REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CONSTITUTIONAL PETITION NO. 10 OF 2020

IN THE MATTER OF THE VIOLATION OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLES 22 AND 23 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF VIOLATION AND THREATENED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 10, 25, 27, 29, 40, 47, 50, 157 AND 245 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE VIOLATION OF SECTIONS 4 AND 6 OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT

AND

IN THE MATTER OF SECTION 10 AND 24 OF THE NATIONAL POLICE SERVICE ACT

AND

IN THE MATTER OF SECTION 7 (2) OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF THE MALINDI CHIEF MAGISTRATE'S COURT CRIMINAL CASE NO. 240 OF 2020; REPUBLIC –VS- MATHIAS SCHMIDT & 40 OTHERS

BETWEEN

JAN RAMIN LANGER & 40 OTHERS...PETITIONERS

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS................... 1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE............................ 2ND RESPONDENT

AND

ISAAC MWAURA RODROT...........................INTENDED INTERESTED PARTY

Coram: Hon. Justice R. Nyakundi

Makambo Makabila Advocates for the petitioners

The Director of Public Prosecutions for the 1st Respondent

The Office of the Attorney General for the 2nd Respondent

S. K. Kibunja Advocate for the Interested Party

RULING

Introduction

The petitioners are currently facing trial as they are charged with the offence of forcible entry contrary to section 90 of the Penal Code. The matter is **Malindi Criminal Case number 240 of 2020 Republic Vs Mathias Schimidt & 40 Others**. The petitioners challenge the charges and the prosecution thereof.

The 1st petitioner avers that he is the Director of Temple Point Resort Limited, a limited liability company incorporated in Kenya and operating a high-end holiday resort popularly known as Temple Point Resort in Watamu, Kilifi County while the other petitioners allege that they are employees at the said Resort.

The 1st Respondent is the Director of Public Prosecution established under article 157 (2) as read with Subsection 108 (1) of the Constitution and Section 8 of the Office of the Director of Public Prosecutions Act No.2 of 2013 is responsible for instituting and undertaking criminal proceedings against the any person before any court (other than a court martial) in respect of any alleged offence.

The 3rd respondent, the Inspector General of Police, is the head of the Kenya Police Service in accordance with Article 245 (2) (a) of the Constitution of Kenya and Section 12 of the National Police Service Act No. 11A of 2011 to exercise independent command over National Police Service and to perform related functions and powers.

The Interested Party sues as a **Director of Salama Beach Hotel** which allegedly trades as **Temple Point Resort Ltd.**

The Case

The Petitioners' case

The petitioners through their Advocate on record **Mr. Gregory Makambo** of **Makambo Makabila & Co. Advocates** filed a Notice of Motion Application under Certificate of Urgency dated 23.04.2020 and filed on 27.04.2020 seeking the following orders *inter alia*:

> ***1. THAT…spent***
>
> ***2. THAT pending the hearing and determination of this Application, the Honorable Court be pleased to issue an ORDER staying and/ or suspending plea taking and further proceedings in Malindi Chief Magistrate's Court Criminal Case number 240 of 2020 Republic Vs Mathias Schimidt & 40 Others.***
>
> ***3. THAT pending the hearing and determination of the Petition herein, the Honorable Court be pleased to issue an ORDER staying and/or suspending plea taking and further proceedings in Malindi Chief Magistrate's Court Criminal Case number 240 of 2020 Republic Vs Mathias Schimidt & 40 Others.***
>
> ***4. Costs be provided for.***

The application is premised on the grounds (a) – (s) on the face of the application and supported by supporting affidavit of **Nicholas Kazungu Katana** dated 23.04. 2020.

The petitioners also filed this petition dated 23.04.2020 seeking the following reliefs:

> ***i. A declaration that the arrest, detention of the Eighty Three (83) employees of Temple Point Resort and prosecution of the Petitioners herein on account of events that occurred at the said Resort on 10.3.2020 is unconstitutional, unlawful and invalid.***
>
> ***ii. An order of certiorari do issue quashing the decision by the Respondents to charge the Petitioners, the Charge Sheet dated 17.3.2020 by which the Petitioners are charged with the offence of forceable entry contrary to Section 90 of the Penal Code and all proceedings in*** Malindi Chief Magistrate's Court Criminal Case number 240 of 2020 Republic ***in respect of the charge of forcible entry arising from the events that occurred at Temple Point Resort on 10.3.2020.***
>
> ***iii. An order of prohibition do issue restraining the 1st and 2nd Respondents from arresting, detaining or charging any employee of Temple Point Resort or the Petitioners herein whatsoever on account of the events that occurred at Temple Point Resort on 10.3.2020.***
>
> ***iv. That the Respondents be do bear the Petitioners' costs.***

The petitioners aver that on 10.03.2020 a multitude of armed police officers arrived at the Temple Point Resort in Watamu and without orderliness declared that the Resort had a new owner and everybody on the premises working under the management of **Mr. Hans Langer** was a trespasser and therefore under arrest. They state that the said declaration and the manner in which it was made threw the employees into a panic and fear and whereas few of them managed to escape running towards the Ocean a vast majority could not escape and Eighty Three (83) employees were arrested and detained on the purported charge of robbery with violence. Some of the employees who managed to escape were severely injured and one **Evans Chumba** an electrician and employee of the Resort drowned while trying to swim across the Ocean channel separating the Resort from Uyombo village.

They further aver that the 1st petitioner, **Jan Remin Langer,** a director of Temple Point Resort Limited was not at the Resort at the time of the police invasion but was notified of police presence rushed to the Resort in the company of the 2nd petitioner **Mathias Schmidt** where upon arrival while trying to find out from the police the reason for their presence were bundled into the police lorries without any explanation or being granted audience.

They further aver that the said Eighty-Three (83) employees were detained at the Watamu and Malindi police stations in deplorable conditions without access to water, sanitation facilities, taking baths or ready access to medical provisions and without police bond for six (6) days and that some of the employees who were lactating mothers were forced to nurse their months old babies in the police cells which brutality, rough and inhumane treatment by the police was calculated to overawe them.

