



**Ragot v Officer in Charge, Directorate of criminal Investigations Department,  
Kisumu & 2 others; Njer (Interested Party) (Constitutional Petition  
E013 of 2024) [2024] KEHC 15774 (KLR) (9 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15774 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CONSTITUTIONAL PETITION E013 OF 2024  
RE ABURILI, J  
DECEMBER 9, 2024**

**BETWEEN**

**JUDE THADEUS RAGOT ..... PETITIONER**

**AND**

**THE OFFICER IN CHARGE, DIRECTORATE OF CRIMINAL  
INVESTIGATIONS DEPARTMENT, KISUMU ..... 1<sup>ST</sup> RESPONDENT**

**ROBERT KIPSUM ..... 2<sup>ND</sup> RESPONDENT**

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

**AND**

**OTIENO DAVID NJER ..... INTERESTED PARTY**

**RULING**

1. The petitioner herein Mr. Jude Thadeus Ragot is an advocate of this Court. He is a partner in the firm of Owiti, Otieno & Ragot Advocates, whose offices are situated within Kisumu City.
2. The Respondents are the office and office holder responsible for criminal investigations within Kisumu County.
3. Vide a petition dated 4<sup>th</sup> July 2024, the petitioner who also filed a Notice of motion dated the same day, seeks from this Court various orders.
4. The petitioner seeks for a declaration that the respondents' refusal to supply him with witness statements of the complainant who is his partner in the law firm and the statements of other witnesses and the documents presented to the respondent in support of the complaint against the petitioner, of



- alleged threats to kill the said complainant is in violation of the petitioner's fundamental rights and freedoms.
5. The petitioner also seeks for judicial review by way of mandamus to compel the respondents to supply him with the said documents and witness statements and a permanent injunction to restrain the respondents from concluding investigations of the complainant or arresting the petitioner, based on the alleged complaint lodged by the complainant vide OB No. 68 of 5<sup>th</sup> June, 2024 or otherwise giving anu recommendation to the Director of Public Prosecution for prosecution of the petitioner before supplying the petitioner with the aforesaid documents and statements of witnesses including the complainant's.
  6. The petitioner's case against the respondents is that on 18<sup>th</sup> June 2024, he received a phone call from one of the officers at the respondents' offices in Kisumu informing the petitioner applicant herein that they were investigating a complaint lodged by the petitioner's partner Mr. Otieno David Njer advocate, and that the petitioner should avail himself to the 1<sup>st</sup> Respondent's offices for a meeting, but that the investigator, Mr. Benfelt Otieno declined to divulge more on the nature of the complaint.
  7. That in the subsequent telephone calls between the petitioner and the said investigators, the 2<sup>nd</sup> respondent Robert Kipsum came into the picture as the Senior Superintendent of police and DCIO, Kisumu disclosed to the petitioner that the were investigating an alleged threat to kill complaint against the petitioner directed at his partner Mr. Otieno David Njer.
  8. That the said Robert Kipsum showed the petitioner two witness statements filed by the complainant and their other partner Mr. Kennedy Odhiambo Owiti and some documents contained in the investigations file and that the petitioner was requested to write a statement concerning the allegations, to enable them decide whether to press charges against the petitioner or not.
  9. That when the petitioner requested for copies of witness statements and the documents in question, the respondents herein refused and instead gave him the occurrence Book report made by the complainant.
  10. That from the occurrence Book report, the allegations of threats to kill against the petitioner are vague and that his legitimate expectation is to be supplied with the witness statements so that he can adequately respond to the allegations made against him.
  11. That unless the petitioner is given the documents in question, he will not be in a position to understand the inquiry against him which will lead to the Director of Public Prosecutions framing charges against him on the basis of an erroneous state of facts as presented by the petitioner, thereby prejudicing him.
  12. That despite the petitioner writing a demand letter to the respondents on 1<sup>st</sup> July 2024, and personally delivering the said letter, the respondents had adamantly refused to supply him with the requested documents, which refusal deprives the petitioner of the right to a fair hearing.
  13. That the complaint is malicious, false, ridiculous and preposterous and with an intention to deliberately mislead the police and ODPP to commence unnecessary criminal proceedings against the petitioner on trumped up charges which are baseless and intended to harass and intimidate the petitioner over his lawful partnership shares in the law firm where they run a joint business without the petitioner having to pursue his claim in an ongoing partnership dispute since January, 2023 and which dispute between the complainant and his witness is already pending before an alternative agreed upon dispute resolution forum.
  14. When the application was first placed before the duty Judge Shariff J on 15/7/2024, she granted a temporary injunction restraining the respondents from arresting the petitioner/ applicant herein until



the application was heard and determined. She also granted the applicant anticipatory bond of Kshs 500,000 plus one surety of similar amount and directed the applicant to serve the respondents for inter partes directions.

