REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.310 OF 2014

BETWEEN

DR. ALFRED N. MUTUA…….……..…….PETITIONER

AND

THE ETHICS AND ANTI-CORRUPTION

COMMISSION…….....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS (DPP)…....2ND RESPONDENT

INSPECTOR GENERAL OF THE

NATIONAL POLICE SERVICE….…….....…….3RD RESPONDENT

ATTORNEY GENERAL…….....….4TH RESPONDENT

RULING

Introduction

1. The Petitioner filed his Petition on 8th July 2014 along with a Notice of Motion Application dated 8th July 2014. Upon hearing of the said Application, this Court, by Consent Orders crafted by the Parties, on 3rd December 2014, granted him conservatory orders restraining the Respondents from causing apprehension of the Petitioner, in any Court, based on an alleged unlawful procurement process of motor vehicles for the Machakos County Government, that are the subject of the Petition.

2. The Respondents were thereafter ordered to file responses to the Petition and the Petitioner to file rejoinders thereto, both within specific timelines. They were also ordered to file their written submissions before 22nd January 2015 but the Petitioner failed to file his written submissions as ordered and so no Respondents could file any submissions within the timelines given to them.

3. The Petition was then mentioned on 2nd July 2015, at the instance of the 1st Respondent, on which date the Court vacated its orders of 3rd December 2014, in the presence of Counsel for the 1st and 2nd

Respondents and stated in doing so, that, a party engaged in conduct that amounted to abuse of the court process could no longer enjoy interlocutory orders made in its favour.

4. The Petitioner thereafter applied to the Court for vacation of the orders made on 2nd July 2015, an application that was dismissed for want of merit. On 18th December 2015, the Petitioner then applied for the following orders;

> ***"(a) That the matter be certified as urgent and service of the same be dispensed with and interim orders be granted in the first instance.***
>
> ***(b) That conservatory orders be granted restraining the Respondents from causing the apprehension of the Petitioner and/or considering to prefer any criminal charges against the Petitioner in any Court, based on the procurement process of motor vehicles subject of the 1st Respondents inquiry No. EACC/FI/INQ/51/2014, pending hearing of the Application.***
>
> ***(c) That the Notice of Motion dated 8th July 2014 be heard on merit.***
>
> ***(d) That in the alternative, conservatory orders be granted restraining the Respondents from causing the apprehension of the Petitioner and/or considering to prefer any criminal charges against the Petitioner in any Court, based on the procurement process of motor vehicles subject of the 1st Respondents inquiry No. EACC/FI/INQ/51/2014, pending hearing of the Petition.***
>
> ***(e) That this Honourable Court be pleased to grant any relief that may be appropriate to ensure preservation of the subject matter of the Petition.***
>
> ***(f) That costs of this Application be provided for."***

Submissions for the Applicant

5. This Application is supported by an Affidavit and Supporting Affidavit sworn by Counsel for the Petitioner, Mr. Wilfred Nyamu and the Petitioner, Dr. Alfred Mutua, respectively. The affidavits are both dated 18th December 2015.

6. Counsel for the Petitioner in arguing the Application contended that although the Director of Public Prosecutions (DPP) has powers under **Article 157 (9)** of the **Constitution** of Kenya, 2010 (***"the Constitution")*** to prosecute any person, this power is not absolute; it is subject to **Article 157 (11)** that stems abuse of the legal process. In this regard, where there are allegations, such as in this case, of contravention of the rights under **Article 47** of the **Constitution,** the Court must stop any prosecution in accordance with **Article 22** of the **Constitution**. He contended that the DPP has therefore *prima facie* abused his powers, contrary to **Article 157 (11)** of the **Constitution.**

7. He further contended that there is further apprehension of contravention of the Petitioner's rights and therefore there is no need to approach the Court only after his arrest. That **Article 258** of the Constitution also applies to this case as there is a threat of contravention of the Constitution and **Article 165 2 (d) (ii)** as read with **Article 157 (11)** grants this Court the jurisdiction to interfere with any abuse of power by the DPP.

