



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E128 OF 2021

BETWEEN

SAMUEL ASIAGO KIARI.....PETITIONER

VERSUS

DIRECTORATE OF CRIMINAL INVESTIGATIONS.....1ST RESPONDENT

OFFICER COMMANDING POLICE STATION, MUTHANGARI

POLICE STATION.....2ND RESPONDENT

ANTHONY DOYLE.....3RD RESPONDENT

RULING

1. By way of a notice of motion application dated 31st March, 2021 the Petitioner, Samuel Asiago Kiari, seeks the following orders:

i. Spent;

ii. Pending the hearing and determination of this Application an order be issued compelling the 1st and 2nd Respondents, its employees or representatives to forthwith release Petitioner's Motor Vehicle Registration Number KCU 872M;

iii. Pending the hearing and determination of this Petition an order be issued compelling the 1st and 2nd Respondents, its employees or representatives to forthwith release Petitioner's Motor Vehicle Registration Number KCU 872M;

iv. Pending the hearing and determination of this Application an order be issued against the 1st and 2nd Respondents from disposing of or releasing Motor Vehicle Registration Number KCU 872M to any other person other than the Petitioner;

v. Pending the hearing and determination of this Application (Petition?) an order be issued against the 1st and 2nd Respondents from disposing of or releasing Motor Vehicle Registration Number KCU 872M to any other person other than the Petitioner;

vi. Pending the hearing and determination of this Application an order be issued restraining the 1st and 2nd Respondents from harassing and interfering with the peaceful enjoyment of the Petitioner's Motor Vehicle Registration Number KCU 872M;

vii. Pending the hearing and determination of this Petition an order be issued restraining the 1st and 2nd Respondents from harassing and interfering with the peaceful enjoyment of the Petitioner's Motor Vehicle Registration Number KCU 872M; and

viii. The cost of this Application be borne by the Respondents.

2. The application is premised on the grounds on its face and the Applicant's affidavit sworn on the date of the application.
3. The Applicant's case is that he is a shareholder and director of Prime Batteries East Africa Limited (hereinafter simply referred to as the Company) which is located at Pili Trade Centre, along Mombasa Road. He avers that the 3rd Respondent, Anthony Doyle, is also a shareholder and director of the company. It is the Applicant's averment that he has had significant differences regarding the control, management and direction of the Company with the 3rd Respondent. His deposition is that attempts to resolve the differences, including a proposal that the 3rd Respondent buys out his interest have not been successful.
4. The Applicant's averment is that his case stems from the 3rd Respondent's complaint to the 1st and 2nd respondents that he had stolen motor vehicle registration No. KCU 872M which was assigned to him by the Company. Following the lodging of the report he was summoned by the 1st and 2nd respondents on 20th March, 2021 and instructed to surrender the motor vehicle in question to them for transmission to the 3rd Respondent.
5. According to the Applicant, the 1st and 2nd respondents did not obtain any statement from him or conduct any investigations to ascertain the allegations of the 3rd Respondent but simply discriminated against him due to what he terms as the 3rd Respondent's 'white supremacy'. It is the Applicant's averment that upon raising concerns about the legality of the process and the bias displayed against him, the 1st and 2nd respondents proceeded to place the motor vehicle under police custody awaiting the settlement of their dispute over the ownership of the Company.
6. It is the Applicant's case that the 3rd Respondent's actions are motivated by his personal vendetta against him as evidenced by the difficult history in the management of the Company. According to the Applicant, further evidence of malice is evidenced by his pending claim at the Employment and Labour Relations Court Cause No. E021 of 2021 for unlawful and unfair dismissal by the 3rd Respondent during the Covid-19 pandemic.
7. The respective 1st to 3rd respondents being the Directorate of Criminal Investigations; Officer Commanding Police Station, Muthangari Police Station; and Anthony Doyle did not respond to the application despite being served.
8. The Applicant filed written submissions dated 20th May, 2021. It is the Applicant's submission that the 1st and 2nd respondents, being officers of a State organ, are bound by the national values and principles of governance set out in Article 10 of the Constitution which include equity, social justice, equality, human rights, non-discrimination, good governance, integrity, transparency and accountability. Further, that his right to equality and freedom from discrimination under Article 27, right to privacy under Article 31, right to property under Article 40, right to fair administrative action under Article 47, right to access justice under Article 48, and right to fair hearing under Article 50 of the Constitution have been infringed.
9. According to the Applicant, the 1st and 2nd respondents violated his constitutional rights by being biased against him hence denying him the right to equal protection and benefit of the law; failing to investigate the complaint as required by the law thus enabling the 3rd Respondent to harass him; discriminating against him on the grounds of race and seizing the motor vehicle; and failing to record his statement when they summoned him on 20th March, 2021.
10. The Applicant contend that the 1st and 2nd respondents are bound by provisions of Article 73 of the Constitution which require State officers to serve the people in a manner that promotes public confidence in the integrity of their offices. It is further the Applicant's argument that the 1st and 2nd respondents discharged their duties contrary to the principles of public service and in particular the objects and purposes of the National Police Service.
11. According to the Applicant, the dispute between him and the 3rd Respondent is with regard to the management of the Company which falls with the domain of company law and not criminal law. In support of this argument, reliance is placed on the decisions in **Muchiri Kiuma Maina v Attorney General [2018] eKLR; Civil Application No. Nai. 186 of 1992 (NAI 77/92 UR) Kamau Mucuha v Ripples Limited; and Commissioner of Police & The Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others [2013] eKLR**, for the holding that it is not in the public interest or in the interest of the administration of justice to use the criminal justice process as a pawn in civil disputes.
12. The Applicant additionally submits that there was no proper basis for commencement of the criminal proceedings due to lack of material evidence to constitute a prosecutable case. To buttress this argument, the Applicant relied on the case of **Republic v Attorney General Ex-parte Kipngeno Arap Ngeny, High Court Civil Application No. 406 of 2001** where it was held that any criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior purpose.
13. The Applicant consequently urges this Court to grant him conservatory orders pending the hearing and determination of the petition in order to protect his case from being rendered nugatory.
14. Upon perusal of the pleadings and submissions, it emerges that the only issue for the determination of this Court is whether the Applicant has met the conditions for the grant of conservatory orders.
15. In **Invesco Assurance Co v MW (Minor suing thro' next friend and mother (HW) [2016] eKLR** the meaning and purpose of a conservatory order was stated as follows:

“A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of *status quo* for the preservation of the

subject matter.”

16. The principles that guide courts in determining whether to grant conservatory orders are now well settled. The principles were pronounced by the Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others** [2014] eKLR thus:

“[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...*”

17. The Court in the case of **Centre for Rights Education and Awareness (CREAW) & another v Speaker of the National Assembly & 2 others** [2017] eKLR held that:

“A party who moves the Court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation, are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending cause or petition...

A conservatory order would normally issue where there is real impending danger to violation of the Constitution or fundamental rights and freedoms with a consequence that a petitioner or the public at large would suffer prejudice unless the court intervenes and grants Conservatory orders. In such a situation, the Court would issue a conservatory order for purposes of preserving the subject matter of the dispute.”

18. The principles to be taken into account in deciding whether an applicant is deserving of a conservatory order were summarized in **Wilson Kaberia Nkunja v Magistrates and Judges Vetting Board & another** [2016] eKLR as follows:

“25. 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.*”

19. The question that follows is whether the Applicant has satisfied the conditions for the grant of conservatory orders. The first condition is the need to establish an *prima facie* case. In **Mrao Ltd v First American Bank Ltd & 2 others** [2003] KLR 125 what constitutes a *prima facie* case in civil cases was defined as follows:

“So what is a *prima facie* case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...a *prima facie* case is more than an arguable case. It is not

sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”

20. The Applicant's averment before this Court that the dispute stems from a commercial relationship between him and the 3rd Respondent as they are both directors at Prime Power Batteries East Africa Limited remains uncontroverted. The Applicant's case raises fundamental issues of law involving the exercise of the 1st and 2nd respondents' constitutional and statutory powers. One of the questions to be answered in the substantive proceedings is whether the two respondents have jurisdiction to meddle in a dispute over the ownership of a private company where there is no evidence that a crime has been committed.

21. It is the Applicant's averment that although he was summoned by the 1st and 2nd respondents to answer an allegation that he had stolen a motor vehicle, his statement was not recorded but the motor vehicle was instead seized and he was told it would only be released after the dispute over the ownership of the Company was resolved. This is clear evidence that the 1st and 2nd respondents were not investigating a criminal offence but were instead using their police powers to force the Applicant to release the motor vehicle to the 3rd Respondent. The Applicant has therefore shown that the police powers may have been abused to the detriment of his constitutional rights.

