



**Singh v Inspector General of the National Police Service & 6 others  
(Constitutional Petition E310 of 2021) [2023] KEHC 22250 (KLR)  
(Constitutional and Human Rights) (15 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22250 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E310 OF 2021**

**M THANDE, J  
SEPTEMBER 15, 2023**

**BETWEEN**

**MANJIT SINGH ..... PETITIONER**

**AND**

**INSPECTOR GENERAL OF THE NATIONAL POLICE  
SERVICE ..... 1<sup>ST</sup> RESPONDENT**

**OFFICER IN CHARGE, LAND FRAUD INVESTIGATIONS  
UNIT DIRECTORATE OF CRIMINAL INVESTIGATIONS  
HEADQUARTERS ..... 2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 3<sup>RD</sup> RESPONDENT**

**BURUDI NABWERA ..... 4<sup>TH</sup> RESPONDENT**

**TABITHA NASIPWONDI NABWERA ..... 5<sup>TH</sup> RESPONDENT**

**CYRUS SHIKALAKAL JIRONGO ..... 6<sup>TH</sup> RESPONDENT**

**CYPPER INTERNATIONAL LIMITED ..... 7<sup>TH</sup> RESPONDENT**

**RULING**

1. The subject of this ruling is an Application dated 4.8.21 in which the Petitioner seeks the following orders:
  1. Spent.
  2. Spent.



3. Spent.
  4. That pending the hearing and determination of the Petition, a Conservatory Order do issue suspending the proceedings in Criminal Case No. E549 of 2021 Republic vs Manjit Singh Amrit.
  5. That pending the hearing and determination of the Petition, a Conservatory Order of Prohibition do issue prohibiting the Respondents herein by themselves, their servants and agents, from arresting, harassing or intimidating the Petitioner on issues touching on the ownership of Buna Agencies Limited.
  6. That the costs of this Application be provided for.
2. The grounds upon which the Application is premised are set out in the Application and in the affidavit of the Petitioner sworn on even date. The Petitioner states that he is a director of Buna Agencies Limited (the Company), which owns L. R. No. 11635 (IR 57221) (the property), situate in Westlands, Nairobi County. The initial directors and subscribers of the 2 shares in the company were the 4<sup>th</sup> and 5<sup>th</sup> Respondents Hon. Burudi Nabwera (Nabwera) and Tabitha Nasipwondi Nabwera (Tabitha). The late Harbans Singh Amrit (Harbans) was interested in the property and entered into an agreement dated 15.12.92 with Nabwera, for the purchase of the Company, which owned the property. He paid a deposit of Kshs. 1,500,000/=, receipt which Nabwera acknowledged. Further payment of Kshs. 2,000,000/= was made vide a cheque dated 27.01.93 and thereafter other payments totaling Kshs. 3,000,000/=. In return, Nabwera and Tabitha duly signed share transfer forms transferring their shares to Harbans and his son Manjit Singh Amrit, the Petitioner, who also signed the said form. The transfer of shares was on 22.1.93 registered at the Companies Registry.
  3. It was further stated that upon acquiring the property, the Company developed a 6-floor office block thereon in the year 2000 of which the 4<sup>th</sup>-7<sup>th</sup> Respondents have been well aware all along. The Company has had quiet possession of the property and the developments thereon for over 26 years. However, 5 years after the demise of Harbans in 2016, the 4<sup>th</sup>-7<sup>th</sup> Respondents filed a complaint claiming fraudulent transfer of Nabwera's and Tabitha's shares in the Company without their consent. They further claimed that the engagement with the Harbans was to secure a loan and not the sale of the company. As a consequence, the Petitioner as a director of the Company, was charged in Criminal Case No. E549 of 2021: Republic -vs- Manjit Singh Amrit with the offences of conspiracy to defraud contrary to Section 317 of the Penal Code, making a false document contrary to Section 347 of the Penal Code, forgery contrary to Section 345 of the Penal Code and obtaining Registration by false pretenses contrary to Section 320 of the Penal Code.
  4. It is the Petitioner's case that in a bid to build a case against him, the complainants have cleverly manipulated minutes of an alleged meeting held in the 2012 but backdated to 7.11.93, a letter dated 2.12.15 from Harbans Singh Associates to S. K Jirongo, sale agreement dated 4.11.92 and a letter dated 3.11.15. The minutes and correspondence relate to engagements that allegedly took place between Harbans and Nabwera, Tabitha and 6<sup>th</sup> Respondent (Jirongo). The Respondents however waited 26 years later and 5 years after the death of Harbans to now produce these documents on which the Petitioner cannot testify or verify their authenticity since they contradict the sale agreement signed in the 1992 and the payments totaling 6,500,000/ =.
  5. The Petitioner further states that he was summoned to the DCI headquarters on 11.05.19. Upon perusal of the investigations file, the Petitioner's Advocate pointed out to the Investigating Officer that the minutes of 7.11.93 were fraudulent for the reasons that in 1993, the print was not in use, the post code 00100 GPO had not been introduced and the telephone extension 020 was not in place.