8. He also stated that there exists specifically a threat of the Petitioner's right to dignity being infringed upon, as he is likely to be arraigned in Court in relation to an alleged violation of procurement law and the Petitioner's right to hold and continue to hold office would also be infringed upon since he is likely to be arrested and charged by the DPP's office.

9. He added that the Petition has a high chance of success, as the alleged offence was committed before the Petitioner had settled in his office as Governor and what he is investigated for was not his responsibility at the time but the responsibility of the **Transitional Authority.** In this regard, he

submitted that the *status quo ante* ought to be preserved as it is the subject matter of the Petition, otherwise the Petition would be rendered nugatory if the order is not granted and the Court would only be delivering an academic judgement after hearing the Petition. He also contended that granting the orders sought would help to meet the purpose of conservatory orders, which is to preserve the subject matter of the Petition.

10. He further submitted that no report has been filed by the DPP indicating what steps his office has taken towards prosecution of the Petitioner and it is therefore unclear what that office intends to do and when and so the Court is left to speculate on that matter and yet the Petitioner is still apprehensive of his arrest, innocent as he may be.

11. He also relied on **British American Tobacco vs The Cabinet Secretary For The Ministry Of Health & 2 Others [2015] eKLR** where Ngugi J referred to the case of **Muslims For Human Rights & 2 Others vs Attorney General & 2 Others [2011] EKLR**, on the need not to render a case nugatory through denial of interim orders. The learned Judge had in that case also held that a conservatory order is an order that is intended to preserve the subject matter or set of circumstances in such a way that the constitutional proceedings and cause of action are not rendered nugatory.

12. For the above reasons, the Petitioner now seeks the orders elsewhere reproduced above.

Submissions for the 1st Respondent

13. In opposing the Application, the 1st Respondent, the **Ethics and Anti-Corruption Commission** (***"EACC"),*** filed Grounds of Opposition dated 23rd December 2015.

14. Counsel for the 1st Respondent submitted that the Application is speculative and premature, as the Petitioner has failed to show that any of his rights will be violated specifically in case he is arrested. That he is required to set out with precision what right would be specifically violated and how it would be violated as was held in **Anarita Kirimi Njeru vs The Attorney General (1979) KLR 154**.

15. She also submitted that looking at the history of the case, the Petitioner has acted in abuse of the Court process and enjoyed the conservatory orders granted on 3rd December 2014 and did not obey the orders of the Court to file submissions within a set timeframe, thereby forcing the Court to vacate them. Relying on the decision of Majanja J in **Bidco Oil Refineries Limited vs Attorney General & 3 Others [2012] eKLR**, that the grant of conservatory orders is not a matter of right, she stated that any further delay in determining the matter would amount to denying the public justice and thus a contravention of **Article 159 (2)(b)** of the **Constitution**.

16. She concluded by submitting that if the Petitioner is to be granted the orders he now seeks, he first has to show that the DPP has acted in contravention of **Article 157 (11)**, something that the Petitioner had failed to show and added that there is therefore no evidence that he is entitled to the said orders. She relied on the case of **Paul Ng'anga Nyaga** and **Others vs The Attorney General And Others, Petition No.518 of 2012**, where this Court held that the Court can only interfere with and interrogate the acts of other Constitutional bodies when there is sufficient evidence that these bodies have acted in contravention of the Constitution, a fact that the Petitioner had failed to prove. For the above reasons, the EACC prays that the Application ought to be dismissed with costs.

Submissions for the 2nd Respondent

17. In opposing the Application, the 2nd Respondent, the DPP, filed Grounds of Opposition dated 23rd December 2015 and a Replying Affidavit dated 8th January 2016 sworn by Ms. Laura Spira.

18. Counsel for the 2nd Respondent submitted that for conservatory orders to be granted, the Petitioner has to show that he has a *prima facie* case and she referred the Court to the case of **Paul Ng'anga Nyaga and Others vs Attorney General** and **Others, Petition No.518 Of 2012** and **Thuita Mwangi & 2**

Others vs Ethics & Anti-Corruption Commission & 3 Others [2013] EKLR, as authorities on the same and added that the Petition has no chance of success and therefore any conservatory orders granted would be in vain.