22. From the facts placed before the Court, it is reasonable to reach the conclusion that this petition highlights a 'threat' to the Applicant's rights and fundamental freedoms as envisaged in the Constitution. It follows that as observed in **Mrao Ltd** (supra), **“a right which has apparently been infringed by the opposite party calls for an explanation or rebuttal from the latter”**. To that end I am inclined to find that the Applicant's case does disclose an arguable *prima facie* case. The Applicant has thus surmounted the first hurdle.

23. The next step is to find out if the Applicant has demonstrated that failure to grant the orders sought would render his petition nugatory. In the case of **Muslims For Human Rights (MUHURI) & 2 others v Attorney General & 2 others [2011] eKLR**, the Court while considering the circumstances under which conservatory orders should be granted observed that:

“What is clear to me from the authorities is that strictly a “Conservatory Order is not an injunction as known in Civil matters or generally in other legal proceedings but is an order that tends to and is intended to preserve the subject-matter or set of circumstance that exist on the ground in such a way that the Constitutional proceedings and cause of action is not rendered nugatory. Through a Conservatory Order the court is able to “give such directions as it may consider appropriate for the purpose of securing of ... the provisions of the Constitution (see – BANSRAJ above)”. A Conservatory Order would enable the court to maintain the status quo or existing situation or set of facts and circumstances so that it would be still possible that the rights and freedoms of the claimant would still be capable of protection and enforcement upon determination of the Petition and the trial was not a futile academic discourse or exercise.”

24. The supporting affidavit sworn by the Applicant makes reference to the existence of a strained commercial relationship between him and the 3rd Respondent in regard to the control and management of their business. It is discerned from the evidence that despite an attempt to resolve the matter the 3rd Respondent resorted to reporting the matter to the police. It is averred that the 1st and 2nd respondents did not obtain any statement from the Applicant or conduct any investigations to ascertain the allegations of the 3rd Respondent. According to the Applicant, upon raising concerns about the legality of the process, the 1st and 2nd respondents proceeded to place the motor vehicle under police custody.

25. The Court of Appeal while addressing itself to a similar matter in the case of **Commissioner of Police & The Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others [2013] eKLR**, held that:

“Clearly, the company and the guarantor through their directors were employing criminal process to assist them in resolving their civil dispute. While the law (Section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that that power must be exercised responsibly, in accordance with the laws of the land and in good faith...It is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court. This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations. We have no doubt in our minds that the belated involvement of the police in this purely civil dispute is an abuse of their power. The police should direct their energies and resources to prevention of crime which we all know is rampant in this country and is about to get out of control.”

26. The circumstances of this case raise serious issues considering the Applicant's averments as to the reasons for the seizure of the motor vehicle and the alleged failure by the 1st and 2nd respondents to carry out investigations. One can say that the 3rd Respondent is using the 1st and 2nd respondents to settle his business dispute with the Applicant and has in the process infringed upon the Applicant's constitutional rights. Allowing the state of affairs to continue as they are will occasion prejudice to the Applicant. It consequently follows that the Applicant has met the second condition for grant of conservatory orders as there is need to preserve the *status quo* so as to ensure the Applicant's petition is not compromised and rendered nugatory.

27. In a case of this nature, the last barrier the Applicant is required to cross is the need to establish the injury to be sustained if the orders sought are not granted. The act of being subjected to an unlawful process is in itself injurious to the victim of such a process. The State power granted by the Constitution and law to the 1st and 2nd respondents should only be used to attain the legitimate objectives of that power. Any unlawful deployment of the authority becomes injurious to the person on the receiving end and this Court has a duty to stop the abuse of power.

28. From what has been stated above, it follows that the Applicant has met the conditions to warrant the grant of conservatory orders. His

application dated 31st March, 2021 therefore partially succeeds. The appropriate order in the circumstances is to bar the 1st and 2nd respondents from releasing motor vehicle registration number KCU 872M to any person other than the authorized officials of Prime Batteries East Africa Limited. Costs of the application shall abide the outcome of the petition.

Dated and signed at Nairobi this 6th day of July, 2021

W. Korir,

Judge of the High Court

Dated, countersigned and delivered virtually at Nairobi this 8th day of July, 2021

J. A. Makau,

Judge of the High Court