- Additionally, despite the fact that the minutes are on the letter head of Mr. Harbans Singh Associates, the name of Mr. Harbans Singh is misspelt. After the said meeting and upon being coached by the 2<sup>nd</sup> Respondent's officers the Nabwera and Jirongo changed their statement to state that the minutes were drawn in the 2012 but backdated to 7.11.93.
6. It is the Petitioner's further contention that after the death of Harbans on 4.3.16, Nabwera is now attempting to resile from the sale of the Company and facilitated by Jirongo, who is well known for engaging in large scale fraud to salvage himself from bankruptcy. The criminal proceedings are being used to extort a settlement of Kshs. 750,000,000/= from the Petitioner, yet no complaint was made to the police for over 26 years when the Company was sold and the building erected thereon. Additionally, no civil claim has been filed by the complainants. Further, that Harbans, a key witness, is now deceased and without his evidence and testimony on the documents produced by the Respondents at this stage, the Petitioner stands to be prejudiced significantly. In light of the foregoing, the Petitioner claims he is unlikely to get a fair trial in the circumstances.
  7. The Petitioner further claims that the Respondents' actions embodied in the complaint and charge sheet dated 4.5.21 are bereft of any iota of procedural propriety and fails the test of constitutionality and legality and the constitutional imperatives under Articles 19, 27, 28, 29, 40 and 50 of *the Constitution* of Kenya, 2010. He also claims that owing to the Respondents' unconstitutional, illegal, arbitrary, oppressive, capricious, unfair and unreasonable acts aforesaid, he has and continues to suffer severe prejudice and is constantly threatened with further arrests. In the circumstances, unless this Court grants the reliefs sought herein, the rights of the Petitioner as stated hereinabove and guaranteed by *the Constitution*, shall continue to be infringed, infracted and violated by the Respondents.
  8. The Application is opposed by the Respondents.
  9. No. 62020, Sgt. Lawson Shiuma, a police officer attached to the Directorate of Criminal Investigation (DCI) Headquarters, swore a replying affidavit on 3.3.22 on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents opposing the Application. He denied the allegations made by the Petitioner. He averred that following a complaint by Stephen Kinyanjui Kibunja (Kibunja), Advocate, on behalf of Jirongo vide referral form dated 25.2.19, he and Detective Guyo were instructed to launch investigations. Jirongo confirmed entering into a sale agreement in respect of the property dated 4.11.92 between the Company owned by the Nabwera and his company Cypper International Limited (Cypper). Jirongo confirmed paying Nabwera Kshs. 4 million as evidenced by correspondences and statement of account from Kenya Commercial Bank Ltd. He further confirmed that a meeting was held on 7.11.93 and minutes of the meeting were signed by the Nabwera, Kibunja and Harbans. Jirongo confirmed writing a letter dated 30.8.93 to Harban informing him about the payments and transfer the property to M/s. Dale Investments Limited. Further that Kibunja & Mwiti Advocates confirmed writing a letter to Harbans dated 15.12.92 informing him about the sale agreement of the property, a letter dated 8.11.93 in regard to the transfer of the property together with consent to transfer and another dated 18.11.93 informing him that they were holding Kshs. 6,000,000/= and awaiting release to his designated advocates. Jirongo confirmed writing a letter dated 3.11.15 in regard to the Amicable Settlement on the property vide meeting on 7.11.93. Further that Wagara, Koyyoko & Company Advocates acting for the complainant confirmed writing a claim letter to the Company of Kshs. 750,000,000/= for fraudulent acquisition of the property. Jirongo confirmed receiving a letter from Harbans dated 2.12.15 to accept a settlement of Kshs. 550m and they close the matter. Jirongo further confirmed getting a copy of title IR 57221 confirming that the property was registered in the name of the Company on 15.12.92.
  10. In his interview, Nabwera confirmed that the Company, which owned the property, belonged to him and Tabitha; that he received a cheque of Kshs. 2,000,000/= dated 27.1.93 and acknowledged receipt by signing on a copy thereof; that he received a total of Kshs. 4,000,000/= from the Jirongo and



