



**Ahmed & another v DCI, Nyali Police Station & 2 others; Agango (Interested Party)
(Constitutional Petition E047 of 2021) [2021] KEHC 175 (KLR) (4 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 175 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E047 OF 2021**

JM MATIVO, J

NOVEMBER 4, 2021

BETWEEN

KHALID MOHAMED AHMED 1ST PETITIONER

AHMED MOHAMED AHMED 2ND PETITIONER

AND

DCI, NYALI POLICE STATION 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

AND

EMMY ANDISI AGANGO INTERESTED PARTY

RULING

The applicant's case

1. In order to put the applicants' amended application dated 2nd September 2021, the subject of this ruling into a proper perspective, it is necessary, albeit briefly, to highlight the facts which triggered this Petition in which they seek to inter alia to stay arrest and or criminal prosecution against them arising from matters touching on Plot No. 5815/MN CR 24470.
2. The Petitioners contend that the intended arrest and prosecution revolves around the estate of Nashon Juma Agango alias Nashon Juma Asango-deceased whose succession was finalized on or about February 2014. They state that the Interested Party is alleged to be a beneficiary of the deceased's estate even though she has never filed her claim in the succession court.
3. The Petitioners claim that they are bona-fide purchasers for value of the aforesaid property and they are the registered owners, and that the Interested Party has instigated their arrest and prosecution under



trumped up charges through the 1st Respondent, despite there being no reasonable and probable cause for mounting the prosecution. They contend that the intended prosecution is not rooted in the rule of law and that they will be prejudiced if the prosecution proceeds.

4. Concurrent with the original Petition, the Petitioners filed a Notice of Motion dated 17th August 2021. On 2nd September 2021, the applicants filed an amended Petition and an Notice of Motion, the subject of this ruling seeking to stay the arrest and/or taking of plea regarding pending hearing and determination of the petition. They also pray for costs of the application. Prayers (1), (2) and (3) of the application are spend.
5. The grounds in support of the application are essentially a replication of the averments in the amended Petition, so, it will add no value to rehash them here.

The 1st and 2nd Respondent's grounds of opposition

6. The Honourable Attorney General filed two sets of grounds of opposition dated 26th August 2021 and 17th September 2021. The crux of the grounds are:- (i) that the application and the Petition are misconceived, frivolous, vexatious and an abuse of court process; (ii) that the 1st Respondent under section 24 of the *National Police Service Act*¹ and Articles 243 and 245 of the Constitution the 1st Respondent is mandated to investigate crime; (iii) that the allegation that the 1st Respondent is malicious and baseless; (iv) that the applicants have not demonstrated that the intended investigations or arrest are high handed, illegal or in bad faith nor have they provided evidence to show that they will not be afforded a fair trial; (v) that they have not demonstrated that the Respondents will not respect their constitutional rights; (vi) and, that the Petitioners have not set out with precision the specific rights that were violated or are likely to be violated.

The 3rd Respondent's grounds of opposition

7. The 3rd Respondent filed grounds of opposition dated 9th September 2021 stating:- (i) That this court has no jurisdiction to entertain the Petition; (ii) that the orders sought are premature nor is there evidence that the 3rd Respondent has sanctioned the charges; (iii) that the Petitioners have not demonstrated how the 3rd Respondent has breached his powers under Article 157 of the Constitution; (iv) no material has been disclosed to show that the 3rd Respondent has violated the applicants' rights nor have they demonstrated bad faith, unreasonableness or breach of procedure; (v) that the Petition lacks merit; (vi) that section 204, 210, 211 and 215 of the *Criminal Procedure Code*² provides for remedy, hence, the applicant's rights are guaranteed under the law; (v) this court has no supervisory powers to divest the 3rd Respondents of its constitutional mandate.

The Interested Party's Replying affidavit

8. The Interested Party filed, Wmmy A. Agano filed a Replying affidavit dated 21st September 2021. The substance of the affidavit is that Lucy Damar Agano and George Ajwang Agano are children of the deceased and beneficiaries to the estate and that they are not entitled to sell the suit property because the deceased was survived by a widow. Further, that the property was not disclosed in Succession Cause No 423 of 2015, but it was purportedly transferred to her step children vide succession cause number 296 of 2012 raising the questions as to why there are two grants in existence.

¹ Act No. 11A of 2011.

² Cap 75, Laws of Kenya.



9. Further, she averred that subsequently the entry relating to the transfer was expunged from the land register and a new entry entered prompting her to file a restriction dated 12th May 2021. Further, she averred that no right of action can arise from fraud.

