



Gikonyo v Chief Magistrate’s Court at Milimani & 8 others (Petition E009 of 2023) [2023] KEHC 20735 (KLR) (24 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20735 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
PETITION E009 OF 2023**

HM NYAGA, J

JULY 24, 2023

**IN THE MATTER OF ARTICLES 22, 23(3), 24, 47, 50 AND
165 (3) (A) AND (6) OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

AND

**IN THE MATTER OF THE ARRAIGNMENT, CHARGE AND PROSECUTION OF THE
PETITIONER, VIDE MILIMANI CRIMINAL CASE NO. E4026 OF 2020, MCCR E948/2021,
MCCR E067 OF 2023 ON THE 3 RD , 4 TH & 5 TH RESPONDENTS COMPLAINANTS**

BETWEEN

PETER GATHUNGU GIKONYO PETITIONER

AND

CHIEF MAGISTRATE’S COURT AT MILIMANI 1ST RESPONDENT

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND
RESPONDENT**

CHARLES KIBANDI KAGUOYA 3RD RESPONDENT

JOE WANYOIKE GICHUHI 4TH RESPONDENT

FRANCIS KIBATTA KAIRU 5TH RESPONDENT

KAGGS INVESTMENT LIMITED 6TH RESPONDENT

KETHIAN INVESTMENT LIMITED 7TH RESPONDENT

CIRKON TRUST COMPANY LIMITED 8TH RESPONDENT

HYPER TRADING LIMITED 9TH RESPONDENT



RULING

1. The petitioner herein filed a petition dated May 3, 2023, seeking several reliefs.

These are;

- i. A declaration be, and is hereby, issued that the arraignment, charge and prosecution of the Petitioner is tainted with ulterior motives, bad faith and against the public interest.
- ii. A declaration be, and is hereby, issued that the arraignment, charge and prosecution of the Petitioner is an abuse of prosecutorial discretion and the court process i.e. the criminal justice process.
- ii. A declaration be, and is hereby, issued that the 3rd, 4th and 5th Respondent's criminal complaints were made with ulterior motives and bad faith.
- ii. An order of *certiorari* Be, And Is Hereby, Issued Calling Into This Honourable Court, The Entire Proceedings In Milimani Chief Magistrates Court Criminal Case Number Milimani Criminal Case Cr E4026 Of 2020, MCCR/ e948/202, MCCR E067 Of 2023, Republic Vs Peter Gathungu Gikonyo For Purpose Of Their Being Quashed; And By The Same Order The Proceedings Be Subsequently Quashed.
- v. A Declaration that a "Decision to Charge/Prosecute or not to Charge/ Prosecute within the meaning of sections 5 (4) (e) and 23(1) (a) of the [Office of the Director of Public Prosecutions Act, 2013](#) amounts to an administrative action within the meaning of section 2 of the [Fair Administrative Action Act](#).
- vi. A Declaration that the 2nd Respondent's action of charging/prosecuting the Petitioner without taking into account the matters raised by the Petitioner, as expressly pleaded at paragraph 54 (above), the 2nd Respondent failed to take into account relevant considerations and thus subjected the Petitioner to an unfair administrative action, and thus violated Article 47 of the [Constitution](#) and the [Fair Administrative Action Act](#).
- vii. A Declaration be, and is hereby, issued that the 3rd, 4th and 5th Respondent's act of using the Petitioner's photograph and personal details obtained in a confidential agreement is contra Articles 28 and 31 of the [Constitution](#) and infringes on the Petitioner's right to dignity and privacy.

A Permanent Injunction be, and is hereby issued prohibiting the 3rd Respondent from publishing the face and details of the Petitioner in any Local Daily And Or Newspaper Of National Circulation henceforth.
- ix. An Order Of Mandamus be, and is hereby issued, directing the 3rd Respondent to publish an advertisement 12 times in Newspaper of National Circulation withdrawing due false publications against the Petitioner, and apologising thereto.