The petitioners aver that the group was then brought to court and charged with the offence of robbery with violence contrary to Section 295 as read with together with Section 296 (2) of the Penal Code on **11.03.2020** where the police sought to 14 days to carry out investigations as there were victims hospitalized with serious injuries and hence could not record statements within the mandated 24 hours, which request was declined but the trial court granted them 3 days and the matter was stood over until 16.03.2020 for mention for further directions. They aver that this is a clear indication that the police had not carried investigations or established a probable cause for their arrest and detention prior to their arrest. They aver that the disposition by the Investigating officer that there were injured people in hospital as a result of the alleged attack was a deliberate and sensationalized effort to ensure that they do not secure favorable bond or bail terms.

They aver that the particulars of their offence as captured on the 1st Charge Sheet was that:

> ***"On 10.03.2020 at Temple Point Hotel Watamu, Malindi Sub-County within Kilifi County, jointly with others not before the court, being armed with dangerous weapons namely bows, arrows, pangas, rungus and machete robbed Jack Charo Jefwa cash Kshs. 170,000.00/-, one laptop make HP valued at Kshs. 70,000.00/- and other assorted items and or immediately after the time of such robbery wounded the said Jack Charo Jefwa."***

It is also their contention that the Police, under the influence of one **Isaac Mwaura Rodrot,** fabricated further charges on 16.3.2020 and sought to charge all the employees with additional charges of handling stolen goods contrary to section 322 (1) and (2) of the Penal Code and forcible entry contrary to section 90 of the Penal Code, which charge sheet was served upon them on 16.03.2020 and they were to be arraigned in court in the afternoon of the same date to take plea. This however did not materialize and they were later informed that they could not be arraigned as the 1st respondent allegedly refused to approve the charges contained in the charge sheet upon learning that the charges had been drafted by the said **Isaac Mwaura Rodrot**.

The particulars of the offences in the new Charge sheet dated 16.03.2020 were that:

> ***"On 10.03.2020 at Temple Point Hotel Watamu, Malindi Sub-County within Kilifi County, jointly with others not before the court, being armed with dangerous weapons namely bows, arrows, pangas, rungus and machete robbed Jack Charo Jefwa cash Kshs. 157,000.00/-, one laptop make HP valued at Kshs. 70,000.00/- and other assorted beers and cigarettes all valued at Kshs. 200,000.00/- and or immediately after the time of such robbery wounded the said Jack Charo Jefwa."***

For the 2nd count of robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code particulars of the said charge were framed as follows;-

> ***"On 10.03.2020 at Temple Point Hotel Watamu, Malindi Sub-County within Kilifi County, jointly with others not before the court, being armed with dangerous weapons namely bows, arrows, wooden planks and metal bars robbed Mabrook Mohammed Bilali off cash Kshs. 5,000.00/- and or immediately after the time of such robbery wounded the said Jack Charo Jefwa."***

For the 3rd charge of handling stolen goods contrary to section 322 (1) and (2) of the Penal Code particulars of the said charge were framed as follows;-

> ***"On 10.03.2020 at Temple Point Hotel Watamu, Malindi Sub-County within Kilifi County, jointly with others not before the court, being armed with dangerous weapons namely bows, arrows, pangas, rungus and machete robbed Jack Charo Jefwa cash Kshs. 157,000.00/-, one laptop make HP valued at Kshs. 70,000.00/- and other assorted beers and cigarettes all valued at Kshs. 200,000.00/- and or immediately after the time of such robbery wounded the said Jack Charo Jefwa."***

They aver that following outcry and protests the Respondents abandoned the said charges and in the Charge Sheet dated 16.3.2020 relating to robbery with violence and handling stolen goods but on 17.3.2020 presented another Charge Sheet with trumped-up charge of forcible entry contrary to Section 90 of the Penal Code. They aver that from the particulars of the offence in the new charge sheet, the value of the alleged money stolen had changed from Kshs. 170,000.00/- to Kshs. 157,000.00/-, the HP laptop was no longer among the stolen items, the alleged people injured had increased to include one **Mabrook Mohammed Bilali** and the nature of the weapons had changed to include wooden planks and metal bars. They contend that the reason for the shifting charges is because they were all fabricated to falsely implicate the

petitioners and the employees in order to force them to vacate the Resort to allow **Isaac Mwaura Rodrot** take control and replace them.

They also aver that all Eighty-Three (83) employees were arraigned in Court on allegations that they as part of a group of 100 employees had stormed the Resort with crude weapons and allegedly robbed and injured several people but on 17.3.2020 Forty-Two (42) were unconditionally discharged by the respondents without any charges being preferred against them, a clear indication they submit, that no offence was committed by any of the employees. Further it is the petitioners' contention that the charge of Forcible entry is fake and calculated to harass and intimidate them while assisting one **Isaac Mwaura Rodrot** take control of the Temple Point Resort from one **Hans Langer**. They aver that the Charge Sheet is fundamentally defective and upon taking objection the trial court released the petitioners on cash bail of Kshs.5,000.00/- and stood over the matter to 30.4.2020 for further directions.

Further, they aver that on 10.3.2020 they together with other employees who had been arrested reported to their place of work at Temple Point Resort as usual and it is not logically possible that the said employees committed the various offences as alleged by the respondents and that the police officers did not carry out investigations prior to arresting them as the same had been instigated by the said **Isaac Mwaura Rodrot** and that the respondents herein are being used by him as a mouth piece and pawns to brandish their powers in criminal justice system to aid him to threaten**,** embarrass, scare and intimidate them to leave their employment without following due process. They attached their employment contract letters as evidence that they were employees of Sais Resort.

The petitioners further challenge the constitutional validity of the respondents actions in arresting and fabricating charges against them, invoking and brandishing the sword of justice in a purely civil dispute in view of the ongoing disputes on the ownership of the said Resort in **Malindi HCCC No. 118 of 2009 and Malindi HCCC No. 10 of 2018** and allowing themselves to be influenced contrary to the constitutional obligations placed upon them by their respective offices. They contend that in **Malindi Misc. Criminal Application No. 34 of 2020, R-V-Mathias Schimidt**, the second petitioner herein, the Investigating Officer admitted that the investigation and arrest of employees of Temple Point is related to the dispute over ownership of the said Resort, a clear indication according to them that the respondents have unlawfully been influenced by the said **Isaac Mwaura Rodrot** to apply their criminal justice powers in a purely civil dispute. They aver that the employees cannot be used as collateral in the ownership dispute.