- acknowledged receipt; that he entered into a sale agreement between the Company and Cyperr; that he and Tabitha never appeared before Sureta Chana Advocate to sign share transfer forms dated 18.12.92 and 18.2.93; that he gave Harbans title documents for the property as security for a loan of Kshs. 2,000,000/= which he never advanced in time, prompting him to approach Jirongo who gave him Kshs. 4,000,000/=; that Nabwera and Tabitha signed blank share transfer shares; that they never ceased to be or resigned as directors of the Company; that no meeting of the Board of the Company was held to pass a resolution in 1993 authorizing the transfer of its shares to Harbans and the Petitioner and that no consideration was received from them, for the shares; that Nabwera wrote a letter dated 3.4.19 to the Registrar of Companies outlining the foregoing and received a response dated 5.4.19.
11. It was further averred that the investigators obtained from the Principal Secretary Ministry of Lands and Physical Planning records relating to the property. They also got a letter from the Registrar of Companies dated 9.4.19 confirming the status of the Company. They also got records of the Company and of Cyperr and Peterson Wachira of registrar companies recorded his statement and gave history of the Company. The Petitioner, was summoned to DCI headquarters Land Fraud Unit where he recorded his statement and supplied the investigators with schedule of documents in support of his statement dated 27.3.19.
  12. According to Sgt Lawson, the allegation by the Petitioner that the dealings of the sale of shares in the Company were between Harbans and Nabwera is a mere denial since the Petitioner signed share transfer form allegedly between him and the Tabitha. This was confirmed by a letter from the Harbans to Sureta Chana. Further that the Petitioner's claim that documents were manipulated are mere allegations because the documents were done in their office and bear their letter heads and signed by Harbans, Nabwera, Jirongo and Kibunja as per their understanding on the matter. The Petitioner and his advocate visited DCI headquarters and were shown the original documents. The said documents are not prejudicial to the Petitioner because as a director he was aware of what was taking place in the company. He denies that Nabwera and Jirongo were coached by the 2nd Respondent and that they willingly recorded their statements and gave facts of what transpired. Further the Petitioner declined to give his specimen signatures and documents with known signatures of the Harbans for forensic audit.
  13. It was further averred that the purported sale agreement dated 15.12.92 between Harbans and Nabwera and other documents were never availed to the 2nd Respondent by the Petitioner and are now being introduced to prejudice the criminal proceedings before court. Notably, the Petitioner has not availed copies of cheques acknowledged receipt by Nabwera as alleged. Further, the Petitioner has intentionally left out the share transfer form allegedly signed by him and Tabitha that he had earlier submitted to the investigators. The inconsistencies are meant to mislead the Court and the Petitioner is well aware of the facts as he is part of the conspiracy. Having concluded investigations, the DCI forwarded the duplicate file to the office of the Director of Public Prosecutions (DPP) who advised and directed vide their letter Ref: ODPP/CAM/13/2/211 dated 31.3.21 that the Petitioner be charged, which was done.
  14. Sgt Shuma further deposed that the facts raised by the Petitioner can be raised at the trial court as the accuracy and correctness of the facts or evidence gathered by the Respondents can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered in support of the charges. Additionally, that the presumption of innocence of the Petitioner and his fundamental rights and freedoms are guaranteed and jealously guarded by *the Constitution* and do not vanish by their prosecution before a competent court of law. Accordingly, the Petitioner having failed to demonstrate that substantial injustice would otherwise result if the criminal proceedings proceed, the Court was urged to dismiss the Petition with costs to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
  15. In a replying affidavit sworn on 16.5.22, Jirongo stated that he was a director of Cypper, the 6<sup>th</sup> Respondent. He stated that though the underlying transaction was the purported sale of the property,



