



**Kites Technical Limited v Police & 2 others; Kenya Power & Lighting Company Limited (Interested Party) (Constitutional Petition E 041 of 2021) [2021] KEHC 204 (KLR) (10 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 204 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION E 041 OF 2021  
JM MATIVO, J  
NOVEMBER 10, 2021**

**BETWEEN**

**KITES TECHNICAL LIMITED ..... PETITIONER**

**AND**

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

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

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

**AND**

**KENYA POWER & LIGHTING COMPANY LIMITED ..... INTERESTED PARTY**

**RULING**

1. In order to contextualize the applicants’ application dated 19<sup>th</sup> July 2021, the subject of this ruling, it is necessary, albeit briefly, to highlight the facts which triggered this Petition as disclosed in the Petition. In a nutshell, in February 2021, the Petitioner was sub-contracted by H. Young Gibbs Consortium to carry out street lighting work at Changamwe, Kipevu Road within Kenya Ports Authority Premises. The work entailed erecting 47 concrete poles and power cables along the said road which it completed.
2. Vide a letter dated 15<sup>th</sup> July 2021, the Interested Party’s security officer, a one Major (RTD) Anthony Jakaa Mganda required the Petitioner’s Manager to report at the Interested Party’s Security office to assist in investigations into alleged theft of the Interested Party’s poles and cables. Its manager complied and met a one Isaac Mutiso, a police officer attached to the Interested Party’s security office who told him that they were suspecting that cables and poles used for the lighting at the project site were stolen from the Interested Party hence they needed an explanation on the source of the applicant’s materials. The Petitioner states that its manager, supplied copies of invoices, receipts and bank transfer slips



- evidencing that the concrete poles were purchased from Bett Company (K) Ltd, and the cables were purchased from Melsec Cables Limited and Jojaws Enterprises Limited in Mombasa.
3. However, its manger did not have all the details, so he requested for time until 16<sup>th</sup> July 2021 to avail the information, but the same day police officers attached to the Interested Party's security office removed all the poles and cables which had been installed by the Petitioner. The applicant is apprehensive that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents intend to arrest and prefer charges against it or its directors without any factual basis.
  4. As a consequence of the foregoing, the Petitioner seeks declarations that the Respondents' conduct impinges on its constitutionally guaranteed rights; a declaration that the investigations were unfair, inefficient, shoddy, impartial and tainted with mala fides and or ulterior motive; an order prohibiting them from proceeding with the investigations; a declaration that it is entitled to damages and costs of the Petition.
  5. Concurrent with the Petition, the Petitioner filed the application the subject of this ruling seeking a conservatory order prohibiting the respondents from undertaking any further investigations and or proceeding with any criminal proceedings against the Petitioner, its directors and or officers in connection with the alleged theft pending the hearing and determination of this Petition. It also prays for costs of the application to be provided for. Prayers (a) and (b) of the application are spent. The grounds in support of the application are essentially a replication of the averments in the Petition, hence, it will add no utilitarian value to rehash them here.
  6. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed grounds of opposition stating:- that the applications is misconceived, frivolous, vexatious and an abuse of court process; that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are empowered by law to investigate and prosecute criminal offences pursuant to the provisions of section 24 of the *National Police Service Act*,<sup>1</sup> that the allegations that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are malicious is unfounded, baseless and a mere assumption; that it is incumbent upon the applicant to demonstrate that the intended police investigations are hinged on an illegality or bad faith; that the Petitioner has not demonstrated that he will not be afforded a fair trial or that the Respondents will infringe his constitutional rights.
  7. The 3<sup>rd</sup> Respondent filed grounds of opposition dated 2<sup>nd</sup> August 2021 stating that the application is frivolous, vexatious and an abuse of court process, that the application is premature against the 3<sup>rd</sup> Respondent, and that the application does not disclose bad faith or illegality.
  8. The Interested Party also filed grounds of opposition dated 11<sup>th</sup> August 2021 stating that the Petition and the application are pre-mature, unprocedural, made in bad faith and it does not disclose all material facts; that the application is a delaying tactic aimed at frustrating and curtailing the respondents from exercising their lawful and constitutional mandate; that this court lacks jurisdiction to entertain the application; that the orders sought offend public policy; and that the application offends Orders 40 and 19 Rule 3(1) of the *Civil Procedure Rules*.
  9. The application was canvassed by way of the pleadings filed and written submissions. The applicant's counsel in his submissions argued that that the respondents and the Interested Party did not file affidavits challenging the Petitioner's averments. He submitted that the investigation process by the Respondents is an administrative function which ought to be conducted in accordance with the values and principles set out under Articles 10, 27, 40, 47 and 50 of the *Constitution*. He argued that the said principles are binding on all State organs, State officers, public officers and all persons whenever

<sup>1</sup> Act No. 11A of 2011.



any of them applies, or interprets, the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.