It's the petitioners case that it is illegal and against public policy to and not in the interest of administration of justice for the respondents to use their powers in such a manner as to aid the said **Isaac Mwaura Rodrot** and that such conduct offends Article 157 (10) and (11) of the Constitution as the 1st respondent has been influenced to institute criminal proceedings against the Petitioners.

The petitioners state that their prosecution, unless halted by this Court, will be a great injustice to them as they would have to spend limited resources to defend themselves and even if they are tried and acquitted they will still have lost their reputation and suffer great trauma and anxiety. They argue that Article 50 of the Constitution cannot be achieved or guaranteed in the criminal trial as the same is a roundabout way for the said **Isaac Mwaura Rodrot** to eject them from the Resort without due process. They contend that the 1st respondent has offended Article 157 of the constitution by failing to serve the course of justice and prevent the abuse of the legal process.

In furtherance to persuade the Court it's the petitioners contention that the 2nd respondent must be guided by Section 10 (4) of the Act as well as Article 10 of the constitution in the performance of its functions. It was at this juncture, on 28.04.2020, this court certified the application as urgent and asked the petitioners to serve the respondents and both parties to file written submissions on the same.

Submissions by the Petitioners for their Notice of Motion Application

In their submissions in support of their Notice of Motion application dated 20.05.2020 and filed on the same date the petitioners submit that despite the fact that the respondents were duly served on 30.04.2020 they were yet to file any replies to their application or Petition and as such their application and Petition should be admitted.

Learned counsel submitted that the aforesaid developments as enumerated in their Petition of events occurring from 10.03.2020, were ulterior motives divorced from a course of justice and that the applicants herein were unlawfully being sued as collateral attack by the respondents and **Mr. Isaac Mwaura Rodrot** in the dispute over the ownership of the said Resort currently the subject of two ongoing civil matters; **Malindi HCCC No. 118 of 2009** and **Malindi HCCC No. 10 of 2018.**

Learned counsel further submit that the purported criminal case against the applicants is not genuine but calculated to help the aforementioned **Isaac Rodrot** take over ownership and control of the said hotel and terminate the employment of the employees employed thereon under the management of Hans Langer without following due process.

He further submits that the 1st respondent's decision to discharge Forty-Two (42) of the arrested persons without preferring any charges against them and further the 1st respondent's actions of abandoning the robbery with violence charges was arbitrarily done and not informed by any evidence on their culpability or probable cause. They submitted that the same is discriminatory and an abuse of the court process.

Learned counsel argued and submitted that it was illegal, against public policy and not in the interest of administration of justice for the respondents to use the criminal justice system as a pawn to aid the said **Isaac Rodrot** in the civil dispute over the ownership of the said Hotel. They submit that the criminal case is simply a sword being brandished at the behest of **Isaac Rodrot** to threaten, scare and intimidate the employees of Temple Point Resort including the applicants as part of the wider plan to aid him in his takeover of the said Resort. He further submits that the 1st respondent had violated Article 157 (10) and (11) of the Constitution by accepting directions and being influenced by the said **Isaac Rodrot** as their arrest and present charges have unlawfully been influenced by him and that unless the same is halted by the court they stood to suffer great injustice and incur financial expenses to defend themselves on the fabricated and corrupt charges.

Learned counsel contention is that the petitioners' fundamental rights to a fair trial cannot be guaranteed and that these rights are likely to be violated if they are tried in Criminal case No.240 of 2020 as the charges against the applicants have no basis and that unless the same is stopped pending the hearing and determination of the Petition, they shall be forced to take plea and hire advocates to represent them at great

financial cost. That even if they are tried and acquitted their lives would be greatly disrupted and they would have lost their reputation. Learned counsel submits that the petitioners will suffer great trauma and anxiety of being charged with an offence, they did not commit.

Finally, Learned counsel submit that the damage likely to be suffered should they be prosecuted is far much greater and that it is in the interest of justice that the court grants the orders sought as the respondents have a constitutional mandate to preserve protect and promote rights of the petitioners and will not suffer any prejudice at all if the criminal proceedings are stayed pending hearing and determination of the Petition.

For these submissions Counsel relied on the following cases; **Peter O. Nyakundi and 68 Others V Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & 4 Another [2016] eKLR**, **Mohammed Gulam Hussein Fazal Karmali & Another V Chief Magistrate's Court & Another [2006] eKLR**, **Ronald Leposo Musengi v Director of Public Prosecutions & 3 Others [2015] eKLR** and **R V Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No.406 of 2001.**

As such Learned counsel submits and urged this Court to prevent the respondents from using the judicial system in a way that is inconsistent with its fundamental values, purposes and principles.

Interested Party's Case

The Interested Party, **Mr**. **Isaac Mwaura Rodrot** filed a Notice of Motion Application under Certificate of Urgency dated 14.05.2020 and filed on the same date seeking the following orders *inter alia*:

> ***1. That…spent***
>
> ***2. That this Honorable court be inclined to grant leave the applicant herein Isaac Mwaura Rodrot to be enjoined as an interested Party.***
>
> ***3. Costs be in the cause.***

The application is premised on the grounds (a) – (i) on the face of the application and supported by supporting affidavit of **Isaac Mwaura Rodrot** dated 14.05.2020.

The Interested Party avers that there has been an ongoing dispute over the ownership of **Temple Point Resort** between himself and the Directors of **Salama Beach Hotel Ltd** as a result of which parties have made several attempts to outwit each other singular of which is employing the criminal process to achieve their ulterior motives. He also avers that he was not privy to these current proceedings and came to his knowledge that he had been adversely mentioned as a propagator of the criminal activities that have been witnessed hence the need to be enjoined in the suit. He further avers that he has knowledge and sufficient information that will substantially assist the court to effectively deal with the issues raised in the current proceedings. It is also his contention that his enjoinment will result in the expeditious determination of the matters in controversy herein.

Further, the Interested Party, **Mr. Isaac Mwaura Rodrot** filed a Replying Affidavit dated 13.06.2020 stating that he and one **Stephano Uccelli** were directors of Salama Beach Hotel which has been trading under the name and style of Temple Point resort Ltd and had been involved in the running of said hotel for more than 30 years, first as an employee and then later was appointed as a director by the investors in Italy. He states that in 2009, **Mr. Hans Langer** and is wife **Zahra Langer** came to Kenya and presented to him and his co-director a decree from a court in Milan Italy and was included as a director in the hotel. He further avers that there have been many legal battles between themselves and the said **Langers** over the control of the hotel.