- x. Damages be awarded to the Petitioner for subjecting the Petitioner to an unfair administrative action.
 - xi. Damages Be Awarded to the Petitioner as against the 3rd, 4th and 5th Respondents for violating the Petitioner's right to privacy and dignity as enshrined in article 28 and 31 of the Constitution.
 - xii. Costs of, and incidental to, these proceedings be borne by the 3rd, 4th and 5th Respondents.
 - xii. Any other relief that this Honourable Court may deem fit and just to grant in the interests of justice and/or that may become apparent and necessary in the course of these proceedings.
2. The petitioner alleged that his fundamental constitutional rights and freedoms were violated and continue to be violated. In a nutshell, the Petitioner averred that he is a businessman, running a real estate firm in Nakuru and Nairobi Counties. That in the course of his business he acted as an agent for the 3rd 4th and 5th respondents for their rental properties. That his mandate as an agent included sourcing for tenants, collecting rent, then remit the collections after deducting his expenses as agreed.
 3. The petitioner further averred that after 15 years of doing business, the 3rd respondent embarked on a pre-planned process to terminate the relationship and commenced a malicious and vengeful campaign to destroy the petitioner through 12 newspaper advertisements, using a manufactured property agreement, which then caused the 4th and 5th respondents to terminate the agency agreements they had with the petitioner. That the 3rd respondent, who had acted as his advocate in numerous transactions, used confidential documents to obtain among others, the petitioner's passport photograph, which he used to tarnish the name of the petitioner, in an effort to destroy his business.
 4. The petitioner also alleged that the 3rd respondent caused a charge sheet dated June 29, 2020 to be drawn against him, on charges of stealing a sum of Kshs 8,684,000/-. That the particulars of the charges were similar to the contents of the purported property management agreement even before its further purported termination on September 1, 2020. That the purported agreement contained a clause that stated that any dispute arising would be referred to arbitration, which the 3rd respondent conveniently refused to abide by.
 5. The petitioner further claimed that the 3rd respondent commenced Civil Suit No E4692 of 2020 against him for the same amount claimed in the charge sheet, and had obtained ex parte judgment through lies and falsehoods that he had served the summons and pleadings on him. That the petitioner successfully moved the court to set aside the ex-parte judgment.
 6. The petitioner claims that despite having the said civil suit in court the 3rd respondent is using the criminal law process, through criminal case No E4026 of 2020, to destroy his business.
 7. The petitioner further states that to demonstrate the vendetta by the 3rd respondent, his advocate acting for him in the Civil suit wrote a letter dated 17th October 2022 to the Firearms Licensing Board asking it to consider withdrawing his firearm license since he had been placed on his defence in one of the cases.
 8. The petitioner further averred that in Criminal case No E067 of 2023, he was charged even without being given an opportunity to say his part. That the police just went to his house brandishing guns before his children and spouse.



