



**Odero (suing on his own behalf and on behalf of New Life Prayer Centre & Church)  
v Attorney General & 7 others; Law Society of Kenya & 6 others (Interested Parties)  
(Constitutional Petition E027 of 2023) [2023] KEHC 17273 (KLR) (15 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17273 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION E027 OF 2023**

**OA SEWE, J**

**MAY 15, 2023**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL  
RIGHTS & FREEDOMS UNDER ARTICLES 2, 10, 22, 23, 27, 28,  
32, 40, 47, 48 & 258 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF RULES 4, 10, 11, 13 & 20 OF THE CONSTITUTION  
OF KENYA (PROTECTION OF RIGHTS AND FUNDMENTAL  
FREEDOMS) PRACTICE AND DPROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**BETWEEN**

**EZEKIEL OMBOK ODERO ..... PETITIONER  
SUING ON HIS OWN BEHALF AND ON BEHALF OF NEW LIFE PRAYER  
CENTRE & CHURCH**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT  
INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> RESPONDENT  
OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS .... 3<sup>RD</sup>  
RESPONDENT  
COMMUNICATIONS AUTHORITY OF KENYA ..... 4<sup>TH</sup> RESPONDENT  
EZRA CHILOBA ..... 5<sup>TH</sup> RESPONDENT**



**MINISTRY OF INTERIOR SECURITY ..... 6<sup>TH</sup> RESPONDENT**  
**DIRECTORATE OF CRIMINAL INVESTIGATIONS & ANOTHER .... 7<sup>TH</sup>**  
**RESPONDENT**

**AND**

**LAW SOCIETY OF KENYA ..... INTERESTED PARTY**  
**KENYA NATIONAL HUMAN RIGHTS COMMISSION ... INTERESTED PARTY**  
**OFFICE OF THE OMBUDSMAN ..... INTERESTED PARTY**  
**SUPREME COUNCIL OF MUSLIMS ..... INTERESTED PARTY**  
**NATIONAL COUNCIL OF CHURCHES OF KENYA ..... INTERESTED PARTY**  
**ASSET RECOVERY AGENCY ..... INTERESTED PARTY**  
**ETHICS AND ANTI CORRUPTION COMMISSION ..... INTERESTED PARTY**

### **RULING**

1. The petitioner, Ezekiel Ombok Odero, approached the Court vide his Petition dated 3<sup>rd</sup> May 2023, seeking various reliefs on allegations that his constitutional rights had been infringed or were threatened with violation. He explained that he was arrested and subsequently presented before Shanzu Law Court on 27<sup>th</sup> April 2023 in Miscellaneous Application No. E075 of 2023 on an application seeking his detention for 30 days pending the completion of investigations allegedly linking him to one Paul Mackenzie. The petitioner further averred that, upon his arrest, the officers of the 2<sup>nd</sup> respondent unreasonably and without any written notice or notification, ordered the closure of the New Life Prayer Centre & Church for an indefinite period of time and for undisclosed reasons.
2. At paragraph 31 of his Petition, the petitioner averred that, on the same date of 27<sup>th</sup> April 2023, the 4<sup>th</sup> respondent's CEO, one Ezra Chiloba, who is also the 5<sup>th</sup> respondent herein, wrote a letter communicating the directive by the 4<sup>th</sup> respondent to immediately suspend the frequency enjoyed by World Evangelism TV, owned by the petitioner. Thus, the petitioner averred, at paragraph 32 of the Petition that:

“...the Respondent have resolved to persecute the Petitioner and accused him of all manner of capital offences because of a previously failed financial transaction with one Paul Mackenzie who is accused of inter alia murder, assisted suicide, genocide and fraud.”
3. Consequently, the petitioner was apprehensive that the respondents were intent on freezing his or the church's bank accounts in order to frustrate the church and cripple his fight for justice. He added that the threats of freezing the church's bank accounts follow the pronouncement by the Shanzu Magistrate's Court, declining the application for the detention of the applicant for 30 days. Accordingly, the petitioner prayed for the following reliefs:
  - (a) A declaration that the petitioner is entitled to fair administrative action that includes the right to be informed well in advance of the 4<sup>th</sup> respondent's intention to suspend the broadcasting licence for the New Life Communications Limited (World Evangelism TV) and as such the decision to suspend the broadcasting licence as communicated vide the letter dated 27<sup>th</sup> April



2023 is illegal and unconstitutional ab initio for violating Article 47 of *the Constitution* as read with Section 4 of the *Fair Administrative Action Act*, 2015.