He further avers that on 20.02.2020 **Mr. Hans Langer** peacefully handed over the Hotel to him and **Mr. Stephano Uccelli** and that upon retaking control and management of the Hotel some employees agreed to work under the new management while others declined and left the Hotel. He further stated that on 10.03.2020 the petitioners led by the 1st petitioner who is the son of **Mr. Hans Langer** and the second petitioner who is a long term employee of the hotel , invaded the premises attempting to take over the hotel. He attached photos of the damage caused by said invasion and stated that during the commotion an employee of the hotel died. He states that the petitioners are authors of their own misfortune by deliberately plotting and executing criminal acts and such should be ordered to take plea and that they would not suffer any prejudice as they were already released on cash bail.

Petitioners Response to the Interested Party's Notice of Motion Application

The petitioners in their Replying Affidavit by **Nicholas Kazungu Katana** dated 26.05.2020 and filed on 27.05.2020 opposed the Interested Party's Notice of motion dated 14.05.2020. they aver that the Petition and proceedings are against and challenge the legality of various acts by the police on whose behalf the 2nd respondent is sued and exercise of prosecutorial power and discretion by the 1st respondent and do not in any way relate to or seek any redress against the applicant to give him interest or warrant his joinder into the proceedings and that the mere mention of the applicant is not sufficient reason to join him to the proceedings or give him any interest to warrant his joinder.

They further aver that the applicant has a legal obligation to justify his joinder as an interested party and that he has not outlined the nature of the information relevant to the proceedings that he intends to advance to justify his joinder as per the taste set out in the case of **Francis Karioki Muruatetu V Republic & 5 Others [2016] eKLR**. Further they aver that no reason has been given as to why the purported information within the Applicant's knowledge cannot be furnished to the court through the Respondents who are state agencies or the prejudice that the applicant will suffer if he is not enjoined.

The 1st Respondent's case

The 1st respondent filed a Replying Affidavit sworn by **Ms. Barbara Sombo** dated 06.07.2020 stating inter alia that on 10.03.2020 the police received a report that a group of about one hundred (100) men and women armed with crude weapons had invaded the hotel in Watamu, injuring several people and stealing property of unknown value. She further avers that a joint operation by the Watamu and Malindi Police Stations led to the arrest of 83 suspects inside the hotel while others escaped. The said suspects were arraigned before the court on 11.03.2020 under **Misc. Application No. 34 of 2020** seeking an extension of time to conduct further investigations and were granted 14 days to conclude the investigations. After the lapse of the 14 days the 1st respondent informed the court of its decision not to charge the suspects with the offence of robbery with violence and to release Forty-Two of the suspects as well as charge the Petitioners with the offence of Forcible entry contrary to section 90 of the Penal Code.

She further averred that due to the Covid-19 challenges the Petitioners were yet to take plea but had been released on cash bail. She states that the petitioners were lawfully arrested and detained and that the Respondents were acting independently without any coercion from the said **Isaac Mwaura Rodrot** as alleged by the petitioners which allegation she termed as frivolous, unwarranted and untrue.

She further averred that the 1st respondent's decision not to prosecute the whole group of 83 or to change the charge to forcible entry and not robbery with violence need not be explained to anyone and that the 1st respondent is free to do so without permission from the court and is within the scope of the law. She further stated that Article 49 had been adhered to as the petitioners were out on bail and the 1st respondent opposed the application to stay the proceedings in the trial court as the petitioners had not demonstrated that their rights had been infringed and that Article 49 and 50 would only be available to the petitioners once they had taken plea and proceedings commenced. She further stated that if the charges were trumped up as alleged by the Petitioners then the trial court will acquit them but the Petition was just a way of delaying the matter from commencing and proceeding to its logical conclusion.

Petitioners' Written Submissions on the Petition dated 23.04.2020

In their written submissions dated 06.06.2020 and filed on the same date, the petitioners, submitted that the circumstances under which they were arrested detained and are now being charged with the offence of forcible entry is not founded on true factual cause but calculated to harass, intimidate ad remove them from the employment to assist one **Isaac Rodrot** take control over the Hotel. They submitted that the developments between 10.03.2020 when they were arrested coupled with the constant mutation of the charge sheet and charges from robbery with violence, handling stolen goods and now forcible entry is a clear indication that there was no probable cause for their arrest and detention and is an afterthought informed by ulterior motives divorced of any course of justice.

They further submit that they were employees of the hotel who had reported to duty on the date of their arrest as such it is not plausible that they would have robbed or forcibly entered the hotel as alleged by the police. They further submit that the 2nd respondent had admitted that their arrest was related to the ownership dispute a clear indication that the respondents had unlawfully been influenced to apply their criminal justice power in a purely civil dispute.

They also submitted that from the original group of 83 persons the 1st respondent had not provided any explanation on why they abandon prosecution of some of the employees leaving only the 41 petitioners herein which they term as arbitrary, discriminatory and an abuse of the court process. They further submitted that the charges against them were illegal, against public policy and not in the interest of the administration of justice and that the whole criminal case was simply a sword being brandished by the said **Isaac Mwaura Rodrot** to aid him in his takeover of the Resort.

For these submissions Counsel relied on the following cases; **Ethics and Anti-Corruption Commission & Another V William Baraka Mtengo & 4 Others [2017] eKLR**, **Shakeel Ahmed Khan & Another V Republic & 4 Others [2019] eKLR**, **Hadija Mlao Mlingo v Director of Public Prosecutions & 3 Others; Wilberforce Malanga Wambulwa & 5 Others (Interested Parties) [2020] eKLR** and **Kanyi J. & Co. Advocates V Director of Public Prosecutions & 2 Others; Kikambala Development Company Limited & 10 Others eKLR 2019.**

1st Respondent's Written Submissions

In their written submissions dated 06.06.2020 the 1st respondent submitted that the Petition was premature and should not be entertained as it was a way of delaying prosecution of the matter by the petitioners. It submitted that Justice was being delayed and denied on the part of both the complainant and the accused persons as to date they had not taken plea.