9. The petitioner further averred that he was also charged in Criminal Case No E498 of 2021 with similar charges of stealing by servant, which arose after the 3rd respondent had maliciously published his name in the daily newspapers.
10. That in all the three criminal cases the investigating officer, one PC Paul is the golden thread that runs and ties, with the 3rd respondent appearing as a prosecution witness in all the cases.
11. The petitioner complained that his fundamental rights have been infringed by the existence of the three criminal cases and as a resident of Nakuru County, he has suffered untold suffering and great inconvenience as he has had to commute between Nakuru and Nairobi to attend them.
12. Accompanying the petition was an application of even date, filed under certificate of urgency, which sought interim relief pending determination of the said petition. After perusal of the petition, the application, affidavits, statements and other documents filed, I was satisfied that the petition raised substantial issues and I granted temporary orders pending inter parte hearing of the application.
13. Before the matter could proceed to inter parte hearing of the petitioner's application, on May 15, 2023, the 3rd, 6th and 7th Respondents filed an Application dated May 16, 2023 anchored under Sections 1A,1B, & 3A of the Civil Procedure Act, Rules 8(1),19 and 25 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, Order 40 Rule 7 & Order 51 Rule 1 of the Civil Procedure Rules. The said application sought for a discharge of the orders made by this Court on May 4, 2023 and for the matter to be placed before the Principal Judge in Nairobi for re-allocation and further directions.
14. The said application was struck out on a preliminary point of law in my ruling delivered on May 26, 2023. I stated that the applicants therein were at liberty to file a proper application.
15. As I had pointed out in my ruling dated May 26, 2023, prior to the filing of the said application, there were some 'undercurrents' triggered by some of the parties in regard to this matter. I was made aware that the one advocate had written to the Honourable The Chief Justice, complaining that the petitioner, in filing the petition and application at Nakuru, had embarked on forum shopping. The said advocate asked the Honourable The Chief Justice to take action, presumably against me. It is noted that to date, that particular advocate has not filed any response to the Petition or the Petitioner's application. However, that party(ies), represented by Mr Kiunga Advocate, supported the application that was struck out. The said advocate is on record as having no issue with its determination by the court.
16. After the said ruling, the 3rd 6th and and 7th respondents filed another application dated May 26, 2023, which sought similar orders as the earlier application. Again, Mr Kiunga who appeared for the 4th,5th, 8th and 9th respondents, appeared and supported the said application. He did not have any objection to this court handling the said application. It is that application that is the subject of this ruling.
17. The application dated May 26, 2023 seeks the following orders;
 1. That this application be certified urgent and heard ex-parte in the first instance.
 2. This honourable court be pleased to discharge its order given on 4th May, 2023.
 3. This honourable court be please to direct that this matter be placed before the Principal Judge in Nairobi for re-allocation and further directions.
 4. Costs of this application be borne by the Petitioner.



18. The application is based on the grounds set out on the face of it and is supported by the affidavit of Charles Kibandi Kaguoya, the 3rd respondent herein. In a nutshell, the applicants state that they are dissatisfied with the conservatory orders issued by the court herein.
19. The applicants further aver that the orders were obtained by the petitioner through presentation of misleading allegations. That the petitioner's known residence is in Nairobi. That the suit properties which are the subject of this petition are all in Nairobi so the cause of action arose in Nairobi, not in Nakuru. They also argue in filing the petition in Nakuru, and in the absence of any probable explanation, the said petition can only be deemed mischievous and calculated at achieving an ulterior motive. It is further averred that for this reason, the petition ought to be transferred to Nairobi.
20. The applicants also argue that the petitioner failed to disclose that in Criminal case No E4026 of 2020, the trial court had already placed him on his defence and had already testified. They annexed copies of the proceedings in the said case as evidence. They see this petition as an attempt to scuttle the hearing of that case. They point out that the petitioner has never raised any objection to that case until now, when it is about to be concluded. They view this petition as an attempt to stop a legitimate, lawful and regular prosecution of the petitioner/respondent at Milimani Law Courts, Nairobi.
21. The applicants argue that in filing the petition in Nakuru, the petition offends the well laid down rules and procedures and is thus illegal. That the High Court in Nairobi, where the cause or causes of action arose, is well equipped to deal with the matters raised by the petitioner. That in any case the petitioner has an opportunity to raise any complaints in the trial itself.
22. The applicants further argue that the petitioner will not suffer any prejudice if the orders are granted and that is only fair that the petition be transferred to Nairobi as prayed.
23. In response to the application, the Petitioner/Respondent filed a replying affidavit and raised yet another preliminary objection dated June 7, 2023. After looking at the said objection, I directed that it be argued alongside the application, as I did not see any preliminary point of law that needed to canvassed.
24. The Petitioner/Respondent state that the averments in the application are false and aimed at inflaming the emotions of this court. The Respondent further states that he currently resides in Nakuru and not Nairobi as alleged.
25. The Respondent further avers that he already established a prima facie case with high chances of success by clearly establishing the malicious intents of the Respondents.
26. The Respondent avers that this court has the jurisdiction to supervise any subordinate court in Kenya. That since this court is already seized of the matter, then it is more expeditious if it heard and concluded the matter.
27. The Respondent acknowledges that he has filed High Court Civil Suit No E137 of 2021 which seeks damages for defamation and that the same is not related to this position.
28. The Respondent states that he has made full disclosure and that the alleged non-disclosure does not prevent the Respondent from responding to the Petition.
29. The Respondent argues that contrary to the averments by the Applicants, it is him who stands to be prejudiced if the orders in force are vacated.
30. The parties filed their respective submissions which I have considered. I will incorporate them in the latter section of the ruling.