15. When the matter came up before me on 29<sup>th</sup> September, 2024, it became apparent that the complainant and the ODPP were necessary parties to the petition hence the court made orders enjoining them to the petition as interested party and respondent respectively. The court also granted leave to the petitioner to amend the petition and parties were granted time to file their replying affidavits and submissions. However, neither the respondents nor the interested party filed any replying affidavit or submissions.
16. On 6/11/2024 when the matter came up to confirm compliance with the directions of the court, only the petitioner had filed submissions and so the court fixed a ruling date for today 5/12/2024.
17. The petitioner's submissions mirror the petition, grounds and the supporting affidavit.
18. The petition was brought under various provisions of *the Constitution* on the face of the petition and the application for conservatory orders seeking to restrain the respondents by way of an injunction from concluding investigations into the complaint of alleged threat to kill the complainant and that the respondents do release to the petitioner applicant, copies of witness statements and the documents intended to be relied on in the investigations against the applicant/ petitioner for alleged threats to kill the complainant reportee.
19. I have considered the petitioner/applicant's application and the complainant that the respondents have declined to supply the petitioner with witness statements and documents presented to them by the complainant Mr. Otieno David Njer of an alleged threat to kill him by the petitioner applicant who is his partner in the law firm.
20. I have also considered the submissions in support thereof.
21. The issue for determination is whether the application has any merit and what orders this court should make.
  1. The commencement point is the police powers. The power of the National Police Service through the Directorate of Criminal Investigations Commission under *the Constitution* and the *National Police Service Act* to investigate complaints and the power of the ODPP to prosecute crimes is not in dispute. It is also not in dispute that in the exercise of their powers, the police and ODPP are bound by *the Constitution* and the powers donated by the statutes providing for the establishment and functions of the two institutions in the criminal justice system.
  2. The question would be whether the two institutions in any given circumstances, have exercised their powers in accordance with *the Constitution* and the statutes.
  3. The criminal process entails safeguards which are meant to ensure that an accused person is afforded a fair trial as envisaged under Article 50 of *the Constitution*.
  4. In the instant case, the Petitioner is not yet an accused person and neither is he an arrested person. If arrested, he deserves to be accorded the rights set out in Article 49 of *the Constitution* and if he is charged with an offence, then the rights under Article 50 (2) of *the Constitution* crystallize automatically such that he will be accorded an opportunity to defend himself in the criminal case in accordance with the law.
  5. From the pleadings, the petitioner was summoned and notified by the 1<sup>st</sup> and 2<sup>nd</sup> respondents that there was a complaint of threat to kill lodged against him by Otieno David Njer Advocate,



his business partner in the law firm and they even supplied him with a Police occurrence Book report showing the exact complaint. I have read the report as booked by the police. The complaint is that of threatening to kill.

6. It is therefore upon the police to investigate that complaint by recording statements of witnesses and also notifying the petitioner who is their prime suspect in the complaint, in the even that he has his side of the story to give, for the police to make a decision whether to prefer any charges or not and in consultation with the ODPP.
7. In doing so, the suspect is not bound to record any statement on the allegations levelled against him because he enjoys the right to be presumed to be innocent.
8. Over time, Courts have held the view that they ought not to usurp the constitutional mandate of the Respondents to investigate crimes and initiate criminal proceedings respectively provided the same is done in a justifiable manner. This position was adopted in the case of Michael Monari & Another vs Commissioner of Police & 3 Others, Misc. Application No. 68 of 2011. The 1st Respondent being an independent institution established under *the Constitution*, the Court can only interfere with or interrogate their actions where there is contravention of *the Constitution*. In Paul Ng'ang'a Nyaga vs Attorney General & 3 Others (2013) eKLR, it was held that:

“... this court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they have acted in contravention of *the Constitution*.”
9. Further in Leonard Otieno vs Airtel Kenya Limited [2018] eKLR, the Court further rendered itself as follows:

“It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize *the Constitution* and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not a mere technicality; rather, it is essential to a proper consideration of constitutional issues.”
22. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses. Furthermore, Article 24 (1) of *the Constitution* provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.
23. Has the Petitioner discharged the burden of proof with regards to the alleged violations of his fundamental rights, which is, failure by the respondents to supply him with witness statements and documents in support of the complaint against him for allegedly threatening to kill the complainant David Otieno Njer, his business partner in the law firm?
24. In answering this question, this court will first analyze the role of the judiciary as an independent institution and therefore this Court's role in the protection and promotion of fundamental rights and freedoms espoused in the Bill of Rights under our 2010 Constitution.



25. The Judiciary is independent and Courts decide matters on merit. This is a key tenet in the administration of justice. The Court in exercising judicial authority as contemplated in Article 159 of *the Constitution* does so on behalf of the people of Kenya. It does so in an impartial and accountable manner.
26. Article 160 of *the Constitution* provides that in the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall not be subject to the control or direction of any person or authority.
27. The Petitioner is therefore entitled to enjoy the guaranteed right to equal protection of the law in any Court of law and a fair administrative process as matters are decided on merit, hence no recourse to worries. This is what Article 27 and 47 of *the Constitution* provide.
28. The Respondents have not filed any responses to the petition or the application for conservatory orders seeking to injunct them from concluding investigations into the alleged threat to kill complaint and to compel them to supply the petitioner with the witness statements and the documents that the complainant relied on to lodge the complaint.
29. As earlier stated, the police have not concluded the investigations and neither have they arrested or charged the petitioner with any offence following the complaint by the petitioner's business partner in the law firm, that he was threatened with death by the petitioner herein.
30. In my view, the 1st and 2nd Respondents cannot be said to be infringing the constitutional rights of any person. It has also not been demonstrated how, in these initial stages of the investigations, the petitioner's rights have been violated by the respondents.
31. On the investigative and apprehension powers of the 1<sup>st</sup> and 2nd Respondents, the National Police Service through the directorate of criminal investigations and its officers draw their authority to investigate from Article 245 of *the Constitution* and Section 35 of the *National Police Service Act*. Under Section 35 of the *National Police Service Act*, 2013, the functions of the police include undertaking investigations, apprehending offenders as well as detecting and preventing crime. In the exercise of its powers of investigation and arrest, the 1<sup>st</sup> and 2nd Respondent are functionally independent and can only take directions to investigate from the ODPP, the 3<sup>rd</sup> Respondent as enjoined.
32. In *Republic vs The Commissioner of Police & the Director of Public Prosecution ex parte Michael Monari & Another Misc. Application No. 68 of 2011*, Nairobi, the Court stated thus: -

“.... the Police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The Police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said not to have been the vindication of the criminal justice system. As long as the prosecution and those charged with the responsibility of making the decision to charge act in a reasonable manner, the High Court would be reluctant to intervene.”[emphasis added]
33. The above position is amplified by the Court of Appeal in *Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others* [2018] eKLR citing the Supreme Court of India decision in *State of Maharashtra & Others v. Arun Gulab & Others*, Criminal Appeal No. 590 of 2007, where the Court stated:

“The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in



embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction to the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings.

The provisions of Articles 226, 227 of *the Constitution* of India and Section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as “Cr.P.C.”) are a device to advance justice and not to frustrate it. The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of power of the Court, but the more the power, the more due care and caution is to be exercised in invoking these powers.”

34. In the Bernard Mwikya Mulinge v Director of Public Prosecutions & 3 others [2019] eKLR case, the High Court, Odunga J (as he then was) expressed itself as follows: -

“As has been held time and time again, the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions (DPP) to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of *the Constitution*. The mere fact therefore that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not ipso facto a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. An applicant who alleges that he or she has a good defence in the criminal process ought to ventilate that defence before the trial court and ought not to invoke the same to seek the halting of criminal proceedings undertaken bona fides since judicial review court is not the correct forum where the defences available in a criminal case ought to be minutely examined and a determination made thereon...”