- (b) An order of certiorari to bring to this Court for the purpose of quashing the 4<sup>th</sup> respondent's letter to the petitioner dated 27<sup>th</sup> April 2023 communicating the suspension of the broadcasting licence of the World Evangelism TV for having been made in violation of Article 47 of *the Constitution* as read with Section 4 of the Fair Administrative Actions Act.
  - (c) An order of mandamus compelling the 4<sup>th</sup> respondent to immediately reinstate the licence and frequency enjoyed by World Evangelism TV as used by New Life Prayer Centre & Church for its ministry.
  - (d) An order of prohibition restraining the respondents either by themselves or their servants from in any manner acting adversely to the interest of the petitioner by way of either freezing the bank accounts (whose particulars were supplied in the Petition).
  - (e) An order of prohibition restraining the respondents either by themselves or through their agents from closing or shutting down the ministry as run by the petitioner and registered under the *Societies Act* in the name of New Life Prayer Centre & Church or in any other manner acting in violation of the petitioner's rights under Articles 32, 33 and 36 of *the Constitution*.
  - (f) An order of compensation for the violation of the petitioner's rights to dignity, freedom of religion, expression, association and his right to a fair administrative action as decreed under Article 28, 32, 33, 36 and 47 of *the Constitution*.
  - (g) Costs of the Petition.
  - (h) Any other relief that the Court will be pleased to grant in the circumstances.
4. Concomitantly, the petitioner filed a Notice of Motion dated 3<sup>rd</sup> May 2023 under a Certificate of Urgency, under Articles 2, 10, 22, 23, 25, 27, 47, 48, 49, 50 and 258 of *the Constitution*; Rules 4, 13, 19 and 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and Section 4 of the *Fair Administrative Action Act*, 2015. The petitioner thereby sought orders, inter alia, that:
- (a) In the interim and pending the hearing and determination of the Petition, the Court be pleased to issue a conservatory order temporarily staying the 4<sup>th</sup> respondent's communication to the petitioner dated 27<sup>th</sup> April 2023 suspending the operation of the television frequency operated by the petitioner under the name World Evangelism Television.
  - (b) That in the interim and pending the hearing and determination of the Petition, the Court be pleased to issue a conservatory order restraining the respondents either by themselves or their agents from taking adverse action against the petitioner or New Life Prayer Centre & Church including the freezing of the church accounts to wit, Account Numbers 01128...100, 01128...101, 01128...102, 01128...103, 01128...104, 02100...100, 22100...100, 03100...100 all domiciled at Cooperative Bank and Account Numbers 60540...018, 60540...026, 60540...031, 60540...047, 60540...052, 60540...068 and 60540...073 all domiciled at NCBA Bank.
  - (c) In the interim and pending the hearing and determination of the Petition, the Court be pleased to issue a conservatory order directing the respondents to refrain from interfering with the religious activities as conducted by the petitioner or prayer sessions in New Life Prayer Centre & Church and to allow the smooth running of the ministry.
  - (d) Any other order that the Court will be pleased to issue in the circumstances.



5. The application was supported by the affidavit of the petitioner, sworn on 3<sup>rd</sup> May 2023 in which he deposed that on the 27<sup>th</sup> April 2021 he was arrested in Mavueni under spurious allegations of committing murder, genocide, crimes against humanity, money laundering, fraud and child cruelty among others. He was taken before the Senior Principal Magistrate's Court at Shanzu in respect of an application by the State to have him detained for 30 days; which application was dismissed by Hon. Omido, Senior Principal Magistrate, on 2<sup>nd</sup> May 2023.
6. The petitioner further averred that, on 27<sup>th</sup> April 2023, the Coast Regional Commissioner, Rhoda Onyancha, issued a press briefing on national media outlets stating that the Police had closed down New Life Prayer Centre and Church situated in Mavueni, evacuated all congregants from the church premises and barred any further worship at the church premises at Mavueni in Kilifi County and Majaoni in Shanzu within Mombasa County. He added that, prior to the public pronouncement there was no written communication to him or the church explaining the reasons for such a drastic action.
7. The petitioner added that, in the same breath, the State, through the Communication Authority of Kenya (the 4<sup>th</sup> respondent herein) proceeded to issue a directive suspending the television frequency of the World Evangelism Television Station operated by New Life Prayer Centre and Church, a copy whereof was annexed to the petitioner's Supporting Affidavit as Annexure E04. The petitioner added that, again, no prior notice or warning was issued to him or the church of such imminent action. He therefore asserted that the 4<sup>th</sup> respondent thereby contravened Article 47 of *the Constitution* as well as Section 4 of the *Fair Administrative Action Act*.
8. In support of his apprehension that the respondents were intent on freezing his accounts domiciled in Cooperative Bank and NCBA with the intention of paralyzing his ministry, the petitioner explained that, sometime between the years 2018 and 2022, he desired to acquire a Television Station in an attempt to promote his religious teachings to larger audiences. That he then decided to get in touch with Paul Mackenzie who, at the time, had a television station by the name, Times Television, but which he was unable to operate due to the legal challenges he was facing in court. He added that, after negotiations with Paul Mackenzie they settled on a purchase price of Kshs. 3 million; of which he made a down payment of Kshs. 500,000/= on the understanding that Mackenzie did not have any liabilities. He later found out that Times Television was confined to Kilifi County and had a liability of Kshs. 5 million. He accordingly abandoned the oral agreement with Mackenzie and negotiated new offers with Pan African Networks Ltd (PANG), leading to the birth of World Evangelism TV. He therefore denied any association with Mackenzie and averred that it is discriminatory for the respondents to persecute him because of a failed commercial deal with him.
9. The application was resisted by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents. They relied on the Replying Affidavit sworn by IP Leonce Sombo on 5<sup>th</sup> May 2023. In his affidavit, IP Sombo deposed that he is the investigating officer handling the investigations into the allegations against the petitioner, who is alleged to have been involved in or conspired to commit the crimes of murder, aiding suicide, abduction, radicalization, genocide, crimes against humanity, child cruelty, fraud and money laundering.
10. IP Sombo averred that there was credible information that several deaths occurred within the precincts of New Life Centre and Church at Mavueni and were reported to Kilifi Police Station between the year 2022 and 2023; and that investigations had led to exhumation, at Shakahola, on a piece of land associated with Paul Mackenzie. He added that, in the circumstances, there was need to establish whether there were dealings between the petitioner and Paul Mackenzie bordering on money laundering. IP Sombo further deposed that, owing to the emotive nature of the subject matter under investigation, public interest, the need to maintain integrity of the ongoing investigation and the safety and security of the investigating team, access to the New Life Prayer Centre situated at Mavueni