19. She further contended that there was no evidence that the DPP had exceeded his powers under **Article 157 (11)** and conversely that **Article 157 (10)** would be infringed upon if the orders sought by way of the Application were granted as the DPP, having not acted as highlighted in **Article 157(11),** should be able to bring charges against the Petitioner if he so wished. She added in the public interest, this matter must be heard and finalised once and for all.

20. She concluded by stating that since the Petitioner had acted in abuse of the Court process, his Application should be dismissed with costs.

Submissions for the 3rd and 4th Respondents

21. I did not see nor receive any submissions by the 3rd and 4th Respondents.

Determination

22. This being an application for conservatory orders to be heard on its merits, the Court, in recognising the Petitioner's right to be heard, indulges him and addresses the Application as it is and not based on past proceedings concerning conservatory orders in this Petition. Accordingly, the Court will consider the circumstances under which it is acceptable to grant conservatory orders and determine if the Petitioner has made his case for the same, sufficiently. Firstly, however, this Court will highlight the laws that sanction its consideration of this Application for conservatory orders.

23. **Article 258** of the **Constitution** provides that every person has the right to institute Court proceedings claiming that the Constitution has been contravened, or is threatened with contravention. In similar vein, **Article 22 (1)** and **(3) (c)** of the **Constitution** provides that every 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, whereupon a Court may grant appropriate relief, including a conservatory order. Specifying which Court is referenced, **Article 23** of the **Constitution** states that the High Court has jurisdiction, in accordance with its mandate as provided for in **Article 165**, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Specifically, also ***Article 165*** *grants the High Court jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.*

24. Even without probing the interpretation of these provisions, the words used therein, comprehended in their ordinary meaning, are clear that any person can apply to the High Court alleging a violation or threat of violation of the Constitution and the rights or fundamental freedoms in the Bill of Rights. The Petitioner has in this regard approached the appropriate forum as was properly elucidated in the case of **C K (A CHILD) through Ripples International as her Guardian & Next Friend) & 11 Others vs Commissioner of Police/Inspector General of The National Police Service & 3 Others [2013] eKLR** where the Judge held, and I agree:

> ***"everyone 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 and the High Court has jurisdiction to entertain such proceedings and determine applications for redress of a denial, violation or infringement of, or threat to, a right on fundamental freedom in the Bill of Rights."***

25. In that regard, what are the circumstances under which it is acceptable for Courts to grant conservatory orders? From a reading of **Articles 22, 23, 165** and **258** of the **Constitution** as highlighted above, infringement of or threat of infringement of rights in the Bill of Rights inform the findings of courts when they are considering applications for conservatory orders. This serves as the purpose for granting such orders. Courts have also formulated principles to be considered when granting or denying

such conservatory orders.

> That is why **Musinga, J** in **Petition No.16 of 2011, Nairobi – Centre For Rights Education and Awareness (CREAW) & 7 Others vs Attorney General** stated that;
>
> ***"...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 therefore not 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." (See also Cascade Company Limited vs Kenya Association of Music Production (KAMP) & 3 others [2015] e KLR) (Emphasis added)***

Further, Odunga J in **Kevin K Mwiti & Others vs Kenya School of Law & Others [2015] eKLR** at para 60 held that;

> ***"Whereas under Article 258(1) of the Constitution, every person has the right to institute Court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention, the mere fact that a person is entitled to bring such proceedings does not automatically entitle such a person to grant of conservatory orders. The person is enjoined to go further and show how the refusal to grant the said orders is likely to be prejudicial to him or her"***

The above position had earlier been approved in **Muslims for Human Rights (MUHURI) & 2 Others vs The Attorney General & Judicial Service Commission, Mombasa HC Pet. No.7 of 2011,** where the Court held that an Applicant/Petitioner seeking conservatory orders must also demonstrate that unless the conservatory order is granted, there is real danger which may be prejudicial to him or her.