The 1st respondent further submitted that the arrest of the petitioners was lawful as the 2nd respondent was acting within the scope of the law under Article 245 (4) of the Constitution. They also submitted that the 1st respondent was acting within its mandate under Article 157 of the Constitution and that the charges instituted against the petitioners were done fairly, within the scope of the law and that the 1st respondent was in no way coerced by any individual or authority. They further submitted that the allegations made by the petitioners were frivolous and should not be entertain as no logical evidence had been adduced in any event to show the alleged influence by **Isaac Rodrot.**

They submitted that the decision to charge the petitioners with the alleged offence was based on three important tests; evidentiary, public interest and the threshold tests and that the same was solely determined after investigations were concluded by the 2nd respondent and the police file forwarded to the 1st respondent for perusal and directions. They submitted that the decision was arrived at independently.

Finally, the 1st respondent conclude its submissions by stating that the petitioners had several avenues to assert their constitutional rights under Article 49 and 50 of the constitution once charged and prosecuted and that none had been breached as the Petitioners were currently not in custody as they had been released on cash bail pending plea taking.

Legal Analysis

The Constitution is the Supreme Law as provided under ***Article 2(1) of the Constitution of Kenya, 2010*** which provides:-

> ***"2. Supremacy of this Constitution***
>
> ***(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.***
>
> ***(2) No person may claim or exercise State authority except as authorised under this Constitution."***

The Judiciary as the custodian of the Judicial authority of the People of Kenya under Article 1 (3) (c) of the Constitution must take lead role, when applying and interpreting the Constitution, to uphold and promote the National Value and principle of the Rule of Law entrenched under Article 10 of the Constitution and, through it, help combat the spectre as well as reality of impunity in the State and society of Kenya.

In the **Institute of Social Accountability & Another –Vs- National Assembly & 4 Others [2015] eKLR** the court held that in interpreting the provisions of the **Constitution** touching on the Bill of Rights, the court should strive to promote its purpose. At paragraph 56 of the Judgment, the court had this to say:

> ***"First, this Court is enjoined under Article 259 of the Constitution to interpret the Constitution in a manner that promotes its purposes, values and principles, and advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. In exercising its judicial authority, this Court is obliged under Article 159(2)(e) of the Constitution to protect and promote the purpose and principles of the Constitution."***

I have read and carefully considered the pleadings and submissions made herein and I find that the main issue for determination: ***Is whether the Petitioners have shown a prima facie case with a likelihood of success, so as to be granted the conservatory orders they seek in terms of the stay of the proceedings in Malindi Criminal case No. 240 of 2020.***

It is not in dispute that the issues raised in this case stem from the ownership and control of Temple Point Resort, Watamu. This Court takes judicial notice of the fact that there are myriads of cases by the parties over the said Resort in different jurisdictions within and without the Republic of Kenya. The petitioners allege that their rights and fundamental freedoms as envisaged by the Bill of Rights have been or are threatened to be, violated or infringed upon by the respondents at the behest of one **Isaac Mwaura Rodrot,** an alleged director of Salama Beach trading as Temple Point Resort Limited.

The petitioners themselves also allege to be Directors and employees of the said Resort. Although they cited Articles 22, 23, 25, 27, 29, 40, 47, 50, 157 and 245 of the Constitution to build their case it is clear that the main issue is who between the petitioners and the Interested Party is a Director of said Resort and who is the intruder. I find that this is a question embroiled in another Civil Suit No. 118 of 2009 in which the Court apparently has pronounced itself in one way or another.

Further, Article 22 of the Constitution provides that any person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened while Article 23(1) and 165 (3)(b) of the Constitution grants the High Court the jurisdiction to hear and determine applications for redress or denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights**.**

As this is a Constitutional Court, the Constitution itself grants power and the jurisdiction to this court to hear the petitioners so as to determine whether or not their rights have been violated.

It therefore goes without saying that this court's jurisdiction to determine this Petition is not in doubt as this Court is vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) and as such it has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. Further **Article 165 (6)** of the Same Constitution gives the High Court supervisory jurisdiction over the subordinate Courts:

> ***"…over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function…..and may call for the record of any proceedings before any subordinate court or person, body or authority ......and may make any order or give any direction it considers appropriate to ensure the fair administration of justice".***

However, in the case of **Anarita Karimi Njeru *vs.* Republic (No. 1) [1979] KLR 154,** the court stated that a party who alleges that his or her rights have been violated must demonstrate, with a reasonable degree of precision, the Articles of the Constitution that have been violated and the manner of violation. On this principle, the Court of Appeal in the case of **Mumo Matemu *vs.* Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** *inter alia* stated thus:

> ***"We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point."***

I wish to remind the parties of Article 24 (1) of the Constitution which 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. Further, the Court of Appeal addressed the issue of respecting constitutional rights in the case of ***Attorney General v Kituo cha Sheria & 7 others* [2017] eKLR** and stated;

> ***"The clear message flowing from the constitutional text is that rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largesse because they are not granted, nor are they grantable, by the State. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey."***

Article 259(1) of the Constitution provides as follows:

> ***This Constitution shall be interpreted in a manner that—***
>
> ***(a) promotes its purposes, values and principles;***
>
> ***(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;***
>
> ***(c) permits the development of the law; and***
>
> ***(d) contributes to good governance.***

Article 29 of the Constitution *inter alia* provides that,

> ***'Every person has the right to freedom and security of the person, which includes the right not to be- (a) deprived of freedom arbitrarily or without just cause; (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58.'***

I find myself persuaded by the dictum of **Majanja J** ,in the case of **Sonia Kwamboka Rasugu *vs.* Salwood Hotel & Resort Limited t/a Paradise Beach resort & Anor, Petition No. 156 of 2011, [2013] eKLR**., where he rendered himself thus:

> ***"The right to personal liberty is one of the most fundamental human rights as it affects the vital elements of an individual's physical freedom. Article 9 of the Universal Declaration of Human Rights provides that; 'no one shall be subjected to arbitrary arrest, detention or exile'. Similarly, Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) secures the right to liberty and security of the person in the following terms; "9. (1). Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." …The provisions of the Article 2(5) and 2(6) of the Constitution incorporate into Kenyan Law the Convention."***