- Township within Kilifi County ought to be limited for some time to allow for completion of the investigation.
11. He denied the petitioner's allegations that the Police forcefully evicted worshippers from the church or that they are out to persecute the petitioner. IP Sombo further denied that the rights of the petitioner have been violated in any way. He therefore asserted that the orders sought, if granted, would amount to a contravention of the provisions of Article 245(4) of *the Constitution*.
  12. The application dated 3<sup>rd</sup> May 2023 was certified urgent and fixed for hearing on 8<sup>th</sup> May 2023; and while it was pending hearing, it emerged that the investigating team had filed an application before the Chief Magistrate's Court at Milimani, Nairobi, and obtained orders authorizing CI Martin Munene, a police officer and investigator attached to the Directorate of Criminal Investigations, Financial Investigations Unit, Nairobi, to have access to books relating to the various bank and M-Pesa accounts in the names of the petitioner, Kilifi International School and New Life Prayer Centre, for purposes of investigations into the allegations of money laundering and for CI Munene to:
    - (a) inspect/investigate, obtain information and demand to be supplied with certified copies of the account opening documents, bank account statements, signatories of the accounts, RTGS (swift) transactions for the period between 1<sup>st</sup> January 2017 to 30<sup>th</sup> April 2023;
    - (b) obtain statements from authorized persons, including the requisite certificates for electronic evidence for purposes of Section 106B(4) of the *Evidence Act*, Chapter 80 of the Laws of Kenya;
  13. In addition to the foregoing, the Chief Magistrate's Court issued a freezing order, prohibiting any withdrawal transaction in respect of the specified bank and M-Pesa accounts so as to preserve the funds held therein for a period of 30 days to allow CI Martin Munene or any other investigator attached to or authorized by the Directorate of Criminal Investigations, Financial Investigation Unit, to complete investigations.
  14. The orders aforesated provoked the petitioner's 2<sup>nd</sup> application dated 8<sup>th</sup> May 2023. The petitioner thereby moved the Court for the following orders:
    - (a) That the application be certified urgent and be heard on priority basis (spent);
    - (b) That in the interim and pending the hearing and determination of the application, the Court be pleased to issue a conservatory order suspending and staying the implementation of all the consequential orders and proceedings in Milimani Chief Magistrate's Miscellaneous Criminal Application No. E1348 of 2023 to the extent that the same seek to freeze all the bank accounts belonging to the petitioner, New Life Prayer Centre and Church and Kilifi International School (spent);
    - (c) That in the interim and pending the hearing and determination of the application, the Court be pleased to issue a conservatory order temporarily restraining the respondents from implementing the orders issued in Milimani Chief Magistrate's Miscellaneous Criminal Application No. E1348 of 2023 (spent);
    - (d) That in the interim and pending the hearing and determination of the application, the Court be pleased to call before it the file and proceedings in Milimani Chief Magistrate's Miscellaneous Criminal Application No. E1348 of 2023;
    - (e) That in the interim and pending the hearing and determination of the Petition, the Court be pleased to issue an order of certiorari, calling to this Court for purposes of quashing, the



orders dated 8<sup>th</sup> May 2023 and all the proceedings and consequential orders/directions issued in Milimani Chief Magistrate's Miscellaneous Criminal Application No. E1348 of 2023;