26. More importantly however, in **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR, Application No. 4 of 2014** the Supreme Court specifically highlighted the fact that conservatory orders issued under **Article 23(3)(c)** of the **Constitution** are not akin to injunctions as known to civil law and must be viewed against the values and principles of the Constitution including public interest.

27. Taking all the principles enunciated above and applying them to the present Application, the first question for determination is whether the Petitioner has established a *prima facie* case. A *prima facie* case is one that on the face of it is not frivolous but rather one that raises issues that can be argued in and determined by a Court of law. The Petitioner in this context alleges threats of infringements upon his rights by way of improper investigative actions by the EACC and unconstitutional anticipated arrest and charge by the DPP's office. To that extent only, I find that he has established a case that on the face of it requires deliberation upon and decision from this Court. I say so without any consideration of the merits of the Petition, and I so find.

28. The second question for determination is whether there is a real threat, which will result in the Petitioner suffering harm or prejudice if the conservatory orders are not granted. Indeed, the Petitioner avers in his Application, that his rights to dignity and to hold and continue holding office are threatened with infringement. In order to determine whether these averments carry any weight and that his rights are indeed at threat of violation, the Court will consider what a threat of violation to one's Constitutional rights in actual sense denotes. Only what is found to be a real threat to his rights would allow the Court to intervene and issue conservatory orders to protect the Petitioner.

The 9th Edition of the **Black's Law Dictionary, defines a *"threat"* as;**

> "***an indication of an approaching menace, a Person or a thing that might cause harm"*** *or* ***"a communicated intent to inflict harm or loss to another."***

Further, in the case of **Coalition for Reform and Democracy (CORD) & 2 Others vs Republic of Kenya & 10 others [2015] eKLR,** the Court stated thus:

> ***"What is the test to apply when a court is confronted with alleged threats of violations aforesaid? In our view, each case must be looked at in its unique circumstances, and a court ought to differentiate between academic, theoretical claims and paranoid fears with real threat of constitutional violations."***

The Court then added that:

> ***"clear and unambiguous threats such as to the design and architecture of the Constitution are what a party seeking relief must prove before the High Court can intervene."***

29. In that context, in his Application, and in his Affidavit dated 18th December 2015, the Petitioner explains that his rights to dignity would be infringed upon if he is charged and therefore associated with a procurement crime and his right to continue to hold office would also be infringed upon by his being arrested. On the other hand, Counsel for both the 1st and 2nd Respondents have argued that the Petitioner's allegation that his rights are threatened with violation by of way arrest and charge by the 2nd Respondent, is premature and speculative.

30. Having reflected on the matter, I would agree with the Respondents because the Petitioner has not convinced me that the 2nd Respondent, by doing his work in the ordinary course of his mandate, i.e. reviewing investigation files that have been forwarded to his office and deciding to prefer criminal charges on persons implicated with any alleged crime, poses or represents any sort of menace that might harm him or infringe upon his rights. It is not clear and unambiguous what rights will be violated and what actions stand to violate the specific rights. The allegations of potential threats are at the most hypothetical and it is obvious why.

31. In addition, to submit that one's rights will be violated through employment of a fairly predictable procedure that he has not yet even been subject to is indeed merely speculative and premature. In fact, I find that the premature nature of this claim is the very reason why the Petitioner is unable to clearly demonstrate, with the specificity required, how his rights are at threat of being violated.

32. I also note that Mr. Nyamu submitted that the Petitioner will be prejudiced if the conservatory orders sought are not granted. Counsel for the 1st and 2nd Respondents have argued the contrary and as was earlier mentioned, the law calls for demonstration of a threat or danger that will cause the Petitioner prejudice in the case that the conservatory orders sought are not granted. Having found that *prima facie* there exists no real threat or danger to the rights of the Petitioner, I also cannot find that that any harm or prejudice can result therefrom.