Article 27 of the Constitution provides that all persons are equal under the law. Discrimination was defined in the case of **Peter K. Waweru Vs Republic [2006] eKLR** as follows

> ***"affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description. Blacks Law Dictionary (11th ed) defines 'discrimination' as hereunder:***
>
> ***…..'Unfair treatment or denial of normal privileges to person because of their race, age, sex nationality or religion. A failure to treat all person equally where no reasonable distinction can be found between those favoured and those not favoured.' Baker Vs California Land title Company DC CAL 349 Supp 235, 238, 239."***

The state protects its citizens through the Police Service and as per Section 24 of the National Police Service Act it is the organ responsible for maintaining law and order, preservation of peace, protection of life and property as well as the prevention and detection of crime including the apprehension of offenders. The people's sovereign power as stipulated in Article 1 of the Constitution is delegated to the three state organs and as such citizens have delegated the power to protect their property and lives to the state. Consequently, they no longer have the power to take up arms and defend themselves save for limited situations which call for self defence. Further, the same Section 24 imposes a positive obligation on the Police to protect the people from the threat of violation of their rights and fundamental freedoms. These obligations have also been provided for under Article 243 of the Constitution, establishes the National Police Service.

I stand guided by the decision of the court in the case of **Association of Victims of Post Electoral Violence and Interights vs. Cameroon (272/2003) para 88 & 89** where it held that:

> ***"The respect for the rights imposes on the State the negative obligation of doing nothing to violate the said rights. The protection targets the positive obligation of the State to guarantee that private individuals do not violate these rights."***

The High Court in Kenya has also had the opportunity to pronounce itself on that subject and in **Gullid Mohamed Abadi vs O.C.P.D Isiolo Police Station & 2 Others (2006) e KLR Onyancha J** when interpreting Section 14(1) of the Repealed Police Act stated as follows;

"The duties of the police force in Kenya include the prevention and detection of crime and the apprehension of offenders. The police force is also to protect life and property. If it is asked, 'which crime is to be prevented and detected"' an appropriate answer would be that any crime committed within the Republic is targeted under the above law provision. That means that the police force has a duty to prevent or detect crimes as well as preserve life and property and apprehend possible offenders. The property and life to be protected must be the life and property of Kenyan citizens including that of the government and of those who at any given time claim the protection of the Kenyan law. Otherwise there is no other life or property in Kenya that the above law provision would be referring to except those found and living in Kenya."

The DPP's mandate is also spelt out under Article 157 more specifically Article (10)(11) of the Constitution which provides that the DPP shall have powers to institute and take over proceedings or discontinue. It suffices to note at this juncture that the obligation on the Director of Public Prosecutions to apply the public interest test under Article 157 of the Constitution does not prevent him from taking into account certain factors in prosecutional decision making. Infact, these factors may be applied differently to different accused persons in order to justify differential treatment.

The second factor to be considered is that of bad faith. It is trite that to act in bad faith is to do so for extraneous purposes, that is, outside the purpose under Article 157 (11) of the Constitution for which the power is intended, which is to institute, and undertake criminal proceedings against any person save for a Court Martial giving regard to the public interest.

Thirdly, the factor of independence is insulated under Article 157 (10) of the Constitution. In determining whether the prosecutor acts in a non-independent manner, such as by bowing to the victims of the offence or to political pressures, it might constitute agreed for judicial review. There is therefore an irrebuttable presumption that the director of public prosecutions decisions to initiate, undertake or discontinue any criminal proceeding are Constitutional unless shown to be otherwise by the petitioners seeking a remedy or declarations under the Constitution. Based on the judicial presumption, the burden lies with the petitioners to show that their prosecution is unconstitutional by producing primafacie evidence on violation and infringement.

In assessing the contending positions before this Court, it is noted in bringing the petitioners to trial in the context of this application Counsel had initially argued that the prosecution failed to disclose the reasons for the charging decisions of the 40 petitioners but subsequently withdrew charges against the rest of the 41 suspects initially arrested and detained together at the police station. Strictly, speaking I observe that this position of non-disclosure is consistent on the obligation under Article 10 on transparency and accountability to give reasons in the exercise of prosecutional discretion, notwithstanding the practical arguments in favour of non-disclosure for each specific case.

In this regard as discussed elsewhere, primafacie evidence adduced point to some of the offenders being employees of the Temple Point Resort (Salama Beach). To that extent, there are unknown or undisclosed reasons for the prosecutional decision. Indeed, in my view the backdrop of this litigation involves opposing private interests between the petitioners **Langer** and **Isaac Rodrot** on the other hand.

I stand guided by the Court's decision in the case of **Paul Ng'ang'a Nyaga vs. AG & 13 others) eKLR** the court held that;

"This court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence they acted in contravention of the constitution".

I also wish to reiterate the court's obiter dictum in the case of **Republic vs Chief Magistrate Milimani & Another Exparte Tusker Mattresses Ltd & 3 Others [2013] eKLR** where **Odunga J** stated as follows:-

"... The Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial. That this Court has power to quash impugned warrants cannot be doubted. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the police to investigate allegations of commission a criminal offence ought to be interfered with. It is not enough to simply inform the Court that the intended trial is bound to fail... The High Court ought not to interfere with the investigative powers conferred upon the police or the Director of Public Prosecution unless cogent reasons are given for doing so."

In addition, the Court stated in the case of ***Tinyefuze v Attorney General of Uganda*** **[1997] UGCC3** that;

"if a petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of Constitutional jurisdiction as a matter of course."

As such the petitioners had a duty to demonstrate to this court that the respondents acted outside their statutory mandate and that they abused the process. I find myself persuaded by **Mwongo, J** in the case of **Martin Nyaga Wambora vs. Speaker of The County of Assembly of Embu & 3 Others (Supra)**, where he expressed himself as follows:

"To those erudite words I would only highlight the importance of demonstration of "real danger". 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. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention."

The concept of abuse of the process as an actionable wrong under the Constitution is a basis for stay of proceedings founded on a criminal prosecution. In the case for the petitioners, they cast doubt as to whether the proceedings initiated in the Magistrate Court at Malindi were in accordance with justice. One feature of justice is fairness and due process of a suspect from the moment of an arrest, indictment, trial and final outcome. At the heart of the right to a fair criminal trial and what infuses its purposes, is for justice to be done and also to be seen to be done. In considering what, for purposes of this case, lies the central canons of Constitutionalism of right to dignity, freedom, security, liberty

and equality for every citizen.