10. He argued that the national values and principles of governance under Article 10 of the Constitution include, integrity, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, transparency and accountability. He also submitted that Article 47 and 50 of the Constitution provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and a right to a fair hearing. Also, he submitted that Article 47(2) of the Constitution further provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
11. Counsel argued that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in conducting the investigations were required to adhere to the edicts of the constitutional guarantees of the right to fair administrative action and the right to be heard. He argued that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were required to act professionally, objectively and reasonably and to observe procedural fairness. He argued that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent ought to have considered the exculpatory evidence given to them by the Petitioner and take the Petitioner's statement before they making the decision to arbitrarily and whimsically seize the goods at such an early stage of the investigations.
12. Additionally, counsel argued that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents ought to have given a notice and/or written reasons for seizing the cables, hence, the Petitioner was subjected to an unfair, unlawful and an inefficient administrative action. He argued that Article 27(1) of the Constitution provides that every person is equal before the law and has the right to equal protection and benefit of the law. He submitted that the seizure of the goods was without lawful cause which constitutes a violation of Petitioner's right to property guaranteed under Article 40 of the Constitution. To buttress his argument, he cited *Republic v Director of Public Prosecutions & 2 others; Evanson Muriuki Kariuki (Interested Party); Ex parte James M. Kabumbura*,<sup>2</sup> which held that "a fair trial or an investigation is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favouritism and no miscarriage of justice should be caused to the accused.
13. He argued that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have grossly violated Petitioner's rights under Article 27, 40, 47 and 50 of the Constitution and cited *Agnes Ngenesi Kinyua aka Agnes Kinywa v Director of Public Prosecution & another*<sup>3</sup> which held that where exculpatory evidence is presented to the police during investigations and for some reasons they deliberately decide to ignore the same one may be justified in concluding that the police are driven by collateral considerations other than genuine vindication of the criminal judicial process. He argued that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents ignored the evidence given to them. Additionally, the Petitioner's counsel cited *Hassan Ali Joho v Inspector-General of Police & 3 others*<sup>4</sup> which held that the DPP is not a conveyor belt for each and every investigation and finding placed before him, but he is duty bound to interrogate the investigations and ensure that it meets the constitutional threshold.
14. On whether the Petition is pre-mature, he submitted that the investigation process by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents is an administrative function and that the defendants are required to abide by the law and follow due process in the exercise of their mandate. He faulted the manner in which the items were seized and cited *Samuel Kabiu & 373 others v Betting Control & Licensing Board & 6 others; Association*

<sup>2</sup> {2019} e KLR.

<sup>3</sup> {2019} e KLR.

<sup>4</sup> {2017} e KLR.



of *Gaming Operators-Kenya & another (Interested Parties)*<sup>5</sup> which held that administrative actions that flow from statutes, must now meet the constitutional test of legality, reasonableness and procedural fairness. He cited Article 22 of the Constitution and submitted that the Petitioner being aggrieved by the decision was entitled to move to court, hence, the application and Petition are not premature or an abuse of the court process as alleged.