33. The next principle to invoke is that of proportionality when denying or granting conservatory orders. In the case of **Suleiman vs Amboseli Resort Limited [2004] 2 KLR 589**, **Ojwang, J** said the following about proportionality:

> ***"…the Court is quite convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted; and in these circumstances, the balance of convenience lies in favour of the applicant rather than the respondent. There would be a much larger risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant".***

34. The question that emerges is this- would the risk of injustice that would be occasioned by my not granting these conservatory orders to the Petitioner be greater than the risk of injustice to the Respondents? The Petitioner in this instance is opposed to being arrested and charged by the Respondents whose discharge of mandate would require them to arrest and charge the Petitioner if they have just cause to do so. This would indeed be in the interests of justice and any risk of injustice on the Respondents

occasioned by orders that would require them not to discharge their mandates is representative of a risk of injustice on the public as the Respondents work on behalf of and for the public. I have already stated that the Petitioner only faces a routine procedure employed by the Respondents. The procedure, in and of itself does not typify any risk of injustice to the Petitioner, more so where there is *prima facie* nothing on the record to show that the Respondents are abusing the court process or are acting against the public interest.

35. Addressing my mind therefore to the proportionality consideration of granting conservatory orders, I find that there would be a much larger risk of injustice if this Court found in favour of the Petitioner at this stage.

36. I say so because, and I reiterate this point, the conservatory orders being sought by the Petitioner call for this Court to interfere with the 2nd Respondent's office in the carrying out of its duties. The Petitioner alleges that the intended actions of the 2nd Respondent will cause his rights to dignity and to continue holding office to be infringed upon but I find it prudent to consider whether, in this particular instance, the 2nd Respondent has *prima facie* exercised or intends to exercise his mandate in a manner that necessitates the Court's intervention through the granting of conservatory orders so as to avoid infringement on the rights of the Petitioner.

37. In that regard, the powers of the 2nd Respondent are found in the Constitution and other legislation and they should be exercised within the limits set by the Constitution and aforementioned legislation.

Article 157 of the **Constitution** provides thus:

> ***"(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—***
>
> ***(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;***
>
> ***(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and***
>
> ***(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).***
>
> ***(7) …***
>
> ***(8) …***
>
> ***(9) …***
>
> ***(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.***
>
> ***(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process."***

In addition, **Section 6** of the Office of the **Director of Public Prosecutions Act, No. 2 of 2013** provides the following with regard to the 2nd Respondent's functions:

> ***"6. Pursuant to Article 157(10) of the Constitution, the Director shall—***

(a) <u>not require the consent of any person or authority for the commencement of criminal proceedings;</u>

(b) not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and

(c) be subject only to the Constitution and the law" (Emphasis added)

38. The above **Section 4**, also calls for the 2nd Respondent to discharge his functions reasonably and to promote the diversity of the people of Kenya, impartiality and gender equity, the rules of natural justice, promotion of public confidence in the integrity of the Office, the need to discharge the functions of the Office on behalf of the people of Kenya, the need to serve the cause of justice, prevention of abuse of the legal process and public interest, protection of the sovereignty of the people, securing the observance of democratic values and principles and promotion of constitutionalism.

39. It is evident from the foregoing that the duties of the 2nd Respondent include instituting and undertaking criminal proceedings against any person before any Court. It is also evident that in undertaking his duties, the 2nd Respondent must do so reasonably, having regard to the public interest, the administration of justice and the need to prevent and avoid abuse of the legal process. That is why i**n Cape Holdings Limited vs Attorney General & Another [2012] eKLR,** Warsame J stated that;

"My understanding of the law is that the responsibility to investigate, determine the credibility of the complaint and prosecution is solely left for the police under the direction and control of the Director of Public Prosecution. The predominant factor being that they must act in accordance with the law and so long as they do not exceed the limits, then a court should not prohibit the prosecution of an individual."

Similarly, in The Commissioner of Police & The Director of Criminal Investigation Department & Another vs Kenya Commercial Bank Limited & 4 Others [2013] eKLR, the Court stated thus;

"In terms of Article 157 (11) of the Constitution, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution."

Further that;

*"**The police in conducting criminal investigations are bound by the law and the decision to investigate a crime must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification."***

Odunga, J in **Nairobi High Court Misc. Civil Application No.249 of 2012, Republic vs The Director Of Public Prosecution Ex-Parte Victory Welding Works Limited and Another also categorically stated that:**

"The office of the Director of Public Prosecutions is an independent constitutional office which is not subjected to the control, directions and influence by any other person and only subject to the control by the Court based on the aforesaid principles of illegality, irrationality and procedural impropriety."