- (f) Any other order that the Court deems fit and pleased to issue in the circumstances.
  - (g) That costs be provided for.
15. The 2<sup>nd</sup> application was premised on the grounds that, upon serving his Petition, the interlocutory application dated 3<sup>rd</sup> May 2023 and the Court's directions upon the Attorney General, Director of Public Prosecution and the Directorate of Criminal Investigations (the 1<sup>st</sup>, 3<sup>rd</sup> and 7<sup>th</sup> respondents), the 7<sup>th</sup> respondent proceeded to file a Replying Affidavit to the Petition. That on the 8<sup>th</sup> May 2023 when the matter came up for hearing, the 1<sup>st</sup> respondent sought leave in open court to file a Supplementary Affidavit in response to the petitioner's Further Affidavit; but that before the end of the day's proceedings, it came to light that an order had been given freezing all his bank accounts of the petitioner, ostensibly issued in Milimani Chief Magistrate's Miscellaneous Criminal Application No. E1348 of 2023, yet the same bank accounts were already the subject of this Petition.
  16. The petitioner read malice in the fact that the 7<sup>th</sup> respondent opted to move a court inferior to the High Court in respect of a matter already live and pending before the High Court; and in the fact that at no time did the 1<sup>st</sup>, 3<sup>rd</sup> or 7<sup>th</sup> respondent disclose that they had moved the Chief Magistrate's Court to determine a crucial aspect of this Petition. He therefore averred that the 1<sup>st</sup>, 3<sup>rd</sup> and 7<sup>th</sup> respondents abused the court process to achieve ulterior motives. The petitioner expounded on these grounds in his Supporting Affidavit sworn on 8<sup>th</sup> May 2023, to which he attached a copy of the 7<sup>th</sup> respondent's application in Milimani Chief Magistrate's Miscellaneous Criminal Application No. E1348 of 2023 as well as the ensuing order.
  17. The respondents thereafter filed two Replying Affidavits sworn by CI Martin Munene and IP Sombo defending the action taken by the 7<sup>th</sup> respondent and the impugned orders. CI Munene averred that, in compliance with the FATF Recommendation No. 27, the Directorate of Criminal Investigations formed the Financial Investigations Unit to specifically investigate money laundering and enforce the *Proceeds of Crime and Anti-Money Laundering Act*, No. 9 of 2009 (POCAMLA). He added that, upon receiving instructions to institute investigations into suspected money laundering in respect of Paul Nthenge Mackenzie of Good News International Church and Ezekiel Ombok Odero of New Life Prayer Centre and Church, he filed an application dated 5<sup>th</sup> May 2023, being Milimani Chief Magistrate's Miscellaneous Criminal Application No. E1348 of 2023 for orders to investigate and freeze the accounts of the two suspects, based on his preliminary investigations.
  18. At paragraphs 11, 12 and 15 of his Replying Affidavit, CI Munene averred that, at the time of filing the said application, he was not aware of the existence of this Petition; and that the orders sought were merely intended to facilitate investigations into the allegations of money laundering, which is one of the offences the petitioner is suspected to have committed. He added that the actions of the Financial Investigations Unit in obtaining the impugned orders were within the realm of the law; and that that at no time were they intended for ulterior motives.
  19. On his part, IP Sombo reiterated his initial averments that one of the offences he was investigating was money laundering by the petitioner through church activities conducted at New Life Centre and Church; and therefore that the 2<sup>nd</sup> and 7<sup>th</sup> respondents had the authority to seek orders to investigate and freeze the pertinent accounts for purposes of preservation of funds pending completion of investigations. He further reiterated that though police officers were deployed at the petitioner's church, their purpose was to provide security and not to keep away the congregants. He added, at paragraph 11 of the Replying Affidavit sworn on 8<sup>th</sup> May 2023 that he was aware that on 7<sup>th</sup> May 2023,



members of New Life Prayer Centre and Church congregated at the church premises for worship despite the presence of police officers around the premises.

