



Cevan Interfreight Kenya Limited v Kenya Power & Lighting Company & 3 others; Amanzee Investments Kenya Limited (Interested Party) (Petition E037 of 2023) [2023] KEHC 21152 (KLR) (2 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21152 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E037 OF 2023
OA SEWE, J
AUGUST 2, 2023**

BETWEEN

CEVAN INTERFREIGHT KENYA LIMITED PETITIONER

AND

KENYA POWER & LIGHTING COMPANY 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

INSPECTOR GENERAL NATIONAL POLICE SERVICE 3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 4TH RESPONDENT

AND

AMANZEE INVESTMENTS KENYA LIMITED INTERESTED PARTY

RULING

1. Before the Court for determination is the Notice of Motion dated 11th July 2023. It was filed by the petitioner pursuant to Articles 10, 22, 23, 25, 27, 28, 29, 47, 48, 49(l) & (h), 50, 165(6) and 259 of *the Constitution* of Kenya, 2010, Section 123 of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya and all other enabling provisions of the law, for orders that:

- (a) Spent
- (b) Spent
- (c) Pending the hearing and determination of this Petition the Court be pleased to issue a conservatory order restraining the 1st respondent, their servants, agents, junior officers and/or anybody from interfering with the running of the day to day business/affairs of the petitioner.



- (d) Spent
 - (e) The Court be pleased to issue conservatory order restraining the 2nd, 3rd and 4th respondents, their servants, agents, junior officers and/or anybody else from effecting and/or arresting, charging, harassing or otherwise howsoever from interfering with the applicant without conducting investigations and according him an opportunity to be heard.
 - (f) Pending the hearing and determination of this application inter partes the applicant's directors be admitted to anticipatory bail or bond at such reasonable terms and conditions that the Court may deem just and fit in the circumstances.
 - (g) Pending the hearing and determination of this Petition, the Court be pleased to issue a conservatory order restraining the 2nd, 3rd and 4th respondents, their servants, agents, junior officers and/or anybody else from effecting and/or arresting, charging, harassing or otherwise howsoever from interfering with the applicant and its directors and employees.
 - (h) Pending the hearing and determination of this Petition, the Court be pleased to issue a conservatory order restraining the 2nd, 3rd and 4th respondents, their servants, agents, junior officers and /or anybody else from effecting and/or arresting, charging, harassing or otherwise howsoever interfering with the applicant and its employees and directors, without conducting investigations and according them an opportunity to be heard.
 - (i) Pending the hearing and determination of the Petition, the applicant's directors be admitted to anticipatory bail or bond at such reasonable terms and conditions that the Court may deem just and fit in the circumstances.
 - (j) Further and other orders be issued as the Court may, in its discretion, deem fair and just in the circumstances.
 - (k) Costs be in the cause.
2. The application was premised on the grounds set out on the face thereof and in the Supporting Affidavit sworn by Udit Vikram Rathore Singh as well as the Further Affidavit sworn by Lazarus Karangi on 13th July 2023. The facts deposed to in those affidavits are that the applicant is a limited liability company duly incorporated under the laws of Kenya. It carries out the business of customs clearance, freight management and logistics at its terminal yard in Mikindani, Mombasa; which yard was leased from the interested party, Amanzee Investments Kenya Ltd. Mr. Singh explained that the terminal yard is enclosed in a perimeter wall, and that adjacent to it is a wayleave granted to the 1st respondent; and therefore that the 1st respondent erected a pylon tower on the wayleave with two of the anchoring legs sitting in the applicant's yard and the other two on the wayleave.
3. Mr. Singh further deposed that, on the 2nd July 2023, the 1st respondent's pylon tower that is partly anchored on the applicant's terminal yard, fell and its legs hit the perimeter wall of the terminal yard, resulting in its collapse and damage to third party property including trucks parked in the terminal as well as an explosion of fire sparks that caused damaged to the electrical wires. Mr. Singh further complained that, after they reported the accident to the 1st defendant in writing and were waiting for appropriate response, the 1st respondent issued summons to the petitioner's directors on 6th July 2023, compelling them to appear before it on 7th July 2023.
4. He expressed concern that prior to the 1st respondent's summons, the 2nd respondent had summoned the petitioner's yard manager who was thereafter arrested. Thus, it was the averment of Mr. Singh that the 1st respondent is acting in bad faith; and that, as a result, the petitioner's directors are under



