



**Bushebi v Director of Public Prosecutions & 3 others; Nyambura (Interested Party) (Constitutional Petition E071 of 2023) [2023] KEHC 23143 (KLR) (Constitutional and Human Rights) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23143 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E071 OF 2023**

**LN MUGAMBI, J**

**OCTOBER 5, 2023**

**BETWEEN**

**JOSEPH BUSHEBI ..... PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR, DIRECTORATE OF CRIMINAL INVESTIGATIONS .... 2<sup>ND</sup> RESPONDENT**

**CARL DOUGLAS RUSNELL ..... 3<sup>RD</sup> RESPONDENT**

**THE CHIEF MAGISTRATE’S COURT (MILIMANI) ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**CECILIA NYAMBURA ..... INTERESTED PARTY**

**RULING**

1. The Applicant seeks conservatory orders staying further proceedings in the Milimani Chief Magistrate’s Court Criminal Case No. 1315 of 2016, Republic of Kenya vs. Joseph Bushebi & Cecilia Nyambura pending the hearing and determination of the present application and the Petition.
2. The application is dated 8<sup>th</sup> March, 2023 and is supported by the Petitioner’s supporting affidavit deponed on even date. The Petitioner is the 1<sup>st</sup> Accused Person in Criminal Case No. 1315 of 2016 where is charged together with the Interested Party following a complaint by one Henrich Neuwirth of Canada. He insists that the 1<sup>st</sup> Respondent unlawfully, maliciously and without any proper factual



basis recommended him for prosecution by preparing and filing the charge sheet where he was charged with the following criminal offences:

- a. Court I: Conspiracy to defraud contrary to section 317 of the Penal Code
  - b. Count II: Stealing by Directors contrary to section 282 of the Penal Code;
  - c. Count III: Money laundering contrary to section 4 as read with section 16(1) (a) of the *Proceeds of Crime and Anti-Money Laundering Act*, 2011 and contrary to Article 50(1) of *the Constitution*.
3. He contended that his fundamental rights and freedoms were violated by the complainant, police officers and various Kenyan Government Servants and Institution in the said Criminal case on various dates between the 27<sup>th</sup> of June, 2016 and the 27<sup>th</sup> of February, 2023 at his residence in Kamulu Nairobi Block/118/859, at Muthaiga Police Station, at L.R No. 6845/72/36, at Utawala in Nairobi, at L.R No. 209/28/1 in Nairobi and within Milimani Law Courts.
  4. According to the petitioner, his rights that were violated include: equality and freedom from discrimination (Article 27), the right to human dignity(Article 28), his right to privacy (Article 31), his right to access information (Article 35), his right to property (Article 40), his right to economic and social rights (Article 43), his right to fair administrative action (Article 47), his rights as an arrested person (Article 49), his rights to a fair hearing (Article 50), his right as a detained person (Article 51) and the right to work (Article 23(1) of the Universal Declaration of Human rights).
  5. He deposed that the main reason why the criminal case was instituted was to enable the 3<sup>rd</sup> Respondent obtain documents in the Criminal case and use them against him in the civil suit- Carl Rusnell & Fernwood Developments Ltd vs. Joseph Bushebi. He asserted that the prosecution against him is contrary to public policy and is also oppressive. That the evidence that is lined up for production before Criminal Court has already been used in the civil suit where the Complainant is pursuing alleged 'proceeds of crime' which is the subject matter of the Criminal Case and, already, he has been granted the tracing and freezing injunction using the said evidence.
  6. Consequently, he prays for various declarations and orders against the Respondents including; the quashing and prohibition of Milimani Criminal Case No. 1315 of 2016, on the basis that the said proceedings are compromised beyond repair. He stated that he may not be accorded a fair hearing which is a breach of his fundamental rights and freedoms under Article 27, 28, 31, 35, 39, 40, 43, 47, 49, 50 and 51 of *the Constitution* of Kenya and Article 23 (1) of the Universal Declaration of Rights.
  7. The Petitioner further filed a Notice of Preliminary objection dated 9<sup>th</sup> April, 2023 where is wants the Replying Affidavit sworn by Carl D. Rusnell on the 23<sup>rd</sup> of March, 2023 expunged on account that it is invalid, incompetent and is fatally defective in form and in substance.