the principal complaint and charges facing the Petitioner is the fraudulent acquisition of shares in the Company. As such, the trial court will be called upon to determine whether the transfer of the shares of Nabwera and Tabitha in the Company to the Petitioner was fraudulent; that the Petitioners has not availed any agreement wherein Nabwera and Tabitha agreed to transfer their shares in the Company to him and Harbans; that as Nabwera, Tabitha Sureta Channa advocate and the Petitioner are alive, the question of the authenticity of the signatures on the share transfer forms and process of transfer of shares in the Company can be determined without prejudice to the Petitioner the passage of time notwithstanding; that the queries raised by the Petitioner concerning the documents produced by the complainants as evidence cannot be determined by this Court and are best answered at the hearing of the criminal case.

16. Jirongo further stated that the Petitioner is underserving of the discretionary conservatory orders of prohibition as he has not in this matter as has not demonstrated abuse of the process by any of the Respondents; any threatened or actual breach of his constitutional rights that is not consistent with the law or any abuse of legal powers by any of the Respondents or that his right to a fair trial is not guaranteed. Further that the resolution of the contest of facts and documentary evidence is squarely in the province of the trial court and this Court should reject the invitation by the Petitioner to conduct a mini trial. The passage of time is explained by the fact that there were attempts all along to resolve the underlying dispute amicably. Jirongo urged that the Application and Petition be rejected and that the criminal case be allowed to proceed to trial for a just determination.
17. The 4<sup>th</sup> and 5<sup>th</sup> Respondents did not file a response to the Application. Directions were given for filing of submissions. However, only the Petitioner and the 6<sup>th</sup> and 7<sup>th</sup> Respondents complied.
18. The Petitioner submitted that it will be prejudicial for him if the criminal proceedings against him proceed, given that the claims forming the basis of the charges allegedly occurred 26 years ago and 5 years after the death of the principal with whom the complainants allegedly dealt. That following the death of the sole witness, the Petitioner is faced with proceedings which he cannot plausibly testify on. The Petitioner further contends that the alleged claims ought to have been raised in civil proceedings yet no such proceedings have been instituted. This demonstrates that the criminal case is intended to exert pressure on the Petitioner to enter into a settlement.
19. For the 6<sup>th</sup> and 7<sup>th</sup> Respondents, it was submitted that the discretion the 1<sup>st</sup> and 2<sup>nd</sup> Respondents draw their authority to investigate offences is from Article 245 of *the Constitution* and Section 35 of the National Police Services Act. In exercise of this authority they are functionally independent and can only take directions from the 3<sup>rd</sup> Respondent. It was further submitted that Article 157 vests state powers of prosecution on the 3<sup>rd</sup> Respondent, which power is restated in Section 5 of the Office of Director of Public Prosecutions Act. In the discharge of its mandate, the 3<sup>rd</sup> Respondent is required to do so without seeking the consent or direction from any person or authority. As such it cannot be said that by simply arresting and prosecuting the Petitioner the Respondents have violated his constitutional rights. It was further submitted that the Petitioner's allegations of violation of his rights are baseless and are meant to disorient the justice system in its expedition of the criminal case. Moreover, that the Petitioner has failed to demonstrate the extent of infringement of his rights and how the same was occasioned by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as set out in the case of *Anarita Karimi Njeru v Republic* [1979] eKLR It was further argued that there is no bar as to the time limit for criminal proceedings to be instituted against any person suspected to have committed a crime. The 6<sup>th</sup> and 7<sup>th</sup> Respondents urged that Court to dismiss the Petition for lack of merit and allow the criminal case to proceed.