35. In Meixner & Another vs. Attorney General [2005] 2 KLR 189 the Court stated as follows:

“The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of *the Constitution*. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of *the Constitution*). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion is acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in *the Constitution* particularly the right to the protection by law enshrined in section 77 of *the Constitution*...”

36. Mumbi Ngugi, J (as she then was), in Kipoki Oreu Tasur vs. Inspector General of Police & 5 Others (2014) eKLR stated that:

“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...”

37. In Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR the Court held that:

“... the police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court...As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene....”

38. The High Court in Henry Aming’a Nyabere v Director of Public Prosecutions & 2 others; Sarah Joslyn & another (Interested Parties) [2021] eKLR dealt with several instances where a Court may intervene and stop a prosecution. They include where: -

- i. There is no ostensible complainant in respect to the complaint;
- ii. The prosecution fails to avail witness statements and exhibits without any justification;
- iii. There is selective charging of suspects; or
- iv. An Advocate is unfairly targeted for rendering professional services in a matter.

39. Thus, 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.

40. For this petitioner to succeed in the interlocutory application herein for conservatory orders of even in the petition itself, he must demonstrate the stifling of or threats of infringement of his rights, fundamental freedoms, *the Constitution* and/or the law by the investigative and prosecutorial agencies. The Petitioner may also demonstrate that the intended investigations or prosecution of the criminal case is not in public interest or is not in the interests of the administration of justice or that the prosecution is in abuse of the legal process. Equally, the Petition may succeed if the Petitioner proves that the investigations were undertaken contrary to Article 244 of *the Constitution*, the *National Police Service Act* and the laws, generally.

41. Article 49 of *the Constitution* provides for the rights of arrested persons while Article 50 provides for the rights to a fair hearing and a fair trial in respect of accused persons. Among the guaranteed rights to both categories of persons falling under Articles 49 and 50 (2) of *the Constitution* are the right to remain silent, not to be compelled to confess or admit any offence, to have adequate time and facilities to prepare a defence, to be informed of the charge with sufficient detail to answer it, to be presumed innocent until the contrary is proved to be informed in advance of the evidence that the prosecution intends to rely on and to have reasonable access to that evidence.

42. The petitioner has not been charged and neither is he an accused person. None of the rights contained in the bill of rights have been established, on prima facie basis, to have been violated or threatened to be violated. The petitioner seeks that this court injuncts the respondents from concluding investigations until they supply him with witness statements and documents intended to be relied upon.



43. In my view, the prayers sought in the application for conservatory orders and in the main petition are premature and therefore not available. The respondents cannot be barred, as stated in the decisions cited above, from investigating a complaint, in the absence of any evidence that the investigations are intended to achieve an ulterior motive or that there is absolutely no basis for such investigations to be commenced or concluded.
44. Conservatory orders are aimed at preserving the substratum of the matter pending the determination of the main issues in dispute. Given the interlocutory nature of conservatory orders, courts are to exercise caution when dealing with any request for conservatory orders. Matters which are the preserve of the main petition ought not to be dealt with finality at the interlocutory stage.
45. The principles for grant of conservatory orders are stated in the case of *Katiba Institute v Judicial Service Commission & 2 others; Kenya Magistrates and Judges Association & 2 others (Interested Parties) (Constitutional Petition E128 of 2022) [2022] KEHC 438 (KLR) (Constitutional and Human Rights) (3 June 2022) (Ruling)* by Mrima J to be, inter alia:
- a. The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he was likely to suffer prejudice.
  - b. Whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
  - c. Whether, if an interim conservatory order was not granted, the petition or its substratum would be rendered nugatory.
  - d. Whether the public interest would be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.
46. In the instant case, I am not satisfied that a prima facie case has been established to warrant grant of the interim conservatory orders sought. The petition is premature and so is the application for conservatory orders.
47. For the above reason, I find no reason to sustain the petition or to grant the interlocutory conservatory orders sought. The application dated 4<sup>th</sup> July 2024 is dismissed and the petition dated the same day is hereby struck out for being premature.
48. Each party to bear their own costs of the petition and of the notice of motion dated 4<sup>th</sup> July, 2024.
49. The anticipatory bond granted to the petitioner lapses and the surety is discharged. Any security deposited into court shall be released forthwith.
50. This file is closed.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 9<sup>TH</sup> DAY OF DECEMBER, 2024**

**R.E. ABURILI**

**JUDGE**