15. Lastly, counsel submitted that the Petitioner has sufficiently demonstrated stifling or threats of infringement of its rights, fundamental freedoms, the Constitution and/or the law by the respondents and this court ought to intervene to stop the investigations and the arrest. He argued that the Petitioner has demonstrated that the seized items were lawfully acquired.
16. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that his clients are empowered by law to investigate and prosecute criminal offences pursuant to the provisions of section 24 of the National Police Service Act<sup>6</sup> and Articles 156, 243 and 245 of the Constitution. He argued that the applicant has not shown that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are not going to respect its constitutional rights or that the intended police investigation is hinged on illegality or bad faith. He cited *Total Kenya Limited & 9 Others v Director of Criminal Investigations Department & 3 others* for the proposition that the police are mandated to investigate crime and the DPP's independence is guaranteed under Article 157 of the Constitution.
17. Counsel for the 3<sup>rd</sup> Respondent submitted that the application does not meet the threshold for grant of the orders nor does it disclose that the 3<sup>rd</sup> Respondent acted arbitrarily. He submitted that under Articles 243 to 245 of the Constitution and section 24 of the National Police Service Act,<sup>7</sup> the police are mandated to investigate and arrest offenders, and, under Article 245(5), the DPP can direct the Inspector General of Police in writing. He also submitted that the Constitution provides that investigations is the prerogative of the police.
18. Counsel also submitted that the application is an abuse of process aimed at curtailing the Respondent's constitutional powers and cited *Justus Mwendwa Kathenge v DPP & 2 others*<sup>8</sup> which held that the courts cannot interfere with the 3<sup>rd</sup> Respondent's mandate unless it is shown he has acted in disregard of public interest, or against the interests of the administration of justice or failed to take into account the need to prevent abuse of office. Additionally, counsel cited *Agnes Ngenesi Kinyua aka Agnes Kinyua v DPP* which held that a constitutional Petition challenging a prosecution does not deal with the merits of the case but the fairness of the prosecution process.
19. Further, counsel cited section 6 of the *Office of the Director of Public Prosecutions Act*<sup>9</sup> which provides that the DPP does not require the consent of any person or authority to commence criminal proceedings. In support of this proposition, he cited *Hon. James Ondicho Gesami v The Attorney General & others*<sup>10</sup> which held that the DPP is at liberty to prefer charges against any party in respect of whom sufficient evidence to support the charges has been availed. He also cited *Pauline Adhiambo*

<sup>5</sup> {2019} e KLR.

<sup>6</sup> Act No. 11A of 2011.

<sup>7</sup> Act No. 11A of 2011.

<sup>8</sup> {2014} e KLR.

<sup>9</sup> Act No. 2 of 2013.

<sup>10</sup> Petition 376 of 2011.



*Raget v DPP & others*<sup>11</sup> in which the court was unable to see how investigating an alleged criminal conduct or activity could be discriminatory.

20. Additionally, the 3<sup>rd</sup> Respondents counsel submitted that the applicant has not met the tests for grant of conservatory orders. He submitted that before such orders are granted, an applicant must establish a prima facie case and cited *Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General*<sup>12</sup> which held that at this stage an applicant is only required to demonstrate that he has a prima facie case with a likelihood of success and that unless the order is granted there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the constitution. (He cited the definition of a prima facie case in *Barton v Reid Canada Ltd & Alfresh Beverages Canada Corp.*) He argued that the applicant has failed to establish how its rights will be violated or threatened by the 3<sup>rd</sup> Respondent.
21. Also, the 3<sup>rd</sup> Respondent's counsel cited *Eunice Khabwali Miima v DPP & 2 others*<sup>13</sup> which underscored the need for the court not to usurp the constitutional mandate of the *DPP and Martin Nyaga Wambora v Speaker of the County Assembly of Embu & 3 others*<sup>14</sup> in which the court held that the danger must be imminent, true and actual and not fictitious. Lastly, counsel cited section 107 of the *Evidence Act*<sup>15</sup> and submitted that the applicant has not discharged the burden of prove and urged the court to dismiss the application.
22. I was unable to locate any submissions by the Interested Party.
23. Curiously, the Petitioner's counsel dedicated his submissions addressing the substantive Petition as opposed to the application before me. In the process he never addressed the merits of the application and in particular, the pertinent issue upon which the application will stand or fall, that is whether the application meets the tests for granting conservatory orders pending hearing and determination of the Petition. I will be careful not to fall into the same trap because what is before me is an interlocutory application seeking conservatory orders pending final determination of the Petition.
24. Its basic law 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.
25. Rule 23 of *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*<sup>16</sup> provides that despite any provision to the contrary, a Judge before whom a Petition under Rule 4 is presented shall hear and determine an application for conservatory or interim order. That, this court has powers to grant conservatory orders is not in doubt. However, the acid test which every applicant must pass lies in the tests. It is the litmus test each application for conservatory orders must pass.

<sup>11</sup> {2017} e KLR.

<sup>12</sup> {2011} e KLR.

<sup>13</sup> {2017} e KLR.

<sup>14</sup> {2014} e KLR.

<sup>15</sup> Cap 80, Laws of Kenya.

<sup>16</sup> Legal Notice No. 117 of 2013.