20. The Court has considered the Application, the rival affidavits and submissions as well as the authorities cited. The issue for determination is whether the Petitioner has met the threshold for the grant of conservatory orders.
21. Article 23 of *the Constitution* has conferred upon this Court, the authority to uphold and enforce the Bill of Rights and grant appropriate relief as follows:
1. The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
  2. ...
  3. In any proceedings brought under Article 22, a court may grant appropriate relief, including--
    - (a) a declaration of rights;
    - (b) an injunction;
    - (c) a conservatory order;
    - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
    - (e) an order for compensation; and
    - (f) an order of judicial review.
22. A conservatory order is one of the appropriate reliefs available to a party who alleges and proves denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. The purpose of conservatory orders is to preserve the substratum of a petition before court, pending the hearing and determination of the same. Rule 23 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 (Mutunga Rules) provides that despite any provision to the contrary, a Judge before whom a petition is presented shall hear and determine an application for conservatory or interim orders.
23. The threshold for the grant of conservatory orders was established by the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR as follows:
- (86) “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders 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 causes.
  - (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*.

24. A party seeking conservatory orders must demonstrate to the Court that first, the petition is arguable and not frivolous. Second that unless the orders sought are granted, the suit, were it to succeed, would be rendered nugatory. Though linked to injunctions in private party matters, these 2 limbs are also applicable in public law. The Supreme Court added the third test in the context of *the Constitution*, namely, that it is in the public interest that the orders sought are granted.

25. The prayers that the Petitioner seeks herein are that pending the hearing and determination of the Petition, the Court suspends the proceedings in the criminal case against him. Further that the Respondents herein by themselves, their servants and agents, be prohibited from arresting, harassing or intimidating the Petitioner on issues touching on the ownership of the Company.

26. It is well settled that constitutional and statutory bodies such as the 1<sup>st</sup> -3<sup>rd</sup> Respondents herein, must be given the space to discharge their mandate and to exercise their discretion in doing so. A court will only intervene where it is demonstrated that such institution or organ in question has acted ultra vires or in breach of *the Constitution* or the law. This was the holding of Ngugi, J. (as she then was) in the case of *Kipoki Oreu Tasur v Inspector General Of Police & 5 others* [2014] eKLR. The learned Judge stated:

The criminal justice system is a critical pillar of our society. It is underpinned by *the Constitution*, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated.

27. Additionally, stay of proceedings is a serious judicial action that inevitably interferes with the right of a litigant to conduct his litigation. It undermines the right of access to justice, right to be heard without delay and overall, right to fair trial. The discretion to stay proceedings should therefore be exercised cautiously and only in cases where the Court is satisfied that proceedings ought not to be allowed to continue.



28. In the case of *Katangi Developers Limited v Prafula Enterprises Limited & another* [2018] eKLR, the Court of Appeal stated as follows:

What is in issue before us is simply an application for stay of proceedings under rule 5(2) (b) of the Court Rules. As noted in *Halsbury's Laws of England* 4<sup>th</sup> edition volume 37 at paragraph 330:

“the stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and, therefore, the Courts general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue”.

29. The Petitioner herein challenges the constitutionality and legality of actions of the Respondents and more specifically, the propriety of the criminal proceedings against him. He seeks that the same be halted. At this preliminary stage, the Court may only examine and evaluate the material placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of conservatory orders.
30. In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, the Court of Appeal defined a prima facie case to mean:

4. A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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.

31. In the case of *Free Kenya Initiative & 6 others v Independent Electoral & Boundaries Commission & 4 others; Kenya National Commission on Human Rights (Interested party)* [2022] eKLR, Mrima, J. stated:

32. In sum, therefore, in determining whether a matter discloses a prima-facie case, a Court must look at the case as a whole. It must weigh, albeit preliminarily, the pleadings, the factual basis, the respective parties’ positions, the remedies sought and the law. In so doing, a Constitutional Court must be guided by Articles 22(1) and 258(1) of *the Constitution* which provisions are on the right to institute Court proceedings whenever a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened or the when *the Constitution* has been contravened, or is threatened with contravention.



32. The question whether a suit will be rendered nugatory if conservatory orders are not granted has been the subject of considerable judicial consideration. In the case of *Katangi Developers Limited* (supra), the Court of Appeal stated:

(14) As regards the second limb concerning the nugatory aspect, we reiterate what was stated by this Court in *Reliance Bank Limited vs Norlake Investments Limited* [2002] 1 E.A. 227 that:

“What may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.”