31. Having looked at all the materials before me, I am of the view that the following are the issues for determination?
- a. Whether the orders in force were obtained through non-disclosure of material facts.
 - b. Whether the petition ought to be transferred as prayed.
24. The gist of the application is that in coming to Nakuru High Court, the Petitioner/Respondent offended the so called “Mutunga Rules” of filing Constitutional Petitions. The Applicants cited Rules 8(1) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*. The Rules state as follows:-
- “Place of filing.
- 8.
- (1) Every case shall be instituted in the High Court within whose jurisdiction the alleged violation took place.
 - (2) Despite sub rule (1), the High Court may order that a petition be transferred to another court of competent jurisdiction either on its own motion or on the application of a party.”
24. The Applicants’ Submissions are that the causes of action for all intents and purposes arose in Nairobi and not Nakuru. That the Petitioner’s Management office is situated in Nanak House, Nairobi and not Nakuru. They aver that there is no justifiable reason for filing the Petition in Nakuru, when there is a court of competent jurisdiction in Nairobi.
25. The Respondent reiterated that he currently resides in Nakuru County. He also reiterated the provisions of the above mentioned Rules. They argued that the present application ought to be struck out and the Petition be allowed to proceed.

Analysis and Determination

24. In my Ruling delivered on May 26, 2023, I struck out the Application dated May 16, 2023 because the advocate who commissioned the Affidavit was working in the same office as the deponent of the said Affidavit. I then gave the Applicants leave to file a proper Application.
25. I am of the view that since I did not consider the merits of the said Application, then the present Application cannot be deemed to be an abuse of the court process. The court had invoked a technical issue that was found to be so fundamental, without dealing with the merits of the Application.
26. For these reasons, I am unable to find that the present Application, on the face of it, is an abuse of the court process.
27. I will now move to the next issue, which is to determine whether the filing of the Petition in this court was an abuse of the court process on the part of the Petitioner.
28. It is noted that whilst the Petition and Application were served on all the Respondents, only the 3rd, 6th and 7th Respondents filed a form of response. The others who appeared relied on the Application filed by the former.



29. The arguments by the Applicants is that the filing of the Petition in this court was tinged with ulterior objectives. The Applicants have actually fallen short of making the same averments were done by Mr Kiunga in his letter to the Hon. The Chief Justice.
30. With the above in mind, I have to determine if the filing of the Petition in this court was an abuse of the court process.
31. The Jurisdiction of this court is established under Article 165 of the Constitution which provides as follows;-

“High Court

- (1) There is established the High Court, which—
- (2)
- (3) Subject to clause (5), the High Court shall have—
 - (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
 - (e) any other jurisdiction, original or appellate, conferred on it by legislation.
- (5) The High Court shall not have jurisdiction in respect of matters—
 - (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or