The applicants' advocates submissions**

10. The Petitioners' counsel submitted that the Constitution permits an aggrieved person to approach the court alleging threat of violation of rights. He cited on *Agnes Ngenesi Kinyua aka Agnes Kinywa v Director of Public Prosecution & another*³ in support of the proposition that the Respondent's discretion to prosecute must be exercised properly and where the court finds that the discretion has been abused or is used to achieve some collateral purpose not geared towards the vindication of commission of a criminal offence, the court will halt the proceedings, but the Petition does not deal with the merits of the case but the process nor can it replace the trial court. He also cited *Kuria & 3 others v Attorney General*⁴ which held that where the process is an abuse, the duty of the court is to purge the proceedings.
11. The applicants' counsel urged the court to find that the averments in the supporting affidavit are uncontroverted since none of the Respondents filed a Replying affidavit.
12. Also, he urged the court to find that Article 47 (1) of the Constitution has been violated by the Respondent's failure to act in a manner that contributes to good governance and in absence of a proper factual basis. He invited the court to find that the Petitioner has established prima facie case to merit the grant of the orders sought. Lastly, he cited *Republic v Attorney General & another Ex-Parte Kipng'eno Arap Ng'eny*⁵ in support of the proposition that the court has discretion to stay criminal proceedings where the justice of the case so demands.

The 1st and 2nd Respondents' advocates submissions**

13. The 1st and 2nd Respondents' counsel submitted that the Petition and the amended application lack sufficient particulars such summons to report to the police or any documentation to support the allegations. He argued that the Office of the Director of Criminal Investigations derives its power from section 28 of the National police Service Act under section 28 and its functions include undertaking investigations and maintaining law and order; detecting, and prevent crime; and apprehending offenders. He submitted that its mandate is in accord with Article 239 (c) and 244 of the [Constitution](#).
14. He argued that the orders sought in the Petition cannot be granted without meeting a higher evidential burden. He argued that the orders sought seek to prevent the National Police Service, a constitutional body, from conducting its mandate. That courts can only interfere with the exercise of such authority if there is sufficient evidence that the same is being used contrary to statute or in breach of rights. He cited *Katana Fondo Birya v Krystalline Salt Ltd & 2 others*⁶ in which the court citing previous jurisprudence defined a frivolous proceeding as one with: (i) no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defence would be wasting the Court's time; or (v) when it is not capable of reasoned argument." Also, counsel argued that a court should trike a Petition if it will occasion misuse of time and resources. (Citing *Kivanga Estates Limited v National Bank of*

³ {2019} e KLR.

⁴ {2002} 2 KLR 69.

⁵ {2001} e KLR.

⁶ {2018} e KLR.



*Kenya Limited*⁷). He submitted that the Petition does not disclose violations of rights. (Citing *Anarita Karimi Njeru v Republic*⁸).

The 3rd Respondent's advocates submissions

15. The 3rd Respondent's counsel submitted that the applicant has not established a prima facie case. She cited *Kenya Association of Manufacturers & 2 others v Cabinet Secretary, Ministry of Environment and Natural Resources & 3 others*⁹ in which the court held that in application for a conservatory order, the court is not invited to make any definitive or conclusive findings of fact or law on the dispute before it because that is a function for trial court. It also held that the court is required to evaluate the material before it to and determine whether, if the conservatory order is not granted, the applicant will suffer prejudice. Lastly, it held that conservatory orders are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the court in the public interest.
16. Counsel also cited the *Baron v Reid Canada Ltd & Alfresh Beverages Canada Corp*¹⁰ which defined a prima facie case to mean that the Plaintiff must not only satisfy the court there is a serious issue to be tried but also it is clearly right and utmost certain to be successful at trial. She submitted that the Petitioners have failed to establish how their rights have been violated or threatened to be violated. Also, she cited *Eunice Khalwani Miima v DPP & 2 others*¹¹ which held that the court should not to usurp the Constitutional mandate of the DPP to investigate and undertake prosecution and that the fact that an applicant has a good defence is not a ground to stay a prosecution.
17. In addition, counsel argued that the Petitioners have failed to establish the existence of real danger that would prejudice them and cited *Martin Wambora v Speaker of the County Assembly of Embu & 3 others*¹² which held that the danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the Court and an allegedly threatened violation that is remote and unlikely will not attract the court's attention. Also, counsel cited section 107 (1) & (2) of the *Evidence Act*¹³ and argued that the Petitioner has not proved that the alleged threat to be arrested. He cited *Gitaru Peter Munya v Dickson Mwenda Kithinji & 2 others (supra)* in support of the proposition that conservatory orders, unlike interlocutory injunctions, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes .
18. Additionally, counsel for the 3rd Respondent submitted that this court has powers to stay prosecution where it is demonstrated that the proceedings are not in public interest or are an abuse of the legal process and cited *Kuria & 3 others A.G.*¹⁴ (supra) and added that under Articles 157 (10) and 157(11) of the Constitution, the DPP does not require the consent of any person or authority to the commence

⁷ {2017} e KLR.