- imminent threat of arrest by the 2nd, 3rd and 4th respondents; and are therefore justifiably apprehensive that their constitutional rights are being violated. He further posited that the powers of arrest by the 2nd, 3rd and 4th respondents are being abused and misused to harass, intimidate and oppress the petitioner and its directors. He also expressed concern that the intention of the respondents is to intimidate the petitioner's directors with a view of driving the petitioner, as a business entity, away from Kenya.
5. Mr. Singh further averred that the 1st respondent has made it difficult for the petitioner to use the weighbridge and that the company has had to hire service of a third party for the purpose. He further stated that the 1st respondent's actions have occasioned the petitioner huge losses estimated at Kshs. 10 million a day; and that it is imperative therefore that the orders sought be granted as a matter of urgency.
 6. The application was filed under a Certificate of Urgency on 12th July 2023; whereupon the duty court granted Prayer 2 thereof pending further directions on 19th July 2023. The petitioner was however constrained to file a Further Affidavit on 13th July 2023, sworn by Lazarus Karangi in which it was averred that the petitioner had encountered problems in enforcing the orders issued by the Court on 12th July 2023. In particular, Mr. Karangi averred that the respondent's cables were still so low lying that its machines could not operate freely in the yard without touching the cables. He added that the weighbridge cabin had been dispositioned from its original place through the orders of the 1st respondent; and that it was yet to be ascertained whether the equipment had been damaged during the process of shifting the weighbridge house.
 7. Thus, at paragraph 8 of the Further Affidavit, Mr. Karangi averred that the petitioner needed the 1st respondent to lift the cables higher to enable it resume operations. He annexed to his affidavit several documents to demonstrate that it was impossible for the petitioner to enjoy the benefits of the interim orders issued in its favour on 12th July 2023.
 8. The petitioner's averments were augmented by the two affidavits sworn by Jagjit Liddar on behalf of the Interested party. According to the interested party, its perimeter wall was destroyed by the 1st respondent's pylons; and that it shall be seeking compensation and restitution thereof. Mr. Liddar further averred that the employees of the interested party have known no peace since the accident occurred due to the actions of the respondents, including the intention to arrest him. He averred that he was constrained to file an application for anticipatory bail vide Mombasa High Court Miscellaneous Criminal Application No. E094 of 2023: Jagjit Liddar v the Director of Criminal Investigations & Others.
 9. At paragraph 16 of his affidavit, Mr. Liddar deposed that the 1st respondent is using the backdoor to seize the suit property in respect of which a court of competent jurisdiction cited them as trespassers and for which they have been hesitant to negotiate a wayleaves agreement despite the court's direction. He thus posited that, in supporting the 1st respondent's unlawful cause, the 2nd, 3rd and 4th respondents have acted ultra vires and in utter abuse of power and public office; and as such ought to be estopped by the Court, and all affected parties be protected against abuse by the respondents.
 10. The 1st respondent opposed the application vide its Grounds of Opposition dated 18th July 2023. The 1st respondent contended, inter alia, that:
 - (a) The petitioner has not met the legal conditions for grant of the prayers sought, and in particular:
 - (i) has failed to demonstrate an arguable prima facie case with a likelihood of success or shown any prejudice it is likely to suffer in the absence of conservatory orders;