### **Respondent's Response**

8. The Director of Public Prosecutions, the 1<sup>st</sup> Respondent, opposed the application based on its grounds dated 12<sup>th</sup> April, 2023. He contended that the Petitioner and the Interested Party have failed to demonstrate that the charges levelled against them in Milimani CMCC No, 1315 of 2016 are an abuse of the court process. The 1<sup>st</sup> Respondents asserted that the decision to charge was based on the overwhelming evidence on the prosecution file hence the Trial Court should be left allowed to weigh the prosecution evidence against the scales of justice. That further the said decision to charge was arrived at after having regard for public interest, the interest of the administration of justice and



the need to prevent and avoid abuse of the legal process as per Articles 47, 48 and 157 (11) of *the Constitution* of Kenya.

9. On the concurrence of the criminal and civil cases, the 1<sup>st</sup> Respondent stated that it is lawful for both civil and criminal proceedings to run concurrently under section 193A of the Criminal Procedure Code. The 1<sup>st</sup> Respondent urged this Court to dismiss the petition with costs.

### **Respondents' Response**

10. The 2<sup>nd</sup> and 4<sup>th</sup> Respondents opposed the application and petition on the grounds dated 5<sup>th</sup> May, 2023. The Respondents contend that arrest and detention of a person are legal processes provided for by law and that the Petitioner's rights under Articles 27, 28, 31, 35, 39, 40, 43, 47, 49, 50 and 51 of *the Constitution* are not absolute because they are subject to limitations under Article 24 of *the Constitution*. That the Respondents' powers and functions are constitutional and the same can only be interfered with by the Court after it has been sufficiently demonstrated that they have acted arbitrarily and contrary to their constitutional powers among others. That both the application and petition are based on mere apprehension and unfounded fears hence the reliefs sought will only serve to frustrate and not advance the rule of law. That the Petitioner's constitutional safeguards in the trial are still intact.
11. In the replying affidavit sworn by No. 80929 Mr. Francis Mulinga, No. 80929 on behalf of the 2<sup>nd</sup> Respondent's behalf; he swore that he is a detectives tasked with investigation allegations of fraud lodged by Carl Rusnell through the High Commission of Canada in Nairobi on 26<sup>th</sup> of May, 2016 at the DCI headquarters. That during the course of their investigations, the investigators learned that Carl Rusnell transferred Kshs. 62,233,560 to account no. 041000016467 held by Bushnell Developers Limited which amount was to be used for construction of warehouses for lease. That the 2<sup>nd</sup> Respondent obtained orders to investigate the Petitioner's accounts so as to establish whether the said sums had been transferred into the said account which orders were granted, the investigations done and they discovered that the monies had indeed been transferred into the accounts. The 2<sup>nd</sup> Respondent deponed further that all the documents confiscated from the Petitioner form part of the Court's inventory and the motor vehicle KBK 500A and KCD 645P were confiscated as proceeds of crime and money laundering.
12. The 2<sup>nd</sup> Respondent insisted that the Petitioner has not established how the criminal proceedings against him are vexatious and an abuse of the court process. On the contrary, he the 2<sup>nd</sup> Respondent averred that it is the Petitioner's numerous frivolous applications that are a misuse of the court process and urged this Court to dismiss the application.