- (b) falling within the jurisdiction of the courts contemplated in Article 162
- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”
32. The only limit to this court’s jurisdiction as set out under Article 165(5) above. It is important to note that there is no geographical jurisdiction limit on the High Court, as may apply to say, a magistrate’s court. That is to say that the High Court, sitting anywhere in the Republic of Kenya, has jurisdiction all over the Republic. There have been a number of decided cases that have described the jurisdiction of the High Court. For instance, in *Humphrey Goren and 19 Others vs Nathan Ondego and Others* (2020) eKLR Justice W. Musyoka stated that “the High Court remains the High Court whenever it is sitting.”
33. Further in *Kenya National Chamber of Commerce and Industry vs Music Copyright Society and 3 Others* [2019] eKLR, Justice G.V. Odunga (as he then was) held as follows:-
- “On the issue whether the court’s jurisdiction Article 165 can be limited and/or restricted by an Act of Parliament. It is important to note that under Article 165(2) as read with Article 162(2) and 165(5) of the *Constitution*, the High Court has unlimited jurisdiction in criminal and civil matters save for matters reserved for the exclusive jurisdiction of the Supreme Court and matters relating to employment and labour relations and the environment and the use and occupation of the title to land.”
34. It is only that clear that the only limit to this court, sitting anywhere is as set out in the *Constitution* itself. Thus no Act or Rule, can purport to oust the jurisdiction of the court in matters it is empowered to hear and determine.
35. If I noted the Applicant’s arguments well, they have not really argued that this court does not possess the requisite jurisdiction. Flowing from the cited cases, that argument would not see the light of day.
36. What I want to believe is that the Applicants are saying is in as much as this court may possess jurisdiction, the High Court at Nairobi which directly supervises the Chief Magistrates Court at Milimani, Nairobi ought to have been the one to handle the matter.
37. Now, a distinction must be drawn between administrative jurisdictional functions and the overall jurisdiction of the High Court. In the latter, the court is invoking its powers under the *Constitution* and in so doing, it is not subject to any limitations other those set out in the *Constitution*.
38. Counsel for the Applicants refer to Rule 8(1) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*. As I stated earlier, they did not state that this court does not possess the jurisdiction to entertain the Petition. Rather, they say that the High Court at Nairobi ought to hear the same, hence they seek a transfer of this Petition there. The Petitioner has been accused of avoiding the High Court in Nairobi and filing the Petition in Nakuru.
39. The Petitioner/Respondent’s view is that this court ought to proceed to hear and determine the Petition. The Petitioner gave his reasons, including that he is a resident of both Nakuru and Nairobi



counties and that he could have filed his petition in any of the courts in the two counties. To him his choice of the court should not be cast in bad light, if the nearest court that he had access to was this one in Nakuru. Whether that is the position or not remains a disputed point.

40. To me, in view of the question of jurisdiction that I have addressed, the Petitioner could have opted to file his Petition anywhere in the Republic of Kenya, provided that there is a High Court which he had access to. Whether he resides in Nakuru or not is a matter of fact that is yet to be determined and even if determined is really immaterial. Rule 8(1) of the said Rules cannot oust the jurisdiction of the High Court, whenever it is sitting to hear a Petition of this nature. However, the court may order a transfer of such a Petition as has been sought by the Applicant under Rule 8(2).
41. I think that this finding answers the questions raised by Mr Kiunga and his clients outside these proceedings. I think that part of the reason that those arguments never found their way to the court proceedings was due to the realization that they could not hold any water.
42. I have perused all the documents filed herein. I have noted that the main protagonists herein were close business associates who have now turned to be sworn enemies, so to speak. That explains why emotions appear to have clouded some of them, to the extent that they forget to even file responses to the Petition.
43. My advice to Mr Kiunga is that before he pens a letter in the nature of what he wrote, he also takes a keen look at the law. Cases are decided in court, not in the channels he is pursuing. Be as it may, he had the right, if he so felt, to address his perceived grievances. I will not belabor this point further.
44. So what is the court to do, in light of the material laid before me? In my opinion, the most favourable avenue is to transfer the Petition to Nairobi.
45. The Applicants asked that it be placed before the Principal Judge, High Court for directions. I think that this is unnecessary. as we all know that there is a Constitutional and Judicial Review Division of the High Court at Nairobi. The said Division has a Presiding Judge, who has powers to assign the matter to any judge in that Division.
46. I therefore direct that this file be transferred to the Constitution and Judicial Review Division, High Court Nairobi. The Deputy Registrar, Nakuru High Court, shall facilitate the transfer of the file, to be placed before the Deputy Registrar, Constitutional and Judicial Review, to give a mention date before the Presiding Judge, after the Court's vacation.
47. The last issue that I have to determine is whether I should discharge the conservatory orders that were granted. The applicant urged the court to do so, citing non disclosure of material facts by the petitioner/respondent. I was referred to the decision in Kenya Electricity Transmission Company Ltd vs Kibotu Limited (2019) eKLR where it was held that;

“The fundamental principles of non-disclosure of material facts that an applicant must adhere to are as follows: -

- a) The applicant is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge.
- b) The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries.
- c) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the



application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries.