- (ii) has failed to demonstrate what specific right or freedom in the bill of rights that would be enhanced by the grant of conservatory orders;
 - (iii) has failed to demonstrate that the Petition or its substratum would be rendered nugatory in the absence of conservatory orders; and,
 - (iv) has failed to demonstrate what public interest would be served or prejudiced by the decision to exercise discretion to grant or deny a conservatory order.
- (b) That the alleged dispute between the petitioner and the 1st respondent is at best a civil/commercial and/or criminal dispute with little constitutional underpinning; and thus should be referred to the proper forum for resolution;
 - (c) That there is no iota of material, legal or factual evidence placed before the court to support the application and the claims being advanced by the petitioner.
 - (d) That the petitioner has approached the Court with unclean hands and is therefore undeserving of any equitable remedies.
 - (e) That the orders sought are contrary to public interest in sanctioning acts adverse and prejudicial against the 1st respondent;
 - (f) That the application and the subject orders sought offend the trite principles for issuance of injunctive orders and the provisions of Order 40 of the Civil Procedure Rules, 2010.
 - (g) That the affidavits in support of the application offend Order 19 Rule 3(1) of the Civil Procedure Rules, as they are not confined to information which the deponent has first-hand knowledge of.
 - (h) That the application herein is a delaying tactic aimed at frustrating and curtailing the respondents from exercising their lawful and constitutional mandates and thus an abuse of the process of the Court.
 - (i) That the application is vexatious, scandalous, frivolous and otherwise an abuse of the court process.
11. In addition to its Grounds of Opposition, the 1st respondent filed a Replying Affidavit, sworn on its behalf by Wilfred Kaaria Mbiuki. Mr. Mbiuki deposed that he has been on the site of the incident since Sunday 2nd July 2023 when the pylon towers of the 132 KV Kipevu-Rabai Transmission Line II fell. He confirmed that the line runs within the wayleaves trace situated in the suit property. Mr. Mbiuki further deposed that the petitioner encroached on the 1st respondent's wayleave; and that the perimeter wall had been earmarked for demolition.
12. At paragraph 9 of his affidavit, Mr. Mbiuki deposed that, since the fall of the towers, the following events have occurred:
- (a) the towers are currently under repair albeit with challenges including heavy rainfall and the procurement process of crane-lifting services for the collapsed transmission line;
 - (b) the conductors of the collapsed Kipevu-Rabai line II have been anchored temporarily on wooden pole structures to pave way for restoration works of the collapsed tower No. 1567 which has been hampered by the perimeter wall of the petitioner;



- (c) The weighbridge cabin was moved by the petitioner since it was illegally located under the power line and on the wayleaves trace of Kipevu-Rabai Line II and that was blocking emergency and repair works of the power line;
 - (d) The damages if any on the equipment in the weighbridge cabin cannot be blamed on the 1st respondent since the movement was done solely by the petitioner;
 - (e) The petitioner admits that it was illegally carrying out weighbridge activities within the wayleaves and therefore the purported interference of their activities is not merited.
- 13 The averments of Mr. Mbiuki were augmented by the affidavit of the 1st respondent's Chief Wayleaves Officer, Mr. Bishar I Amin, sworn on 20th July 2023. And, on behalf of the 4th respondent, Ms. Anyumba filed Grounds of Opposition dated 20th July 2023, contending that:
- (a) The application is premised on a defective appreciation of the express provisions of Article 157 of *the Constitution* and the *Office of the Director of Public Prosecutions Act*;
 - (b) The application is misconceived and raises no constitutional issues or questions for interpretation;
 - (c) The petitioner has not demonstrated that there is a serious breach of its fundamental rights by the respondents.
 - (d) The applicant challenges a decision which the 4th respondent never took;
 - (e) Investigations are a statutory process in line with Section 24 of the *National Police Service Act, 2011* and must be allowed to run its full course and the same cannot be construed to be an infringement of the petitioner's rights.
 - (f) The petitioner has not demonstrated that the investigation done by the police so far against him have been in excess of jurisdiction to warrant the invocation of the Court's jurisdiction.
 - (g) In view of the above there are no live issues to be determined against the 4th respondent thus the same amounts to a waste of judicial time.
- 14 In response to the 1st respondent's affidavits Mr. Liddar exhibited several documents by way of a Further Affidavit to demonstrate the interested party's ownership of the suit property and to provide the latest status of his application for anticipatory bail.
15. I have given careful consideration to the application, and in particular, the grounds relied on by the petitioner as explicated on the face of the application and in the two affidavits filed in support of the application. I have likewise considered the response filed on behalf of the 1st respondent and the averments set out in the affidavits sworn by Mr. Mbiuki and Mr. Amin. It is worth stating at the outset that, at this stage, the Court need not examine the merits of the case closely. Hence, I bear in mind the caution expressed by Hon. Ibrahim, J. (as he then was) in the *Muslim for Human Rights & 2 Others v Attorney General & 2 Others* [2011] eKLR that:

“The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-à-vis the case of either party. The principle is similar to that in temporary or interlocutory injunctions in civil matters...”



16. Similarly, in Nairobi High Court Petition No. 16 of 2011: Centre for Rights Education & Awareness (CREAW) & 7 Others v Attorney General, it was held:

“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*.”

17. As to the nature of a conservatory order, the Supreme Court had the following to say in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR:

“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.”

(18) Hence, it is now settled that an applicant for conservatory orders for purposes of Articles 22 and 23(3) (c) of *the Constitution* must satisfy the Court as to the following three elements:

- (a) A prima facie case with a high likelihood of success;
- (b) That the Petition will be rendered nugatory;
- (c) That public interest weighs in the applicant’s favour.

19. What amounts to a prima facie case was aptly stated in Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 123 thus:

“A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

20. Similarly, in Kevin K Mwit & others v Kenya School of Law & others (supra), it was held that:

“A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. Accordingly in determining this application, the Court is not required-indeed it is forbidden- from making definite and conclusive findings on either fact or law.



- 21 With the foregoing in mind, I have considered the Petition in the light of the averments set out in the petitioner's Notice of Motion and its Supporting Affidavit. There appears to be no dispute that, on the 2nd July 2023, the 1st respondent's pylon tower that was partly anchored on the petitioner's terminal yard, fell and its legs hit the perimeter wall of the terminal yard, resulting in its collapse. The petitioner claims that the accident resulted in damage to property in the terminal yard; including property belonging to third parties.
22. There is further no dispute that the accident was duly reported to the police and to the 1st respondent in writing; or that in response thereto, the 1st respondent took certain measures, including summoning the petitioner's directors on 6th July 2023, compelling them to appear before it on 7th July 2023. The petitioner expressed concern that prior to the 1st respondent's summons, the 2nd respondent had summonsed the petitioner's yard manager who was thereafter arrested for no justifiable cause. It is therefore apprehensive that the respondents are not acting in good faith but are actuated by some ulterior motive, granted the previous disputes between the interested party and the 1st respondent over the subject wayleave contract.
23. From the material presented before the Court, it appears that, as matters stand, it is impossible for the petitioner to resume its normal day to day operations due to the dangers portended by the low lying cables and the displacement of the weighbridge cabin. The petitioners averred that the 1st respondent's actions have occasioned it huge losses estimated at Kshs. 10 million a day appear; and while that allegation is yet to be proved, it appears to be well-founded.
24. I am therefore satisfied a prima facie case has been made out by the petitioner, judging by the material presented before the Court by the petitioner and the interested party and the response thereto by the respondents. In the premises, I find merit in the petitioner's application dated 11th July 2023. As some of the prayers re either spent or otiose, the application is allowed and orders granted as hereunder:
- (a) Pending the hearing and determination of this Petition, a conservatory order be and is hereby issued restraining the 1st respondent, their servants, agents, junior officers and/or anybody from interfering with the running of the day to day business/affairs of the petitioner.
 - (b) Pending the hearing and determination of this Petition, a conservatory order be and is hereby issued restraining the 2nd, 3rd and 4th respondents, their servants, agents, and/or officers from arresting, charging, harassing or otherwise howsoever from interfering with the petitioner/ applicant, its directors and employees.
 - (c) Costs be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 2ND DAY OF AUGUST 2023

OLGA SEWE

JUDGE