### **Respondents Response**

13. The 3<sup>rd</sup> Respondent filed grounds of opposition on the 19<sup>th</sup> of May, 2023. He faulted the Petitioner for filing numerous applications/appeals only intended to vex, scuttle and frustrate the progress of the case that has been going on against him. He the various instances in which the Petitioner has filed applications to have the judicial officers hearing the cases against him to recuse themselves on the basis that every order the courts made were allegedly against him. It was the 3<sup>rd</sup> respondent's contention that these applications are not brought in good faith and are an attempt to irregularly delay and stop the criminal case with the aim of circumventing justice.
14. The 3<sup>rd</sup> Respondent averred that existence of a concurrent civil suit is not a sufficient ground to stop the criminal proceedings. That it can only be stopped if the petitioner can demonstrate that that the respondents acted in bad faith or were malicious.



## Submissions

15. The application was heard on the 27<sup>th</sup> June, 2023 during which day the parties highlighted their written submissions.
16. The Applicant's submissions are dated 14<sup>th</sup> May, 2022. He submitted on the following issues for determination:
  - a. Whether the replying sworn on 23<sup>rd</sup> March, 2023 at Mesa, Arizona, United States of Merica by Dr. Carl D. Rusnell and the annexures thereto should be expunged from the records of Court; and
  - b. Whether the interlocutory relief sought should be granted.
17. On the first issue the Petitioner questioned the validity of the affidavit filed by the 3<sup>rd</sup> Petitioner while in Mesa, Arizona in the United States of America and the certificate of electronic evidence dated 24<sup>th</sup> March, 2023. That the filing of the said pleadings instituted in the name of the Republic of Kenya is contrary to Article 157(6) of *the Constitution* which solely gives powers of prosecution to the Director or Public Prosecution as the said firm of advocates has no locus standi to file the said replying affidavit on behalf of the 1<sup>st</sup> Respondent. That the affidavit sworn before one Amanda Potinsky offends international law and was improperly commissioned; because the deponent took one oath on 23<sup>rd</sup> March, 2023 before 3 different Commissioners of Oath/Notaries Public who are located in three different geographical locations/jurisdictions. That this is inconsistent with the provisions of section 5 of the *Oaths and Statutory Declarations Act*, Cap. 15 Laws of Kenya. He relied on the cases of Mary Gathoni & Another vs. Frida Ariri Otolu & Another (2020) Eklr, Malewa Ranching Company Limited vs. Joseph Nyutu Ng'ang'a & 146 Others (2022) Eklr, where the Court struck out improperly commissioned affidavits.
18. On his second issue, the Petitioner relied on Article 23 of *the Constitution* and the case of Wilson Kaberia Nkunja vs. The Magistrate And Judges Vetting Board And Others Nairobi High Court Constitutional Petition No. 154 OF 2016 (2016) Eklr where the Court summarised three main principles for consideration on whether to grant conservatory orders: a prima facie case with a likelihood of success, real threat/irreparable damage and public interest.
19. On the limb of establishment of a prima facie case, the Applicant submits that the petition raises an avalanche of justiciable issue arising from Milimani Criminal Case No. 1315 of 2016 which issues ought to be determined by this Court. Some of the issues raised include: the breach of *the Constitution* and the Bill of Rights in initiating, investigation and the prosecution of the Criminal Case; the Respondents have violated his rights under Article 27, 28, 31, 35, 39, 40, 43, 47, 49, 50 and 51 of Constitution and the right to work under Article 23(1) of the Universal Declaration of Human Rights, among other lines.
20. That the said issues are serious, justiciable Constitutional issues worth consideration and the Applicant urged this Court The relied on the cases of: Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others (2014) Eklr; Katiba Institute vs. Judicial Service Commission & 2 Others Ruling No. 2 ; Nairobi High Court Constitutional Petition No. E128 Of 2022 and Isaiah Luyara Odando & Another vs. Kenya Revenue Authority & 6 Others; Nairobi Branch Law Society Of Kenya (interested Party) (2022)eklr.
21. On the limb of irreparable danger or prejudice, the Applicant submitted find that the petition raises a prima facie case with a likelihood of success. He contends that the hearing of the criminal case began