- d) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the Judge in the application.
- e) The question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
- f) Finally, it is not every omission that the injunction will be automatically discharged”.

48. The respondent submitted that there was no proof that the orders were obtained without making full disclosure and that indeed, he had done so. He referred me to the case of *Okinya Omtatab Okoiti vs Joseph Kinyua and 2 others* (2018) eKLR where it was held as follows;

“There seems to be no dispute from the two sides that the test for the recalling an ex parte order is whether or not the order was obtained without the ex parte applicant making a full disclosure of material facts or through misrepresentation of material facts. The applicants herein have relied on several judicial precedents from the English as well as Kenya Courts to support the said threshold for recalling of ex parte orders. In *The King v The General Commissioners for the Purposes of the Income Tax Act for the District of Kensington [1917] 1 K.B. 486* the Court laid down the legal principle that ex parte applicant must make a full and fair disclosure of all material facts. Warrington LJ had the following to say at page 509:

“It is perfectly well settled that a person who makes an ex parte application to the Court that is to say, in the absence of the person who will be affected by that which the Court is asked to do is under an obligation to the Court to make the fullest disclosure possible of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the said proceedings, and he will be deprived of any advantage he may have already obtained by means of an order which has thus wrongly been obtained.”

Still in the same case, Scrutton L. J. held the following at page 514:

“...It has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to Court to obtain relief on an ex parte statement, he should make a full and fair disclosure of all the material facts, not the law. He must not misstate the law if he can help it – the Court is supposed to know the law. But it knows nothing about the facts and the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement.”



In *Sidhu & another v Memory Corporation PLC* No CHANI 1999/0636/A3 the Court of Appeal in England had the following to say about material non-disclosure and misrepresentation of facts at the ex parte stage:

“In the context of what should be disclosed to the Court on a without notice application, the distinction between facts and law is not clear-cut. Many of the authorities already cited refer almost interchangeably to non-disclosure of ‘material facts’ or ‘relevant matters.’ Little weight can be attached to these slight variations in language. But some statements of principle of full disclosure extend to what the Court was told about matters of law.”

In *D. Bank Mellat –V- Nikpour* [1985] FSR 87, 92, Donalson J stated the sanction for material non-disclosure even more candidly at page 90:

“The principle that no injunction obtained ex parte shall stand if it has been obtained in circumstances which there was a breach of the duty to make the fullest and frankest disclosure is of great antiquity. Indeed it is so well enshrined in the law that it is difficult to find authority for the proposition; we all know, it is trite law.”

In *Uhuru Highway development Limited –V- Central Bank of Kenya & others* [1995] eKLR the Court of Appeal of Kenya held that the foregoing principles of full disclosure of all material facts in ex parte applications apply in Kenya in the same way as in England. The Court therefore proceeded to adopt the principles set out in *R –V-Kensington Income Tax Commissioner and Brink’s MAT Ltd Vs Elcombe* in upholding the decision of the high Court whereby ex parte injunction was declined due to non- disclosure of material facts.”

49. The gist of the application in respect to the said orders is that they were obtained through non-disclosure of material facts. One such non-disclosure raised by the Applicants herein is that the Criminal Case No E462 of 2020 had progressed to the defence hearing stage.
50. I have looked at the Petitioner’s Petition. He actually disclosed the existence of the said cases. In fact, the existence of this particular case forms the foundation of his Petition, alongside the other 2 cases.
51. To me, it is immaterial as to what stage the trial has reached. If a party feels that his constitutional rights have been infringed, he/she can seek appropriate relief of a Constitutional Court at any stage of the trial. What matters, in my view, is whether the Petition meets the threshold of what would constitute a Constitutional Petition, as set out in the well known case of *Anarita Karimi Njeru vs Republic* (1979) KLR 154 if the answer is in the affirmative, then the Petitioner has a right to ventilate his Petition.
52. The Applicants argue that the Petitioner ought to raise his concerns in the trial court, which has already placed him on his defence. While that argument may stand, it does not prevent the petitioner from moving the Constitutional Court for appropriate relief if he feels that his rights are threatened. The application are, figuratively speaking, asking the petitioner to pick up the revolver and play Russian Roulette in the trial before the Subordinate Court, a position he has opted not to take. He was well within his rights to move to the Constitutional court and should not be blamed for doing so.
53. In granting the conservatory orders, I looked at the pleadings filed at the time. Due to the interjections and applications by the Respondents, it never reached a stage where I could give some of the reasons that led me to grant the said orders. I think that I can now, albeit briefly, do so.