20. Directions were then given that the two applications be urged simultaneously by way of oral submissions. The petitioner was represented by the lead counsel, Mr. Danstan Omari together with Mr. Cliff Ombeta, Mr. Magolo, Mr. Mulwa, Mr. Okoko, Mr. Osoro, Mr. Wambui and Mr. Egesa; while Mr. Makuto and Ms. Anyumba represented the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents. Mr. Okoko was the first to make his submissions on behalf of the petitioner. He highlighted the factual basis of the two applications as set out in the two affidavits sworn by the petitioner and pointed out that, although in its ruling dated 2<sup>nd</sup> May 2023 the Senior Principal Magistrate, Shanzu SPM's Court gave the State 7 days to finalize their investigations, charges were yet to be preferred against the petitioner after the 7 days; hence his release on bond. Counsel further submitted that the closure of the petitioner's church and the suspension of the frequency for his TV station amount to violations of the petitioner's rights, including the rights of his church members to assemble for worship and associate. He added that, because he was apprehensive that his bank accounts were under threat, the petitioner approached this Court for reprieve; which effort was undermined when the respondents obtained freeze orders from an inferior court. Thus, Mr. Okoko urged the Court to issue the conservatory orders prayed for by the petitioner.
21. Mr. Osoro picked up from where Mr. Okoko left and submitted that it was embarrassing that the State opted to go to an inferior court to obtain orders in respect of matters pending before a superior court. He urged the Court to note that, in this instance, it was not just the rights of the petitioner that were thereby infringed; but also the rights of school-going children and the consumers of banking and other services being rendered in the vicinity of the church premises. He therefore urged the Court to issue the interlocutory orders sought by the petitioner through his two applications.
22. Mr. Wambui, on his part, underscored the fact that the church has been of assistance to members of the public until 27<sup>th</sup> April 2023 when the petitioner was arrested, the church closed and the frequency for the church's Evangelism TV suspended. In his submission, the State had connived further to freeze the petitioner's accounts; and therefore that there are pertinent issues arising for determination in the Petition. Thus, on the authority of *Peter Gatirau Munya v Dickson Mwenda Githinji & 2 Others* [2014] eKLR. Mr. Wambui urged the Court to issue the conservatory orders sought by the petitioner so as to arrest the injustice that has been committed by the State against the petitioner.
23. Lastly, Mr. Magolo made submissions with regard to the prayers directed at the Communication Authority of Kenya, the 4<sup>th</sup> respondent, and pointed out that, since the 4<sup>th</sup> respondent and its CEO, Mr. Ezra Chiloba (the 5<sup>th</sup> respondent) chose to not respond to the applications, the allegations against them are un rebutted; and therefore the orders against them ought to be granted as a matter of course. He relied on Article 20 of *the Constitution* and urged for a purposive interpretation of the applicable provisions of *the Constitution*. Mr. Magolo further submitted that, if indeed, the 2<sup>nd</sup> and 7<sup>th</sup> respondent needed orders for investigative purposes, they ought to have gone back to the SPM's Court at Shanzu instead of surreptitiously approaching Milimani Chief Magistrates Court, Nairobi, as they did.
24. Mr. Magolo further submitted that Sections 118, 121 of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya and Section 180 of the *Evidence Act* only give magistrates powers to issue orders for searching houses, vehicles or vessels, but not to freeze bank accounts. He therefore submitted that the magistrate issued an illegal order, which ought to be nullified under Section 362 of the Criminal Procedure Code. He added that, even POCAMLA does not authorize the sort of orders issued in exercise of the magistrate's criminal jurisdiction.



25. On behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, Mr. Makuto relied on the 3 affidavits filed herein and submitted that, the orders sought by the petitioner are ambiguous and do not meet the threshold laid down in the Anarita Karimi Njeru Case. He also cited Olive Mwhaki Mugenda & Another v Okiya Omtata Okiiti & Others [2016] eKLR for the proposition that the Court cannot grant vague orders. With regard to the prayers sought against the 4<sup>th</sup> and 5<sup>th</sup> respondents, Mr. Makuto made reference to the doctrine of avoidance and cited CAK v Royal Media & Others [2014] eKLR and on that basis contended that the orders sought are not available to the petitioner.
26. In respect of the 2<sup>nd</sup> application, Mr. Makuto urged the Court to find that, since the accounts have already been frozen, conservatory orders cannot issue; and that while the Court has unlimited jurisdiction, the Milimani Chief Magistrate's Court is under the supervisory jurisdiction of the Milimani High Court, Nairobi, and not this Court. He consequently urged the Court to decline the invitation to exercise its supervisory jurisdiction in the matter.
27. Ms. Anyumba for the 3<sup>rd</sup> respondent reiterated the facts as agreed by both sides and added that, one of the allegations against the petitioner was that he had committed the offence of money laundering; and therefore that the orders obtained from the Milimani Chief Magistrate's Court were warranted under Sections 118 and 121 of the Criminal Procedure Code and Section 180 of the *Evidence Act*. She was of the view that Mr. Magolo's interpretation of those provisions is wrong and added that, where money is involved, it would be unreasonable to expect it to be physically availed before the Court.
28. Ms. Anyumba also took the same view as did Mr. Makuto that the prayers as framed by the petitioner are ambiguous. She added that to grant them would be tantamount to a restriction of the powers of the Director of Public Prosecution as envisaged by Article 157(7) and (10) of *the Constitution*. She relied on Petition No. 372 of 2013: Justus Mwenda v DPP as to when the Court can interfere with the power bestowed on other agencies of State. She also submitted on the doctrine of avoidance and urged the Court to uphold the same in this instance by dismissing the petitioner's applications.
29. I have carefully considered the two applications as well as the averments set out in the respective affidavits filed by the parties and the submissions made on their behalf by learned counsel. The background facts are largely not in dispute. Hence, it is not in dispute that the petitioner is under investigations for, among other offences, alleged money laundering; or that he was released by the Shanzu Magistrate's Court on bond pending the completion of investigations.
30. It is imperative to bear in mind that at this stage, and for purposes of the two applications that are the subject of this ruling, the Court need not examine closely the merits of the petitioner's case. Hence, in Nairobi High Court Petition No. 16 of 2011: Centre for Rights Education & Awareness (CREAW) & 7 Others v Attorney General, the view was expressed that:

“ At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.”