⁸ {1979} I KLR, 54.

⁹ {2017} e KLR

¹⁰ {2001} OJN 04116

¹¹ {2017} eKLR

¹² {2014} e KLR.

¹³ Cap 80, Laws of Kenya.

¹⁴ {2002} 2 KLR.



criminal proceedings nor can he be directed or controlled by any person or authority but he is required to have regard to public interest

Determination

19. Both the Petitioner's counsel's submissions and submissions by counsel for the 1st and 2nd Respondent substantially, if not wholly addressed the amended Petition as opposed to addressing the tests for granting conservatory orders pending hearing and determination of the amended Petition. I restrain myself from falling into the same trap because what is before me is an interlocutory application seeking interim conservatory orders pending final determination of the amended Petition.
20. In determining the application, it is useful to recall that Article 23 of the Constitution engrains the authority of courts to defend and enforce the Bill of Rights. It provides that the High Court has jurisdiction, to hear and determine applications for violation or infringement of, a right or fundamental freedom in the Bill of Rights. It states that 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.
21. Pursuant to Article 22(3), The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) *Practice and Procedure Rules*, 2013¹⁵ was promulgated. Rule 23 provides that despite any provision to the contrary, a Judge before whom a Petition under 4 is presented shall hear and determine an application for conservatory or interim order.
22. Conservatory orders are by definition decisions arrived at by a court of law to maintain status quo to ensure that circumstances do not change while a matter is before a court of law pending judgement. Conservatory orders ensure that nothing changes circumstantially in a matter, pursuant to the existence of other factors to be determined by the court. In granting a conservatory order, the danger looming over the realization of rights must be imminent, real and not theoretical. In determining whether a conservatory order should be granted, the court is not invited to make conclusive findings of fact or law on the dispute before it. The court's jurisdiction at this point is limited to examining and evaluating the materials placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of a conservatory order. In determining whether to grant or refuse the application, the court is guided by established principles. These principles were aptly settled in *Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others*¹⁶ as follows:--
 - a. The Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he/she is likely to suffer prejudice.
 - b. The Court should decide whether a grant or a 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 is not granted, the Petition or its substratum will be rendered nugatory.
 - d. Lastly, that the court should consider the public interest and relevant material facts in exercising its discretion.
23. A party seeking a conservatory order is mandated to demonstrate that should the court fail to grant a conservatory order, there is a high probability of him/her suffering prejudice as a result of the violation or threatened violation of the Constitution. However, this must be weighed against public interest.

¹⁵ Legal Notice No. 117 of 2013.

¹⁶ {2015} e KLR.



From the foregoing, it is evident that conservatory orders are a unique instrument in the protection of the Bill of Rights. They may only be granted by courts of law upon being satisfied that several pre-requisite conditions exist. Conservatory orders are distinct from remedies almost similar in nature such as injunctions.