54. The petitioner has averred that the Criminal Case preferred by the 3rd Respondent/Applicant herein is similar in all ways to Civil Suit No E4962 of 2020 in which the 3rd Respondent had obtained ex-parte judgment, which was subsequently set aside. The Petitioner alleges that the ex-parte judgment had been obtained through misrepresentation of facts, by falsely alleging that the Petitioner had been served with the summons and pleadings. The Petitioner seems to connect the said Criminal Case to vendetta by the 3rd Respondent.
55. I noted that the Plaint filed in Civil Suit was dated September 9, 2020, this is from my reading of the Affidavit of one James Muchiri Gachoki, a process server, sworn on August 28, 2021.
56. From the draft defence that was filed by the Petition in the Civil Suit, he had raised issues of use of forged documents to prevent the claim against him.
57. The Petitioner had also annexed the following documents;-
- a. Correspondence between him and C.K. Munga advocate touching on the management of some of the properties in question.
 - b. Advertisements taken out by some of the Respondents informing the General Public that the Petitioner was no longer their appointed agent.
 - c. Documents indicating that the firm of Munga Kibaya & Co. Advocates had acted for the Petitioner in several matters including a Divorce matter.
 - d. A purported agreement that provided that in the event of a dispute between the parties, the matter would be referred to arbitration.
 - e. Pleadings in Milimani CMCC No 4962 of 2020 between some of the Respondents herein (6th and 7th).
58. I also noted that the charge sheet against the Petitioner in Criminal Case No E4620 of 2020 was drawn on 10th November 2020, 2 months after the civil suit had been filed.

Under Section 193A of the *Criminal Procedure Code* it is provided as follows:-

“193A. Concurrent criminal and civil proceedings.

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

59. In as much as the said Section provides for the continuation of a criminal case in the set circumstances, the superior courts have repeatedly abhorred the use of criminal proceedings to settle a matter that is purely civil in nature. In *Republic vs Chief Magistrate's Court Mombasa Ex-parte Ganijee and Another*(2002) KLR 703 the High Court expressed itself as follows;-

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in



the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or *certiorari* will issue and go forth... When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to overawe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in..."

60. In *Rosemary Wanja Mwangi vs A. E. and 3 Others* [2013] eKLR the court held as follows:-

"It is, I believe, undisputed, as provided under Section 193 A of the Criminal Procedure Code, that the institution of civil proceedings does not preclude the State from undertaking criminal proceedings against a party with respect to an issue which is also directly in issue in a pending civil suit.

That notwithstanding, it is the duty of the Court to exercise its inherent jurisdiction so as to prevent its process being used to perpetrate injustice or otherwise as an abuse of its process. Since *Githunguri vs Republic* (supra), it has been established that the High Court is entitled to exercise its jurisdiction to avert abuse of power, discretion or process. Thus, an examination of the events unfolding prior to the institution of the five civil suits and the eventual institution of the criminal complaints by the 2nd and 3rd respondents causes serious unease about the institution of the criminal process. Given the timing of the criminal complaint and the institution of the criminal prosecutions immediately following upon the filing of five civil claims involving the same parties over the same subject matter, and an application for orders of contempt against the petitioners in the Winding Up Causes which they had lodged against the 2nd and 3rd respondents, it is difficult to reach a conclusion other than that the criminal case was calculated to harass, coerce, oppress or otherwise intimidate the petitioners".