31. And, in *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others* [2014] eKLR the Supreme Court offered the following viewpoint (at paragraph [86]):

“(86) Conservatory orders bear a more decided public-law connotation; for these are orders to facilitate ordered functioning within the 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 order of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant cases.

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

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

(88) These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of *the Constitution* of Kenya, 2010, a third condition may be added, namely:

- (iii) that it is in the public interest that the order of stay be granted.

(89) This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through *the Constitution*.”

32. Further to the foregoing, it is important to stress that conservatory orders are geared more towards the protection of the subject matter of the dispute as opposed to individual interests. Hence, in *Judicial Service Commission v Speaker of the National Assembly & another* [2013] eKLR, it was held: -

“...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...”

33. Accordingly, it is now settled that an applicant for conservatory orders pursuant to Article 22 and 23(3) (c) of *the Constitution* must satisfy the Court as to the following three considerations:

- (a) That he/she has a prima facie case with a high likelihood of success;
- (b) That the Petition will be rendered nugatory;
- (c) That public interest weighs in his/her favour.



34. It is also pertinent to bear in mind that a prima facie case is not necessarily one that must succeed. In *Kevin K Mwiti & others v Kenya School of Law & others (supra)*, Hon. Odunga, J. (as he then was) held:

“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.

35. With the foregoing in mind I have given consideration to the petitioner’s applications. In respect of the 1<sup>st</sup> application the petitioner presented a three-pronged approach touching on the arbitrary closure of the church; the suspension of the frequency for his Evangelism TV and the apprehension that his bank accounts would be frozen. Since the filing of the 1<sup>st</sup> application, the 1<sup>st</sup> 2<sup>nd</sup> and 7<sup>th</sup> respondents have made depositions denying that the petitioner’s church was ever closed. For instance, at paragraphs 10 of his Replying Affidavit sworn on 8<sup>th</sup> May 2023, IP Sombo averred:

“That the applicant and the newlife prayer centre and church have not been denied the right to worship or undertake church activities and the presence of security personnel should not be construed to be a denial of the applicant’s right.

That I am aware that on 7/5/2023 members of the newlife prayer centre and church congregated at the church premises and did worship despite members of the security around the premises.”

36. Thus, upon counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents confirming this position to the Court on 9<sup>th</sup> May 2023, prayer (c) of the 1<sup>st</sup> application was granted purely for the avoidance of doubt. In the same vein, prayer (g) of the Notice of Motion dated 3<sup>rd</sup> May 2023 requires no further deliberation since it is unopposed. The same is accordingly granted without further ado.

37. With regard to the petitioner’s apprehension that his bank accounts would be frozen, the parties are also in agreement that this has come to pass in that the 7<sup>th</sup> respondent obtained orders from Milimani Chief Magistrate’s Court on 8<sup>th</sup> May 2023 as per Annexure “LSS” to the Replying Affidavit of IP Sombo sworn on 8<sup>th</sup> May 2023. Accordingly, prayer (f) of the 1<sup>st</sup> application has been overtaken by events and is therefore untenable. This must be why the petitioner found it necessary to file the 2<sup>nd</sup> application in the first place. Indeed, it is trite that a temporary restraint order is only efficacious before and not after the event; the general policy of the law being that courts should not act in futility. (See *Jaribu Holdings Ltd v Kenya Commercial Bank Ltd* [2008] eKLR)

38. As regards the letter dated 27<sup>th</sup> April 2023 by which the licence for World Evangelism TV was allegedly cancelled, the petitioner seeks an order that:

“In the interim and pending the hearing and determination of the Petition, the Court be pleased to issue a conservatory order temporarily staying the 4<sup>th</sup> respondent’s communication to the petitioner dated 27<sup>th</sup> April 2023 suspending the operation of



the television frequency operated by the petitioner under the name World Evangelism Television.”

39. The letter was annexed to the petitioner’s Supporting Affidavit at page 79 of the 1<sup>st</sup> application. It lists about 12 violations as the grounds for the decision and then states:

“...In view of the above noted violations, the Authority hereby directs New Life Ministry (World Evangelism TV) to CEASE any broadcasting with immediate effect as per Licence Condition 6.4 for a period of 45 days effective from the date of this letter to facilitate regulatory tests on the broadcast system and ongoing investigation.

The Authority notifies you as per Licence Condition 29 of the TV broadcasting licence that the TV broadcast licence No. BL/CA/FTATV/2020/52 that was issued to New Life Ministry (World Evangelism TV) shall be Suspended within 45 days from the date of this letter if the above listed violations are not made good. You are meanwhile required to show cause why the Station’s licence should not be cancelled...”