The test is whether in investigating and preferring charges against the petitioners the procedure was in adherence to the Constitution and enabling statutory Law. To do this, the petitioners have a duty to discharge the burden of demonstrating that in the succeeding decisions made by the respondents comprised of Scintilla of evidence incapable of mounting a credible prosecution. As regards the arguments surrounding this question, the Court will lean towards the principles in **Williams v Spantz {1964} AC 1254 in which Mason C. J.** stated on abuse of the process:

> ***"The first is that the public interest in the administration of justice requires that the Court protect its ability to function as a Court of Law by ensuring that its processes are used fairly by state and citizen alike. The second is that, unless the Court protects its ability so to function in that way. Its failure will lead to an erosion of public confidence by reason of concern that the Court's processes may lend themselves to oppression and injustice. It is also possible to state with certainty that a Court of Law, after thoroughly examining the petition must categorize whether the actions complained of the respondents would constitute an abuse of the process."***

In **Hui Chiming {1992} 1 AC 34 Lord Lowry** described abuse of the process as:

> ***"Something so unfair and wrong that the Court would not allow a prosecution to proceed with what is in all other respects a regular proceeding."***

In determining a similar circumstances **Arbour J of the Supreme Court of Canada in Canadian Union of Public Employees v City of Toronto & A. G. of Ontario {2003} SCC 63** stated as follows:

> ***"Judges have an inherent and residual discretion to prevent an abuse of the Court process. This concept of abuse of process was described at Common Law as proceedings." Unfair to the point that are contrary to the interest of justice CR v Rower {1994} 1 SCR 601 at p 616, and as oppressive treatment CR v Convay {1989} 1 SCR 1659 at p. 1667 Mcancehin J as he then was expressed it this way in R v Scott {1990} 3 SCR 979 "abuse of process may be established where 1. The proceedings are oppressive or vexatious and 2. Violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexaciousness underline the interest of the accused in a fair trial. But the doctrine evokes as well as the public interest in a fair and just trial process and the proper administration of justice."***

By way of background as manifested in the petitioners' affidavit and submissions the sate sought to adduce evidence that their conduct was in breach of Section 90 of the Penal Code. A number of issues are raised by the facts of the pending petition that:

> ***1. To begin with the criminal proceedings are discriminatory which would inflict an unfair trial.***
>
> ***2. Secondly, some of the evidence placing them at the scene and identifying them as perpetrators of the crime is based on hearsay material, hence rendering the proceedings vexatious, oppressive and unfair in contravention of their fundamental rights and freedoms.***
>
> ***3. Thirdly, the proceedings in question before the Magistrates Court are brought, initiated and set to be commenced for a collateral purpose.***
>
> ***4. Fourthly, the proceedings in question unless stayed by this Court will otherwise bring the administration of justice into disrepute.***

Having considered all of these factors individually and collectively, and unavoidably at some great extent it is clear that the 1st respondent has the Constitutional mandate against every person suspected of a crime, regardless of the fact that there may be some defects in the committal evidence. This is so despite the fact that the defendant may have had a contrary view of the matter, unless, its shown that the prosecution would result in unfairness and unjust to the defendant at the trial.

In the instant case, many aspects of the issues for and against the prosecution of the petitioners are lumped together under the ownership of the Hotel referred as **"Salama Beach"** or **"Temple Point Resort."** This issue had already been determined in the interested party's favor by the High Court in **HCCC No. 118 of 2009.** On the whole of the material, the Court can safely state that litigation in any subsequent proceedings must be conducted in a manner calculated not to erode public confidence in the administration of justice by generating conflicting decisions on the same issue.

In this petition, the complainant in the **Criminal Case No. 40 of 2020 at Malindi Chief Magistrate Court** sought to be stayed and quashed by the petitioners is one **Isaac Rodrot- the Interested Party**. In another related matter **Criminal Case No. 854 of 2020 at the Chief Magistrate Court Mombasa, Isaac Rodrot** and one **Ucelli** stand charged as accused persons with Langer as the key complainant. The charges recommended in **Criminal Case No. 240 of 2020 at Malindi** identifies **Jan Langer** as the eighteenth accused person. He also happens to be the interested party in **Petition No. 12 of 2020.** The question whether this the criminal proceedings involving Jan Langer and 40 others accomplices should be stayed falls to be determined by a weighing process involving a subjective balancing of a variety of factors and considerations. Among those factors and considerations are the requirements of fairness to the petitioners, the legitimacy of the existence of a Court Judgment in the disposition of the charges factoring the petitioners and the need to maintain public confidence in the administration of justice. Though the charges in **Criminal Case No. 240 of 2020** and in **Criminal Case No. 854 of 2020** are different in nature they arose out the same pattern of ownership of **Temple Point (Salama Beach Hotel)** as such impugning the earlier proceedings on the matter.

It will readily be seen that the factor common to all these cases, indeed the central consideration underlying the entire prosecution is the Judgment of the **High Court in HCCC No. 118 of 2015**. True in both Criminal Cases a fair trial could take place under Article 50 of the Constitution, but given the entrapment arising out of that Judgment so great an affront to the integrity of the justice system, and therefore the rule of Law, that the associated prosecution is rendered inoperative in the interim period and ought not to be countenanced by the Court.

In considering an application for conservatory orders, the court is not required to undertake a deep analysis of the law and the facts as stated by **Musinga, J** (as he then was) in the case of **Centre for Rights and Awareness (CREAW) & 7 others v Attorney General, Nairobi High Court Petition No 16 of 2011** as follows:-

> ***"It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the Petitioner's application and not the petition. I will not therefore delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to 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."***

The question therefore is whether the Applicant has met the conditions for the grant of the orders sought. The guiding principles upon which Kenyan courts make findings on interlocutory applications for conservatory orders and the law is that in considering an application for conservatory orders, the court is not called upon and is indeed not required to make any definitive finding either of fact or law as that is the province of the court that will ultimately hear the petition.

The jurisdiction of the court at this point is limited to examining and evaluating the material placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of conservatory orders. The court is also required to evaluate the pleadings and determine whether denial of conservatory orders will prejudice or occasion an injustice to the petitioners.