- before the 4<sup>th</sup> Respondent on the 27<sup>th</sup> February, 2023 and the time of final determination is imminent and he is in real danger of being denied a fair hearing and continues to face a breach of his fundamental rights and freedoms. That the documents set to be adduced in the criminal case have already been adduced in High Court Civil Case No. 45 of 2017. That the Respondents have deliberately ensured that the criminal proceedings to run parallel with the civil ones which contradict the principle of *ne bis in idem*. The Petitioner submits that the 4<sup>th</sup> Respondent is now conflicted and has lost its moral position as a neutral and impartial arbiter over the impugned criminal case.
22. The Applicant contends further that he will suffer prejudice since it is his liberty at stake on the basis of the tainted/lame prosecution and he faces a greater risk of more serious violations of the same. That the said prosecution should be prohibited because this Court has an overriding duty to prevent injustice and promote justice, from which duty, arises an inherent power to stay an indictment. He relied on the case of: *Isaiah Luyara Odando & Another vs. Kenya Revenue Authority & 6 Others; Nairobi Branch Law Society of Kenya (interested Party) (2022) EKL.R.*
23. On the final limb of whether the conservatory order is in public interest, the Applicant submitted that the present application has met the threshold because the criminal case is a public prosecution and a matter of public policy where the Respondents exercise the delegated power of the Kenyan public through investigating, apprehending, defending and punishing those suspected of offences. That as public bodies the Respondents have violated the Bill of Rights, Article 23 (1) of the Universal Declaration of Human Rights, section 121 and 193A of the Criminal Procedure Code and sections 4, 16(i) (a), 13, 20, 68, 69-75, 71, 121, 130 & 131 of the [Proceeds of Crime and Anti-Money Laundering Act](#). That the prosecution is contrary to public policy and interest and that the 3<sup>rd</sup> Respondent is using the criminal justice mechanisms aided by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to privately pursue alleged proceeds of crime in the criminal case.
24. He urged this Court to allow the application and expunge the affidavits of Carl D. Rusnell sworn on the 23<sup>rd</sup> March, 2023 and that of Francis Mulinga sworn on the 3<sup>rd</sup> of May, 2023.
25. The 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents' submissions are dated 26<sup>th</sup> May, 2023. They submitted on the single issue of whether the Petitioner has satisfied the grounds for granting the constitutional remedies and reliefs prayed. They relied on the principles of granting a conservatory order that were discussed in the case of *Board Of Management of Uhuru Secondary School vs. City Council Director Of Education & 2 Others (2015) EKL.R.*, *The Supreme Court in Civil Application No. 5 of 2014 Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others (2014) Eklr And Nairobi Civil Appeal 151 of 2011 Invesco Assurance Co. Limited vs. Mw (minor suing thro next friend and mother (HW)) (2016) EKL.R.* They stated that conservatory orders are aimed at preserving the substratum of the matter pending hearing and determination of the main issues in dispute and because they are interlocutory in nature, it is prudent for a court to exercise caution when dealing with such a request. That matters which are the preserve of the main petition should not be dealt with finality at this stage.
26. While utilising the principles for awarding conservatory orders outlined in the case of *Gatirau Peter Nyamu (supra)*, the Respondents stated that the Petitioner ought to demonstrate that he has a *prima facie* case, and whether public interest will be served or prejudiced by a decision to exercise discretion to grant or deny the orders. On whether the application brings forth a *prima facie* case, the Respondents relied on the cases of *Mrao vs. First American Bank Of Kenya Limited & 2 Others (2003) EKL.R.*, that of *David Ndii (supra)* and that of *Mirugi Kariuki Vs. Attorney General Civil Appeal No. 70 of 1991 (1990-1994) E.A 156, (1992) KLR 8*, and submitted that this Court must be guided Articles 22 (1) and 258 (1) of [the Constitution](#) and look at the case as a whole, which must weigh, albeit preliminarily, the pleadings, the factual basis, the respective parties positions, the remedies sought and the law. That