40. From the above excerpt of the impugned letter, two things are apparent. Firstly, that the suspension of the petitioner’s TV licence is yet to occur. Secondly, it is plain that the petitioner was thereby invited by the 4<sup>th</sup> respondent to show cause before a decision is taken on suspension or eventual cancellation. It would have been more appropriate for the petitioner to respond to the letter and show cause as invited. This is because, The Kenya Information and Communication Act, No. 2 of 1998 gives the CAK the power to supervise licenses and take appropriate action as the circumstances of each licence may require. In particular, Section 83A provides that:

- (1) Where, on its own motion or consequent upon a complaint made by any person, the Commission
  - (a) is satisfied that a licensee is contravening or has contravened the Act, or any other written law or any of the conditions of that licence:
  - (b) notifies the licensee in writing, specifying the acts or omissions which, in its opinion constitute or would constitute contravention of the Act or the licence:
  - (c) requires the licensee to remedy the contravention within such period as the Commission may specify in the notice, then if the licensee fails to remedy the contravention within the prescribed period without reasonable cause, such a licensee shall be liable to a penalty of five hundred thousand shillings up to a maximum of zero decimal two per centum of the annual gross turnover of the offending licensee in the preceding year for every year or part thereof in which the offence is continuing and such penalty shall be debt owed to the Commission and recoverable summarily.
- (2) Notwithstanding the provisions of subsection (1), any licensee aggrieved by a decision of the Commission under this section may appeal to the tribunal within fifteen days of receipt of the notification thereof by the Commission.

41. Thus, there is an elaborate procedure set out at Sections 102A to 102G of The [Kenya Information and Communications Act](#) providing a mechanism for redress for the sort of situation the petitioner found himself in following the letter dated 27<sup>th</sup> April 2023; and this is by way of appeal to the Communications and Multimedia Appeals Tribunal. In particular, Section 102G of the [Kenya Information and Communications Act](#) is explicit that:



- (1) Any person aggrieved by a decision or order of the Tribunal may, within thirty days of such decision or order, appeal against such decision or order to the High Court.
  - (2) No decision or order of the Tribunal shall be enforced until the time for lodging an appeal has expired or, where the appeal has been commenced until the appeal has been determined.
  - (3) The decision of the High Court on any appeal under this section shall be final.
42. There is no indication that the petition paid attention to these provisions, yet authorities abound for the principle that where, as in this case, there is an alternative dispute resolution mechanism provided for in law, that mechanism must be exhausted before an approach is made to the High Court. It is apparent then that the application was prematurely filed, taking into account the doctrine of exhaustion. Thus, in *Speaker of National Assembly v James Njenga Karume* [1992] eKLR for instance, the Court of Appeal held that:
- “...where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed...”
43. Moreover, Section 9 of the *Fair Administrative Action Act* provides that:
- “(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.
  - (2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
  - (3) The High Court or a subordinate court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that the applicant shall first exhaust such remedy before instituting proceedings under subsection (1).”
44. It is manifest therefore that the petitioner’s prayer in connection with the letter dated 27<sup>th</sup> April 2023 is premature and therefore untenable. Accordingly, other than prayer [g] I am not convinced that the petitioner has shown a prima facie case to warrant the issuance of the orders sought in the 1<sup>st</sup> application. Therefore, except to the extent aforementioned at paragraph 19 herein above, the rest of the petitioner’s prayers in the application dated 3<sup>rd</sup> May 2023 lack merit and are hereby dismissed.
45. In his 2<sup>nd</sup> application, the petitioner is essentially out to challenge the orders issued by the Chief Magistrate’s Court on 8<sup>th</sup> May 2023 in Milimani Chief Magistrate’s Miscellaneous Criminal Application No. E1348 of 2023, one of which had the effect of freezing bank and M-Pesa accounts belonging to petitioner, Kilifi International School and New Life Prayer Centre & Church. In that regard, the petitioner seeks orders as follows:
- (a) That in the interim and pending the hearing and determination of the application, the Court be pleased to issue a conservatory order suspending and staying the implementation of all the consequential orders and proceedings in Milimani Chief Magistrate’s Miscellaneous Criminal Application No. E1348 of 2023 to the extent that the same seek to freeze all the bank accounts



belonging to the petitioner, New Life Prayer Centre and Church and Kilifi International School (spent);