The law applicable to the issuance of conservatory orders was pronounced by the Supreme Court in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** as follows: -

> ***""[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."***
>
> **One of the best cases on this issue is the Judicial Service Commission v Speaker of the National Assembly & Another {2013} eKLR which had properly defined the scope of conservatory orders in the following passage:**
>
> ***"Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme Law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."***
>
> **It is discernible from the submissions of the parties that this contest is a claim regarding the High Court in the exercise of its jurisdiction and the subsequent Judgment rendered in HCCC No. 118 of 2009. Bearing in mind the nature of the competing claims against the background of the earlier discourse there is a focused perception of a public interest in the overall outcome in the entire litigation.**

As it has been held in various decisions, a prima facie case is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, the Petitioner has to show that he or she has a case which discloses arguable constitutional issues. In this case, it is contended that the decisions or actions taken by the respondents fly in the face of the constitutional provisions in particular Articles **22, 23, 25, 27, 29, 40, 47,** and **50** of the Constitution.

Without saying more, it is clear that this petition discloses prima facie arguable issues for trial. In other words, it cannot be said that the petition is wholly frivolous or unarguable. As was held in **Centre for Rights Education and Awareness (CREAW) & 7 others (supra)**, a party seeking a conservatory order only requires to demonstrate that unless the court grants the conservatory order, there is real danger that he or she will suffer prejudice as a result of the violation or threatened violation of the Constitution. However, the same must be weighed against the public interest.

When considering the application by the petitioners, though non-issue as to whether to admit **Isaac Rodrot** as an interested party to the petition, its plausible to see the record straight.

The Law

In the Civil Procedure Rules Order 1 deals with parties to a suit. It provides inter alia under Rule 6 joinder of parties' plaintiffs or defendants liable on same contract. Further, in Rule 10 (1) (2) of the Civil Procedure Rules any of those persons can be joined to a suit as plaintiff, defendant or interested party in whom the right to any relief is alleged to exist. Or who is alleged to possess any interest in the subject matter of litigation.

There are numerous cases interpreting this provisions in the case of **Deported Asians Property Custodian Board v Jaffer Brothers Ltd {1991} E. A. 55 SCU** the Court said:

> ***"A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the Court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit because the party's presence is necessary in order to enable the Court effectually and completely adjudicate upon and settle all questions involved in the case or matter."***

In another case **Civicon Limited v Kivuwatt Limited & 2 others {2015} eKLR** the Court stressed that in an application for joinder the discretion is unfettered. Thus:

> ***"Again the power given under the rules is discretionary which discretion must of necessity be exercised judicially. The objective of these rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protractor, inconvenience and to avoid multiplicity of proceedings thus, any party reasonably affected by the pending litigation is a necessary and proper party and should be enjoined."***

Applying the above principles to the present circumstances the interested party has filed an affidavit demonstrating his interest in the controversy between the petitioners and the respondents. The interest has its roots as the complainant to the pending criminal proceedings against the petitioners in **Criminal Case No. 240 of 2020**. In **Wendell v Van Renselaer I Johns Ch {N. Y. 1815} Elmendorf v Taylor 10 Wheat {23 U. S.} 1824** the Courts observed:

> ***"Courts of equity require, that all the parties concerned in interest shall be brought before them, that the matter, in controversy may be finally settled. This equitable rule, however is framed by the Court itself, and is subject to its discretion."***

As far as the interested party application is concerned he is an indispensable party under Order 1 of the Civil Procedure Rules.

> ***"In view of the rules a party is indispensable of his interest is not severable and his absence will prevent the Court from rendering any Judgment between the parties before it or if notwithstanding his absence his or her interest would necessary be in equitably affected by a Judgment rendered between those before the Court."***

In light of these authorities an objection as to joinder of the interested party in a writ to the petition would have lacked merit, and there is no evidence that in being admitted to the proceedings he will cause a jurisdiction error or spoiler of the subject matter. A similar statement appears in the **Supreme Court Judgment of Nigeria in Awonyi v Registrar of Amarc {2000} 10 NWLR 522-533 where Mohammed JSC** held as follows:

> ***"It is trite that parties to whom complains are made must be made parties to such an action; it is an elementary procedure that in prosecuting civil claim are parties necessary for the invocation of judicial powers of the Court must come before it so as to give the Court the jurisdiction to grant the relief sought."***

Bearing in mind the issues drawn between the parties to be canvassed at the trial, it cannot be said that the interested party is a busy body with no inevitable interest in the outcome of the petition.

Decision

These reasons, allied to those adverted to elsewhere above renders the Court to grant the prayers in the notice of motion dated 13th May 2020 and a further motion by the interested party dated 14th May 2020. In the foregoing, to that extent the following orders do issue: -

1. The Notice of Motion dated 13th May 2020 and filed on the same day by the Petitioners is hereby allowed only to the extent of the following orders:

a) That pending the hearing and determination of this Petition an ORDER is hereby issued staying and/ or suspending plea taking and further proceedings in <u>Malindi Chief Magistrate's Court Criminal Case number 240 of 2020 Republic Vs Mathias Schmidt & 40 Others</u>.

b) In the alternative, exceptional circumstances were placed before this Court in this litigation to persuade me take the view that the approach which is reconcilable and central criteria on cross-cutting issues earlier adverted to and sufficiency importance of the constitutionality of this petition is to have it stayed pending the outcome of Petition No. 12 of 2020. In this regard, the fundamental principle to be observed by the Court is to ensure justice is being done between the parties in the exercise of discretion during the pendency of the petitions. Essentially, the constitutional Court in Petition No. 12 of 2020 when finally empaneled by the Chief Justice has inherent jurisdiction to order whether circumstances dictate for consolidation of Petition No. 10 of 2020 for a fair and just determination, given the degree of complexity and the factual issues involved in the dispute.

c) The Costs of the Notice of Motion shall be in the cause.

I order accordingly.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 1ST DAY OF SEPTEMBER , 2020

....

R. NYAKUNDI

JUDGE

In the presence of

1. Makambo Advocate for the petitioners

2. Mr. Igonga for the DPP for the 1st respondent

3. Munyithya Advocate holding brief for S. K. Kibunja for the Interested Party.