- there was no prima facie case on the said point to entitle the Plaintiff to complain of the defendants' proposed activities that is the end of any claim to interlocutory relief.
27. The urged this Court not to grant the reliefs sought in the application.
  28. The 3<sup>rd</sup> Respondent's submissions are dated 26<sup>th</sup> May, 2023. He gave a brief background of the case and proceeded to submit on the following issues for determination: Giella vs. Cassman Brown: thresholds and/or requirements to be considered for grant for the grant of injunctive orders; abuse of the court process; and the preliminary objection.
  29. While submitting on the first issue, the 3<sup>rd</sup> Respondent relied on the principles set out in the case of Giella vs. Cassman Brown & Co. Ltd (1973) Ea 358 and submitted that the Petitioner has to prove that he has a prima facie case, that he will suffer irreparable injury which can not be compensated by way of damages if the interlocutory injunction is not granted, and that if the Court is in doubt, it should decide the application on a balance of convenience.
  30. He relied on the case of Mrao vs. First American Bank Of Kenya Limited & 2 Others (2003) KLR 125 which described what should entail a prima facie case. That the petitioner's application and ultimately the petition is that his rights are being infringed by reason that there are criminal and civil proceedings being conducted concurrently. The 3<sup>rd</sup> Respondent submitted that for the Petitioner to be successful in proving a prima facie case he has to demonstrate that: the law does not permit concurrent progression of both criminal and civil suits and secondly, that the law prohibits a complainant from using evidence obtained from investigations in a civil suit. That section 193 A of the Criminal Procedure Code and the decided case of Republic vs. Chief Magistrate Criminal Division & Another Exparte Mildred Mbuya Joel (2014) EKLR, the Court stated that the pending civil proceedings on the same subject matter does not ipso fact warrant the halting of otherwise prima facie proper criminal proceedings.
  31. That it is also apparent that the law allows the use, by a victim, of evidentiary material obtained from criminal proceedings so as to establish a prima facie case in civil proceedings. The Respondent submitted further that the criminal case was commenced prior to the civil suit and it is therefore improbable that the criminal case was instituted for collateral purpose. That the Petitioner has failed to prove that he has a prima facie case as discussed in the case of Nguruman Limited Vs. Jan Bond Nielsen & 2 Others (2014) Eklr.
  32. That the Petitioner has also not demonstrated to the Court how the criminal suit will cause him injury that cannot be adequately compensated in damages as stated in the case of Pius Kipchirchir Kogo vs. Frant Kimeli Tenai (2018) EKLR. That in the proceedings before the criminal court, the Petitioner has had an opportunity to interrogate all the evidentiary material that the rely on and even cross-examined the 3<sup>rd</sup> Respondent for over two hours. As such, there is no semblance of perceptible injury that the Petitioner is exposed to, noting that there he has not led any evidence to demonstrate a prima facie case.
  33. The 3<sup>rd</sup> Respondent submitted further that the onus was on the Petitioner to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it. That the Petitioner seeks to curtail the 3<sup>rd</sup> Respondent's rights without sufficiently adducing evidentiary proof to sustain a prima facie case of the alleged malice, abuse of authority and abuse of court process to the detriment of the said Respondent. That the Petitioner has not proved that injunctive orders should be granted.
  34. The Respondent went further to submit that the instant proceedings were an abuse of the court process because the Petitioner had chosen to institute them six years after the criminal case had been instituted. That the petition was filed six days before the hearing of the criminal case and that this was so as to



barricade and/or stop the commencement of the hearing. He placed reliance on the case of Muchanga Investments Ltd vs. Safaris Unlimited (africa) Ltd & 2 Others (2009) EKL.R.