- (b) That in the interim and pending the hearing and determination of the application, the Court be pleased to issue a conservatory order temporarily restraining the respondents from implementing the orders issued in Milimani Chief Magistrate's Miscellaneous Criminal Application No. E1348 of 2023 (spent);
  - (c) That in the interim and pending the hearing and determination of the application, the Court be pleased to call before it the file and proceedings in Milimani Chief Magistrate's Miscellaneous Criminal Application No. E1348 of 2023;
  - (d) That in the interim and pending the hearing and determination of the Petition, the Court be pleased to issue an order of certiorari calling to this Court for purposes of quashing the orders dated 8<sup>th</sup> May 2023 and all the proceedings and consequential orders/directions issued in Milimani Chief Magistrate's Miscellaneous Criminal Application No. E1348 of 2023;
46. It is manifest therefore that prayers [a], [b], [c], and [d] of the 2<sup>nd</sup> application have been overtaken by events to the extent that they were intended to subsist in the interim, pending the hearing of the said application. Thus, the only valid prayer outstanding is prayer [e]; in which the petitioner seeks an order of certiorari to quash the orders of 8<sup>th</sup> May 2023. Counsel for the petitioner are only too aware that such an order, being a substantive dispositive order, can only issue after a full consideration of the merits or otherwise of each party's case.
47. The Court of Appeal pronounced itself on this in Civil Appeal Nos. 3 and 11 of 2016 Olive Mwhiki Mugenda & another v Okiya Omtata Okoiti & 4 others [2016] eKLR, and held: -

“...Analysis of the persuasive decisions from India shows that if a trial court is inclined to grant final orders at the interlocutory stage, this can only be done in exceptional circumstances and the reasons for granting such final orders must be stated. In the Indian case of *Deoraj - v- State of Maharashtra & others*, Civil Appeal No. 2084 of 2004, it was held that balance of convenience and irreparable injury need to be demonstrated before interlocutory final orders can be granted. In the Indian case, it was stated that a court could grant such final interlocutory orders if failure to do so would prick the conscience of the court resulting in injustice being perpetrated throughout the hearing and at the end, the court would not be able to vindicate the cause of justice. In the case of *Ashok Kumar Bajpai - v- Dr. (Smt) Ranjama Baipai*, AIR 2004, All 107, 2004 (1) AWC 88, at paragraph 17 of the decision the Indian Court expressed as follows:

“...It is evident that the Court should not grant interim relief which amounts to final relief and in exceptional circumstances where the Court is satisfied that ultimately the petitioner is bound to succeed and fact-situation warrants granting such a relief, the Court may grant the relief but it must record reasons for passing such an order and make it clear as what are the special circumstances for which such a relief is being granted to a party.”

48. But even assuming that such an order would, in the circumstances of this Petition, be met, it is not lost on the Court that the petitioner is thereby invoking the supervisory jurisdiction of revision under Article 165(6) and (7) of *the Constitution* and Section 362 of the Criminal Procedure Code, which entails disparate and distinct procedures. One of the applicable rules for consideration would be the



High Court (Organization and Administration) (General) Rules, which provides, in Rule 20 thereof that:

- (1) Subject to the Practice Directions issued by the Chief Justice, the filing of appeals, bail applications and references from subordinate courts, tribunals and other bodies or authorities within regions designated under the Schedule shall be made to the respective High Court Station Registry with corresponding supervisory jurisdiction according to the established judicial administrative regions set out in the Schedule.
- (2) Despite paragraph (1), the supervisory jurisdiction of the Court over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function as contemplated under Article 165(6) of *the Constitution* is not limited, and in particular the Court may—
  - (a) call for the record of any proceeding before any subordinate court, body or authority exercising a judicial or quasi-judicial function; and
  - (b) make an order or give any direction it considers appropriate to ensure the fair administration of justice.

49 Accordingly, under Schedule to the Rules, the High Court Station with supervisory jurisdiction over Milimani Chief Magistrate’s Court is the High Court at Milimani, Nairobi. It is therefore anomalous for the petitioner to seek to invoke the supervisory jurisdiction of the Court in the manner proposed in the 2<sup>nd</sup> application. Additionally, whereas by dint of Rule 20(2) of the High Court (Organization and Administration) (General) Rules the exercise of the Court’s supervisory jurisdiction is not limited, good cause would have to be shown for any departure from the requirements of Sub-rule (1). No such cause has been shown in this matter; and certainly it was not contemplated that such proceedings be called for by way of a Notice of Motion in a constitutional petition as the petitioner has attempted to do herein. I therefore take the view that the 2<sup>nd</sup> application is entirely misconceived and therefore untenable.

50. Hence, having taken the view that, for purposes of Section 362 of the Criminal Procedure Code, the impugned order ought to have been challenged way of revision before the High Court at Nairobi, I must refrain from commenting on the correctness, legality or propriety of the order dated 8<sup>th</sup> May 2023 issued in Milimani Chief Magistrate’s Miscellaneous Criminal Application No. E1348 of 2023. Of course, other avenues open to the petitioner in connection with the said order are review before the same court or appeal, as correctly pointed out by counsel for the respondents.

51. In the light of the foregoing, the orders that commend themselves to me and which I hereby grant are:

- (a) That, other than prayer [g] the rest of the petitioner’s prayers in the Notice of Motion dated 3<sup>rd</sup> May 2023 fail and are hereby dismissed with no order as to costs;
- (b) The 2<sup>nd</sup> application dated 8<sup>th</sup> May 2023, being misconceived, is hereby struck out with no order as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MOMBASA THIS 15<sup>TH</sup> MAY 2023**

**OLGA SEWE**

**JUDGE**