The above holdings are similar to the decision of this Court in Paul Ng'anga Nyaga and

Others vs The Attorney General and Others, Petition No.518 of 2012.

Lastly, in Macharia & Another (2001) KLR 448, the Court defined what an improper prosecution is, in the following terms:

"A prosecution is improper if:

(a) It is for a purpose other than upholding the criminal law;

(b) It is meant to bring pressure to bear upon the Applicant / Accused to settle a civil dispute

(c) It is an abuse of the criminal process of the Court

(d) It amounts to harassment and is contrary to public policy

(e) It is in contravention of the Applicant's Constitutional right to freedom"

40. I agree with and adopt all the holdings above, save to add that, just as the police are required to take a decision to investigate that is not unreasonable, made in bad faith, intended to achieve an ulterior motive or used as a tool for settling personal scores, the 2nd Respondent's decisions to prefer criminal charges against anyone should also be guided by the same precepts.

41. Can it therefore be said that based on the specific facts of this case the 2nd Respondent's conduct has *prima facie* been unreasonable and therefore calls for intervention by the Court through granting of the conservatory orders, in order to protect the Petitioner? The conservatory orders which would prohibit arrest and charge of the Petitioner would only be allowable if the Petitioner demonstrated that the 2nd Respondent's conduct thus far and at this stage, regarding the case has been unlawful, unreasonable, contrary to the public interest, the administration of justice or has abused the legal process.

42. These may well be issues that need to be determined when the Court is considering the Petition and not this Application, but at this stage, I cannot find reason to find that the 2nd Respondent has acted in contravention of the law at all. The reasonability behind the decision to investigate the Petitioner is a matter to be disposed of at the hearing of the Petition and not this Application for conservatory orders. This is of course augmented by my earlier determination that the Petitioner faces no actual threat to his constitutional rights and that any limitation thereof is justifiable.

43. On whether refusal to grant the conservatory orders would render the Petition nugatory, I understand that while the Application seeks to restrain arrest and charge of the Petitioner pending determination of the main Petition, the Petition differs in that although it seeks the same orders for the long term, its determination is dependent upon examining the basis and conduct of the 1st Respondent and 2nd Respondent in investigating and at a later date preferring criminal charges against the Petitioner. The latter issues do not form the subject of determination in this Application.

That is why in **Paul Ng'anga Nyaga and Others vs The Attorney General and Others, *(Supra)*.** This Court, referring to **Miscellaneous Application No.68 of 2011 Michael Monari & Anor vs The Commissioner Of Police And 3 Others** stated that:

"It is not the duty of the court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person."

44. I reiterate that holding and taking the facts as placed before me into account, I find that the Petition would not be rendered nugatory if the conservatory orders being sought are not granted.

45. Having disposed of this matter, I recall that the Petitioner insisted that since the consent orders remained vacated, in lieu of proceeding to set the Petition down for hearing, he would still want his Application for conservatory orders to be heard on its merits. Although well within his rights to make such an Application, in consideration of the history of this case, it is obvious that the present Application substantively seeks the same orders as the Application dated 8th July 2014, which was compromised by the consent orders of 3rd December 2014. To revive that Application by the present one is mischievous to say the least.

Disposition

46. It is obvious that none of the prayers sought can be granted and for the above reasons, I do not see any merit in the Application dated 18th December 2015 and it is hereby dismissed.

47. As previously ordered, let the parties set down the Petition for hearing on a priority basis, so that this matter may be disposed of in the interests of justice.

48. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROB THIS 5TH DAY OF FEBRUARY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Nyamu for Applicant

Mrs. Obuo for 2nd Respondent

Miss Lunyolo for 1st Respondent

Mr. Ndubi for Interested Party

Mr. Kima for 4th Respondent

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE

5/2/2016

Further Order

Hearing of the Petition on 14/4/2016.

ISAAC LENAOLA

JUDGE

5/2/2016