24. With the above principles in mind, I now examine the applicants' amended application. For starters, a special feature in our Constitution is the establishment of an independent office of the DPP. His independence is provided under Article 157 (10) which declares that the DPP shall not require the consent of any person or authority to commence criminal proceedings and in the exercise of his powers or functions, he shall not be under the direction or control of any person or authority.
25. The above position is replicated in Section 6 of the [Office of the Director of Public Prosecutions Act](#)¹⁷ which provides that pursuant to Article 157 (10) of the Constitution, the Director of Public Prosecutions shall:- (a) not require the consent of any person or authority for the commencement of criminal proceedings; (b) not be under the direction or control of any person or authority in the exercise of his powers or functions under constitution, this Act or any other written law; and (c) be subject only to the Constitution and the law. It is also important to mention that under Article 245 (4) (a) of the Constitution, "no person may give direction to the Inspector General with respect to the investigation of any offence or offences." Just like the constitutionally guaranteed independence of the DPP, this provision is aimed at ensuring that investigations are undertaken independently.
26. Its trite that the Constitution vests the DPP with the sole Authority, power and responsibility to exercise control over the prosecution of all criminal matters except the institution of cases at the Court-Martial.¹⁸ Individuals involved in a crime – the victim, the accused, and the witnesses – as well as society as a whole have an interest in the decision whether to prosecute and for what offence, and in the outcome of the prosecution. A proper and effective administration of the criminal justice system is a matter of great public interest. Clearly, the decision to prosecute or not to prosecute is of great importance. It can have the most far-reaching consequences for an individual. Even where an accused person is acquitted, the consequences resulting from a prosecution can include loss of reputation, disruption of personal relations, loss of employment and financial expense, in addition to the anxiety and trauma caused by being charged with a criminal offence.
27. There is no doubt that a wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system. For victims and their families, a decision not to prosecute can be distressing. The victim, having made what is often a very difficult and occasionally traumatic decision to report a crime, may feel rejected and disbelieved. It is therefore essential that the prosecution decision receive careful consideration.
28. There is no doubt that courts have an overriding duty to promote justice and prevent injustice. Its trite that from this duty, there arises an inherent power to stop police investigations (or stop a prosecution) if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court or infringement of a citizens' fundamental rights. Abuse of process has been defined as something so unfair and wrong with the prosecution that the court should not allow an investigator or prosecutor to proceed with what is, in all other respects, a perfectly supportable case.¹⁹ Whether an investigation or a prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case.

¹⁷ Act No. 2 of 2013.

¹⁸ Article 157 of the constitution.

¹⁹ *Hui Chi-Ming vs R* {1992} 1 A.C. 34, PC.



29. The Petitioners argues that the intended investigation, arrest and or prosecution is without basis. They argue that the intended prosecution relates to land they properly acquired. However, the DPP is mandated to independently review the evidence and be satisfied that an offence known to the law has been committed. This has not been done. The Petitioners seek to stop investigations, arrest and prosecution. The Inspector General is statutorily and constitutionally ordained to undertake investigation, deter and detect crime and arrest. There are no material before me to suggest that the Inspector General exceeded or violated his mandate or breached the Constitution.
30. But what is more important is that it not for this court to determine whether the evidence discloses an offence known to the law. That is a function statutorily and constitutionally vested in the DPP. Again, it is not a function of this court to determine the veracity or to weigh the strength of the evidence or the Petitioners defence. That is a function for the trial court hearing the criminal case. This court can only intervene if there are cogent allegations of violation of constitutional rights; or threat to violation of the Rights; or in clear circumstances where it is evident that the accused will not be afforded a fair trial; or the right to a Fair Trial has been infringed or threatened; or where the prosecution is commenced without a factual basis. The allegations cited by the Petitioners do not pass this threshold. It is not enough to make empty allegation or recite Articles of the Constitution. There must be clear evidence that the Respondents acted in total disregard of the law. The Petitioners are inviting this court to determine the sufficiency of the evidence (which is constitutionally ordained to the DPP) or weigh the veracity of what ought to be his defence in the lower court which is not the function of this court but the trial court.
31. The initial consideration in the exercise of the discretion to prosecute is whether the evidence is sufficient to justify the institution or continuation of a prosecution. This is a decision constitutionally vested on the DPP. Where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.²⁰ The DPP is mandated to independently evaluate the evidence and make the decision to prosecute independently.
32. The inherent jurisdiction of the court to stop investigations or a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.²¹ The enquiry is whether there has been an irregularity or an illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted. The provisions of the Constitution conferring powers upon the High Court to grant such remedies as conservatory orders are a device to advance justice and not to frustrate it.
33. Guided by the tests discussed above, I find that the Petitioner has failed to satisfy the tests for granting the conservatory orders sought. Having concluded as herein before discussed, the upshot is that the Petitioners' amended application dated 2nd September is unmerited. Consequently, I dismiss the said application with costs to the Respondents.

Orders accordingly

SIGNED, DATED DELIVERED AND ELECTRONICALLY AT MOMBASA THIS 4TH DAY OF NOVEMBER 2021.

JOHN M. MATIVO

²⁰ *Sir Rupert Cross, Statutory Interpretation, 13th edn. (1995), pp.172-75; J. Burrows, Statute Law in New Zealand, 3rd edn. (2003), pp.177-99.* For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

²¹ See *Attorney General's Reference (No 1 of 1990)* [1992] Q.B. 630, C.A; *Attorney General's Reference (No 2 of 2001)* [2004] 2 A.C. 72, H.L.



JUDGE