61. Again in *Reuben Mwangi vs DPP and 2 Others* [2012] eKLR the court held that;

"It is, hence, a settled legal principle and position that whenever a Petitioner sufficiently demonstrates the stifling of or threats of infringement of rights, fundamental freedoms, the *Constitution* and/or the law by the investigative and prosecutorial agencies, a Court should not hesitate to intervene and stop such a prosecution. Such intervention by the Courts should, however, be in clearest of the cases."

62. I will also refer to the decision in *Kuria and 3 Others vs AE* (2002) 2KLR 69 where the Court held that:-

"The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation.



It is a duty of the court to ensure that its process does not degenerate into tools for personal score settling or vilification on issues not pertaining to that which the system was even formed to perform.....A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious... The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process).”

64. Lastly, I will refer to the decision in *Republic vs AE and 4 Others: Exparte Kenneth Kariuki Githii* [2014] eKLR where the court held that:-

“It is therefore clear that whereas the discretion given to the 3rd respondent to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt.”

65. All the above authorities point out to one thing, that this court has power to give appropriate remedies where it feels that there is an abuse of the criminal process.

66. All these were factors that I considered when I first issued the conservatory orders. The Petition and application were served on the Respondents but to date it is only the 3rd, 6th and 7th Respondents who have filed some form of a response.

67. It is noteworthy that the office of the Director of Public Prosecutions, who commenced the criminal cases, have not filed any response to counter the claims by the Petitioner. Whether this is an admission of the facts alleged by the Petitioner or not remains to be seen. It has been left to the 3rd, 6th and 7th respondents to fight the Petition.

68. In respect to the 3rd Respondent, the Petitioner has alleged malice and vendetta. The Petitioner has cited 12 advertisements paid by the Respondents, depicting him to be a criminal of some sort.

69. When I looked at the said advertisements I had the feeling that the issues between the Petitioner and his former clients had become very personal the question that arises is why the advertisements? The Petitioner was an agent for known tenants in known premises. A notice to those tenants would have been sufficient to information that the Petitioners services had been terminated. Instead fully paid adverts some even citing the criminal case in respect to the 3rd respondent were placed on several dates. If this is not a manifestation of malice and vendetta, then I don't know what else is.

70. The Applicants have asked me to discharge the orders in force. The Petitioner is opposed to the same.

71. In my view, a discharge of the orders would only suffice, if the court was to arrive at the conclusion they were obtained through misrepresentation of facts. So far, nothing stated by the Petition has been flagged out as a misrepresentation of facts. In fact, having looked at the application, the affidavits and the annexures, the more I feel that the Petitioner needs to have his day in court.



72. In my view discharging the orders will be more prejudicial to the Petitioner/Respondent than the Applicants. It is the Petitioner who stands the risk of conviction and probable loss of his liberty, if the criminal cases were to be allowed to proceed before the Petition is determined. The Applicants and other Respondents who are complainants in the other cases will only suffer the inconvenience of a delay in their cases. Balancing between the interests, I find that the Petitioner's rights ought to prevail.
73. Therefore, I direct that pending further directions of the High Court at the Constitutional and Judicial Review Division at Nairobi, the conservatory orders shall remain in force.
74. In the end, I make the following orders in respect to the Application dated May 28, 2023.
1. This petition is hereby transferred to the Constitutional and Judicial Review, Nairobi for determination.
 2. The conservatory orders issued on May 4, 2023 shall remain in force pending further directions of the said court at Nairobi.
 3. The Deputy Registrar, Nakuru High Court to forward this file to the Deputy Registrar Constitutional and Judicial Review Division, Milimani Law Courts, Nairobi, to give a mention date before the Presiding Judge for directions after the vacation.
 4. The Costs of this application shall abide by the outcome of the Petition or as directed by the court at Nairobi.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 24TH DAY OF JULY, 2023.

HESTON M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Mr Kiunga for 4th, 5th, 8th and 9th Respondents and

holding brief for Kimathi for 3rd, 6th and 7th Respondents

N/A for others

