms. They also argued that the respondents are intending to force them 2nd petitioner settle a civil claim.
43. Article 23(1) read with article 165(3) of *the constitution* grants this court jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Under article 23(3), one of the reliefs the court can grant is a conservatory order, a judicial remedy granted to preserve the substratum of the subject matter until the determination of the dispute. A conservatory order thus, restrains the party to whom it is directed, from taking any other steps in the matter until further orders of the court.
44. The principles guiding grant of conservatory orders are now settled. In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, (Supreme Court in Civil Application No 5 of 2014 [2014] eKLR, the Supreme Court stated:
 - (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 applicant’s case for orders of stay.

45. In *Invesco Assurance Co Ltd v MW (Minor suing thro' next friend and mother (HW))* [2016] eKLR, the court stated:

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.

46. Again, in *Judicial Service Commission v Speaker of the National Assembly & another* [2013] eKLR, the court had the following to say:

Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under *the Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.

47. It follows that conservatory orders are aimed at preserving the substratum of the matter pending the determination of the main issues in dispute. In that regard, whether to grant interlocutory conservatory orders or not, the court exercises judicial discretion which has to be exercised judiciously with the sole aim of preserving the main petition so that its substratum is not lost.

48. I have considered the issues raised in the petition and application. The main parties entered into a joint venture in order to carry out certain business. The business undertaking did not go far and the relationship was terminated. Parties appear to have agreed on each side’s obligations which were however not met by one side.

49. The petitioners allege that as a result, the 2nd petitioner was arrested and was being forced to settle some outstanding amount of money arising from some undertakings to pay the money due to the other side. The 2nd petitioner was arrested and was forced to issue some cheques in settlement of the outstanding amount. The cheques were however, countermanded and that was the reason why he was being pursued by the police.

50. The respondents on the other hand, deny harassing the 2nd petitioner. They however admit that the 2nd petitioner was arrested in Kisumu and transferred to Nairobi and booked at Muthaiga police station. The respondents, however, deny forcing the 2nd petitioner to cheques or to settle a civil debt.

51. From the facts of this matter, there is no denial that there is an agreement between the parties on a joint venture business which might not have gone the way parties anticipated. The relationship collapsed and parties parted ways. That relationship had bestowed obligations on either side which either were fulfilled or not.

52. There is also no doubt that the 2nd petitioner was arrested by the police and may have issued some cheques under circumstances that are not clear to the court at this interlocutory stage. Those cheques were not paid after either being countermanded or for some other reason.

53. There is no denial that the petitioners are being pursued because of the joint venture agreement and the subsequently issued cheques that were for some reason not paid. The petitioners allege that the



pursuit is intended to coerce them into paying the money that is said to be owing out of the joint venture agreement and the countermanded cheques.

54. This court is acutely aware that when dealing with an interlocutory application for conservatory orders, it must be careful not to delve into final conclusions and make final findings that might dispose of the matter at this stage so that parties have the opportunity to prosecute their cases without prejudice. This understanding preserves the parties right to a fair hearing so that they adduce evidenced to support their respective positions during trial.
55. The court has at this stage to maintain the delicate balance in ensuring that it does not get into issues which are in the realm of the main petition. The court need only be satisfied that the applicant has demonstrated that if conservatory orders are not granted, his rights and fundamental freedoms will be violated or that the substratum of the main petition will be lost.
56. In that regard, the Supreme Court stated in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* (supra), that conservatory orders 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.
57. In this motion application, the petitioners have demonstrated that they have an arguable case that the 2nd petitioner is being pursued and may be arrested and prosecuted on matters that relate to a joint venture business that did not succeed. They have also demonstrated that cheques were issued, countermanded and form the basis of the investigations. They have established that absent of the conservatory orders, the 2nd petitioner will be arrested and prosecuted on the matters that are pending determination before this court, thus he is likely to suffer prejudice.
58. In this respect, I am satisfied that grant conservatory orders will enhance constitutional values and objects of the fundamental rights and freedom in the Bill of Rights. This is because if conservatory orders are not granted, the substratum of the petition will be lost or rendering it nugatory. I do not see the prejudice the respondents will suffer if the orders are granted since if the petition is finally lost, the respondents will proceed with the arrest and prosecution.
59. Consequently, and for the above reasons, I am persuaded that it will be in the interest of justice and preservation of human dignity, that the conservatory orders sought are deserved.
60. The motion application dated July 27, 2022 is allowed and the court makes the following orders:
 - i. A conservatory order is hereby issued restraining the Director of Criminal investigations, his officers, agents, servants and or anyone acting under his authority, from arresting, charging or threatening the petitioners on matters regarding payments and enforcement of the joint venture agreement dated October 4, 2017, until the hearing and determination of this petition.
 - ii. Costs to abide by the result of the main petition

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER 2024

E C MWITA

JUDGE