(15) Therefore, the issue before us is whether the intended appeal will be rendered futile or a mere academic exercise if the order for stay of proceedings is not granted

33. I have considered all the issues raised by the Petitioner concerning the institution of the criminal proceedings against him. I am keenly aware I cannot at this stage delve into the merits of the case which must await the full hearing of the Petition. Suffice it to say however, the question as to whether the issues regarding ownership of the Company and by extension the property, and the allegation that the transfer of the same was done fraudulently, should be the subject of criminal or civil proceedings, are critical and are to be determined upon the hearing of the main Petition. There is also the question whether subjecting the Petitioner to a criminal case based on allegations that occurred over 26 years ago and where the key witness is dead, will occasion him prejudice or whether indeed the same ought to have been instituted in the first place. Additionally, there is the question as to whether the 1<sup>st</sup> -3<sup>rd</sup> Respondents exercised their mandate in line with the law. These are matters that can only be dealt with at the main hearing.

34. Further, since the main Petition is pending, I must caution myself not to make definite and final findings on the issues raised, before parties have been heard substantively, which would prejudice the main suit. In this regard, I follow the reasoning of Ibrahim, J. (as he then was) in the case of *Muslims for Human Rights (Muburi) & 2 others v Attorney General & 2 Others* [2011 eKLR where he stated:

The court must be careful for it not to reach final conclusions 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- a-vis the case of either parties. This principle is similar to that in temporary or interlocutory injunctions in civil matters.

This is a cardinal principle and happily makes my function and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.

35. It is clear from the cited authority that at this stage, the court must caution itself and resist the temptation to make any conclusive findings of fact or law on the matter before it. In the case of *Damour*



*Florian Emmeric v Director of Immigration Services* [2022] eKLR, Mrima, J. spoke to the issue of caution and stated:

29. Given the interlocutory nature of conservatory orders, it is argued, that there is need for a Court to exercise caution when dealing with any request for such prayers. I agree with that proposition for the reason that matters which are the preserve of the main Petition ought not to be dealt with finality at the interlocutory stage.
36. And in the case of *Prasul Jayantil Shah v Republic; Joseph Karuoro Claudio (Interested Party)* [2022] eKLR, Odunga, J. (as he then was) considered a similar case and in granting conservatory orders stated:
57. In the premises, I find that it is only just to temporarily hold further proceedings in the criminal case in abeyance so as to avoid a situation where the Applicant might lose his liberty when the subject matter's status is yet to be determined and this Court is yet to determine the propriety of the criminal proceedings.
  58. Accordingly, I hereby direct that pending the hearing and determination of Criminal Appeal No. E070 of 2021: Prasul Jayantil Shah -vs- Republic, there will be a stay the Sentencing in Mavoko Magistrate's Court Criminal Case No. 238 of 2019: Republic -v- Prasul Jayantil Shah.
37. I concur with the learned Judge. The propriety of the criminal proceedings in question is yet to be determined. In light of the foregoing, I have no difficulty in finding that the Petitioner has established a prima facie case with a probability of success. Further given the nature of the matter herein, I find that if the substratum of the Petition is not preserved by having in place conservatory orders, there is imminent danger of rendering the Petition nugatory and a mere academic exercise, as the criminal case will have proceeded. Indeed, a determination in favour of the Petitioner will be of no use to him if in the meantime, he is subjected to the criminal proceedings under challenge. It is therefore necessary that the said proceedings be stayed pending the hearing and determination of the Petition herein. In the premises, I am satisfied that there is merit in granting conservatory orders sought herein.
38. Accordingly, I do find that the Application dated 4.8.21 is merited and the same is hereby allowed in the following terms:
1. A Conservatory Order is hereby issued suspending the proceedings in Criminal Case No. E549 of 2021 Republic vs Manjit Singh Amrit, pending the hearing and determination of the Petition herein.
  2. A Conservatory Order of Prohibition is hereby issued prohibiting the Respondents herein by themselves, their servants and agents, from arresting, harassing or intimidating the Petitioner on issues touching on the ownership of Buna Agencies Limited, pending the hearing and determination of the Petition herein.
  3. Costs in the cause.

**DATED and DELIVERED in NAIROBI this 15<sup>th</sup> day of September 2023**

**M. THANDE**

**JUDGE**