35. The 3<sup>rd</sup> Respondent also submitted on the preliminary objection and stated that the said objection does not conform to the dictates of what comprises a preliminary objection and it ought to fail. That the said preliminary objection only raises issues of fact and not law. That this was the holding in the case of Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) EA 696. That further in the case of the Oraro vs. Mbaja (2005) 1klr 141 the Court stated that anything that purports to be a preliminary objection must not be deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence. Section 83(1) of the Law of [Evidence Act](#) provides that the Court shall presume to be genuine every document purporting to be a certificate, a certified copy or other documents is declared by law to be admissible as evidence of any particular fact and which is substantially in the form and purporting to be executed in the manner directed by law in that behalf. That the presumption of genuineness is enshrined in the [Evidence Act](#) and the Court in the case of West African Foodstuffs Co. Ltd & 2 Others Vs. Kayser Investment Ltd (2021) EKL.R.
36. That expunging the affidavit will occasion drastic repercussions to the Respondent but there is no prejudice that will be occasioned to the Petitioner is there no new material that has been adduced in the said affidavit that would raise issues of authenticity and validity.
37. The 3<sup>rd</sup> Respondent concluded by submitting that the impugned application is incapable of success for having failed to attain the threshold set in the Giella vs. Cassman Brown Case (supra) and further that the Preliminary Objection having breached the fundamental mandatory requirements is fatally bad at law and cannot be allowed.

### **Analysis and Determination**

38. After scrutinizing the pleadings and submissions, I find that the following issues arise for determination:
- a. whether the applicant's preliminary objection is merited.
  - b. whether conservatory orders should be granted;
  - c. who pays costs of the application?
39. The Applicant has raised a preliminary objection centred majorly on the 3<sup>rd</sup> Respondent's replying affidavit. He asks that the same be struck out for not only being filed out of time but also on account of its invalid/improper execution.
40. It is trite law that a preliminary objection should be based majorly on points of law and not on facts. It is based on the fact that the facts relied on are uncontested or taken as they are. The Court in the case of Charles Onchari Ogoti vs. Safaricom Ltd & Anor [2020] EKL.R stated as follows:
- “(9) This court is aware of the leading decision on Preliminary Objection where the Court of Appeal for East Africa, then the highest court for purposes of this jurisdiction and the others in East Africa in Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd. (1969) EA 696, where Law J.A. and Newbold P. (both with whom Duffus V-P agreed), respectively at 700 and 701, held as follows:



Law, J.A.:

“So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Newbold, P.:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

41. The Supreme Court also affirmed in the case of Hassan Ali Joho & Another -v- Suleiman Said Shabal & 2 Others Sck Petition No. 10 Of 2013 [2014] EKLK when it stated that:

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.”

42. The preliminary objection by the Petitioner seeks to attack/fault the the replying affidavit of Carl Rusnell on account that it offends document legalization requirements by being not properly commissioned, as it was commissioned by three persons in three different geographical jurisdictions. Looking at the issues raised, one cannot say that the applicant’s Preliminary Objection is based on facts that are presumed to be correct or uncontested. As clearly pointed by Counsel for the 3<sup>rd</sup> Respondent, the facts relied upon by the applicant are in contest such as the affidavit was commissioned by three different people in three different geographical jurisdictions, fact disputed by 3<sup>rd</sup> respondent who offered a different explanation. A preliminary objection cannot be based on facts that are argumentative. As was held in the celebrated case of Mukisa Biscuits vs West End Distributors (supra) a pure point of law is argued on assumption that all the facts pleaded by the other side are correct and cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
43. I thus find that the preliminary objection fails to meet the legal test that qualifies it as such. That notice of preliminary objection is thus struck out.
44. On whether the conservatory orders should issue, the Petitioner contends that it is against his constitutional rights and freedoms to have two cases, the criminal case and the civil suit run concurrently and where information in one case is used against him in the other. The object of



conservatory orders was discussed in the case of David Ndi & Others vs. Attorney General & Others (2021) EKLK, where the learned Judges in granting Conservatory Orders held that;

“... Such orders are granted to preserve the substratum of the Petition and therefore, where it is contended that there is a threat of violation of *the Constitution*, any stage in the chain of a constitutional process under challenge may properly be the subject of a conservatory order as long as that action is consequential to the process under challenge...”