26. By definition, conservatory orders are 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.
27. 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 Uburu Secondary School v City County Director of Education & 2 Others*<sup>17</sup> 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.
28. By now its trite that a party seeking a conservatory order is required 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. Conservatory orders are a unique instrument in the protection of the Bill of Rights, so, they may only be granted by courts of law upon being satisfied that several pre-requisite conditions exist.
29. I now apply the above tests to the instant application. For starters, the preamble to the National Police Service Act<sup>18</sup> provides that it is an Act of Parliament to give effect to Articles 243, 244 and 245 of the Constitution; to provide for the operations of the National Police Service; and for connected purposes. Also, it is imperative to bear in mind Article 245 (4) of the Constitution which provides that no person may give direction to the Inspector General with respect to— (a) the investigation of any particular offence or offences; (b) the enforcement of the law against any particular person or persons; or (c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.
30. Section 24 of National Police Service Act provides the functions of the Kenya Police Service as follows — (a) provision of assistance to the public when in need; (b) maintenance of law and order; (c) preservation of peace; (d) protection of life and property; (e) investigation of crimes; (f) collection of criminal intelligence; (g) prevention and detection of crime; (h) apprehension of offenders; (i) enforcement of all laws and regulations with which it is charged; and (j) performance of any other

<sup>17</sup> {2015} e KLR.

<sup>18</sup> Act No. 11 A of 2011.



duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

31. The independence of the DPP is entrenched in Article 157 (10) of the Constitution which provides 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. This position is replicated in Section 6 of the *Office of the Director of Public Prosecutions Act*<sup>19</sup> 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. 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.<sup>20</sup>
32. The police have a statutory and constitutional duty to investigate crime. Failure to investigate is a gross dereliction of duty which can have the most far-reaching consequences for the complainant, the suspect and the criminal justice system. A wrong decision not to investigate or failure 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 investigate crime or 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.
33. The Petitioner argues that the intended investigation, arrest and or prosecution is without basis. It argues that it provided evidence on how it acquired the items in question. Investigation and arrest are lawful processes. There is no argument before me that the investigation and arrest is being undertaken in breach of the law. Also, the DPP is required to independently review the evidence and be satisfied that an offence known to the law has been committed. The DPP is yet to decide because the matter is still under investigation. The Inspector General is statutorily and constitutionally ordained to undertake investigation, deter and detect crime and arrest. There is no material before me to suggest that the police exceeded or violated their mandate or breached the Constitution.
34. In any event, it not for this court to determine whether the evidence discloses an offence known to the law. Also, it is not for this court to determine whether the applicant's account is true. 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 Petitioner's 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. They do not reveal a real danger of breach of rights and prejudice if the orders are not granted. It is not enough to make empty allegations or recite Articles of the Constitution. There must be clear evidence that the Respondents acted in total disregard of the law

<sup>19</sup> Act No. 2 of 2013.

<sup>20</sup> Article 157 of the constitution.



and that there is a real imminent threat of breach of the Constitution and the applicants' fundamental rights. 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 its defence in the lower court which is not the function of this court but the trial court.

35. The initial consideration in the exercise of the discretion to investigate is whether an offence known to law is alleged to have been committed. The decision to prosecute is made by the DPP upon being satisfied that the evidence discloses an offence known to law. The determination of the innocence or guilt is left to the trial court.
36. But more important is the fact that 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.<sup>21</sup> 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.
37. The applicant cites breach of Articles 27 and 40 Rights. Sincerely, these are issues for determination at the time of hearing the Petition. Also, the Petitioner alleges failure to be issued with a Notice and failure to be heard. Whether a suspected offender requires notice that he is being investigated or notice of seizure of suspected stolen goods or items likely to be used as exhibits and the merits if any of such arguments is a matter for trial. Equally interesting at the trial will be the applicability of Article 47 rights prior to investigations, during investigations and arrest. I refrain from delving into the discussion at this interlocutory stage.
38. In conclusion, I find that the applicant has failed to satisfy the tests for granting the conservatory orders. The upshot is that the application dated 19<sup>th</sup> July 2021 is unmerited. I dismiss the said application with costs to the Respondents.

Orders accordingly

**SIGNED, DATED AND DELIVERED ELECTRONICALLY AT MOMBASA THIS 10<sup>TH</sup> DAY OF NOVEMBER 2021.**

**JOHN M. MATIVO**

**JUDGE**

<sup>21</sup> See *Attorney General's Reference* (No 1 of 1990) [1992] Q.B. 630, CA; *Attorney General's Reference* (No 2 of 2001) [2004] 2 A.C. 72, HL.