45. In the case of Law Society Of Kenya vs. Office Of The Attorney General & Another, Judicial Service Commission (interested Party) [2020] EKLK, the Court discussed the conditions for grant of conservatory orders by stating thus:

“... The Applicant has demonstrated an arguable prima facie case with likelihood of success and shown in absence of the conservatory orders he/she is likely to suffer prejudice; the Applicant has further met the second principle that grant or denial of conservatory relief will enhance the Constitutional values and objectives of a specific right or freedom in the Bill of Rights; thirdly the Applicant has demonstrated, if interim orders or conservatory orders are not granted, the Petition or its substratum will be rendered nugatory and finally has demonstrated that public interest will be prejudiced by a decision not to grant conservatory orders...”

46. Lenaola J (as he then was) in Wilson Kaberia Nkunja vs. Magistrates And Judges Vetting Board & Another [2016] EKLK summarized the main principles as follows:-

“It therefore follows that an applicant must satisfy three key principles in order to make out a case for the grant of conservatory orders that is:-

- a. An applicant must demonstrate that he has a prima facie case with a 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*;
- b. Whether if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
- c. The public interest must be considered before grant of a conservatory order.”

47. The Applicant contends that the parallel civil and criminal proceedings violates his rights and fundamental freedoms and seeks to have the documents that have been produced in the civil case be barred from being used in the criminal proceedings. He states that whilst obtaining the said documentation, he was harassed by the Respondents and his property confiscated.

48. The court in Kuria & 3 Others vs. AG (2002) 2 KLR discussed the viability of existence of concurrent civil and criminal proceedings before reaching the following conclusion: -

“...A prerogative order should only be granted where there is an abuse of the process of the law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution... It is not enough to state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process



of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the Applicant are under serious threat of being undermined by the criminal prosecution. In the absence of concrete grounds.... it is not mechanical enough that the existence of a civil suit precluded the institution of criminal proceedings based on the same set of facts. The effect of criminal prosecution on an accused person is adverse but so also are their purpose in the society, which are immense... an order of prohibition cannot also be given without any evidence that there is manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial...”

49. Section 193A of the Criminal Procedure Code provides that:

“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.’

50. While discussing the import of section 193A, the Court of Appeal in the case of Lalchand Fulchand Shah vs. Investments & Mortgages Bank Limited & 5 Others [2018] EKLK stated thus:

“In terms of Section 193A of the Criminal Procedure Code, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings does not bar the commencement of criminal proceedings. However, where the criminal proceedings are oppressive, vexatious and an abuse of the court process or amounts to a breach of fundamental rights and freedoms, the High Court has the powers to intervene. But this power has to be exercised very sparingly as it is in the public interest that crime is detected and suspects brought to justice.”

51. Under 50 (2)(k) of *the Constitution*, the accused in a criminal trial has the right to adduce and challenge evidence. The Petitioner is raising matters of admissibility of evidence in the criminal case before wrong forum. He should object to the admissibility of the specific evidence before the trial court that is seized with jurisdiction over the criminal case.

52. The Petitioner’s claim that the production of the documents in the criminal case which have already been produced in the civil case infringes on his rights and fundamental freedoms has not been demonstrated. He has failed to substantiate the conditions for granting the conservatory orders sought.

53. The upshot of the foregoing is that the preliminary objection and the notice of motion application have no merit. They are dismissed with costs

**Dated, Signed and delivered at Milimani this 5<sup>th</sup> day of October, 2023**

**L.N MUGAMBI**

**JUDGE**

