



Kangogo & another v Attorney General & 4 others (Constitutional Petition E002 of 2025) [2025] KEHC 13930 (KLR) (2 October 2025) (Ruling)

Neutral citation: [2025] KEHC 13930 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CONSTITUTIONAL PETITION E002 OF 2025**

E OMINDE, J

OCTOBER 2, 2025

**IN THE MATTER OF ARTICLES 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 40,
43, 47, 48, 50 AND 259 OF CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ARTICLES 1, 2, 3, 7, 8, 9 AND 10 OF THE
UNIVERSAL DECLARATION OF HUMAN RIGHTS**

AND

**IN THE MATTER OF ARTICLES 9, 14 AND 15 OF THE
INTERNATIONAL COVENANT CIVIL AND POLITICAL RIGHTS**

AND

**IN THE MATTER OF RULES 3, 4 AND 10 OF THE CONSTITUTION
OF KENYA**

(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)

PRACTICE PROCEDURE RULES, 2013

BETWEEN

MARGARET JEMUTAI KANGOGO 1ST PETITIONER

ZENDERA KIPLAGAT BIWOTT 2ND PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

DIRECTOR PUBLIC PROSECUTIONS 2ND RESPONDENT

NATIONAL POLICE SERVICE 3RD RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS 4TH RESPONDENT



RULING

1. By a Notice of Motion dated 6/02/2025, the Petitioners/Applicants seek orders that:
 1. Spent.
 2. Spent.
 3. Spent.
 4. The Respondents be restrained from arresting and prosecuting the Petitioners/Applicants herein or in any way interfering with their liberty pending the hearing of the Petition.
 5. There be stay of the proceedings in Eldoret CMCRC No.E216 of 2015 pending the hearing of the instant Petition.
 6. Costs of the Application be awarded to the Petitioner/Applicants.
2. The application is premised on the grounds set out on the face of the motion and the facts deponed in the Supporting Affidavit sworn by Margaret Jemutai Kangogo, the 1st Petitioner/Applicant herein.
3. The 1st Applicant deposed that the 5th Respondent was the registered proprietor on land parcel number Eldoret Municipality Block 13/31 but abandoned its possession and that subsequently, they acquired an interest over the abovementioned parcel of land under the doctrine of adverse possession after the lapse of the 12 year period envisaged under the Limitations of Act. That they moved to the Honourable Court on 25th January 2023 vide Eldoret CMCC E&L Case No.12 of 2023 (OS) Zendera Kiplagat Biwott & Another Vs. Kanika Nitin Amin, seeking a declaration in their favour as having acquired a legal interest on the subject parcel of land and that the Honourable Court heard the above-mentioned matter and issued a Decree in their favour against the 5th Respondent herein on 9th May 2023.
4. That thereafter they registered the Decree with the County Land Registrar to facilitate endorsement of the court's declaration on the Parcel Register. That the 5th Respondent was aggrieved by the court's decision and she lodged an Application dated 14th March 2024 seeking to set aside the Decree and the said application is pending hearing and determination by the Court. Additionally, the 1st Applicant deposed that the 5th Respondent, sensing a dismissal of her Application proceeded to lodge a complaint with the Directorate of Criminal Investigations against the applicants in a bid to harass, blackmail and intimidate them.
5. That as a consequence, they were summoned to the Kapsaret Sub-County Criminal Investigation Office at Langas Police Station to record Statements and that while at the Police Station, the 5th Respondent gave a condition to the investigating officers that she will only withdraw the complaint if the Applicants accede to her Application for setting aside of the Decree and forfeit their rights over the subject parcel of land.
6. The 1st Applicant deposed that the Respondents then moved behind their backs and sought for Warrants of Arrest vide Eldoret CMCRC No. E216 of 2025, creating an impression that they had declined to attend Court and that this points to an ulterior motive on the part of the Respondents herein and further that the Respondents' decision to seek Warrants of Arrest against them is aimed at poisoning the trial court's mind against them in order to deprive them of our right to bail/bond.



7. The 1st Applicant further deposed that it is evident that the Respondents are hell-bent to further their malice in the matter and trample on their rights by manipulating the criminal trial process and that their actions are informed by the misconception that their arrest and prosecution could easily put pressure on them to give up on their rights to the subject parcel of land and further that the Respondents have on several occasions expressly indicated to them that they don't care if the criminal proceeding lead to a conviction but are only keen on using the same to teach them a lesson which points to the malice on the part of the Respondents and that this therefore calls for the intervention of this Honourable Court.
8. The 1st Respondent maintained that there is an imminent risk that they will be arrested and subsequently prosecuted on trumped up charges thereby depriving them of a level playing field in the prosecution of the land case before the Magistrate's court.
9. The 1st Applicant further deposed that the Prosecution and Police powers are public resources which should not be abused to settle personal scores, least of all land disputes and that the intention to found criminal prosecution on civil proceedings will have a negative impact on the sanctity of the judicial processes. Further, the fact that the Petitioners will have a right to defend themselves in the criminal trial cannot sufficiently ameliorate the harm that would have been caused to them by their arrest and prosecution.
10. That their arrest and prosecution will severely taint their reputation noting that some of their friends, family members, acquaintances and associates may never quite understand what transpired even after an acquittal by the criminal court. Additionally, the 1st Applicant deposed that there is an effective opportunity for the 5th Respondent to contest their claim to the suit land through the civil law processes and there is no compelling reason to invoke the criminal law processes and if the criminal process is allowed to continue, the Respondents will effectively steal the match from them.
11. In the end, the 1st Applicant deposed that the Respondents have acted in a manner that will infringe on their fundamental rights and freedoms hence the need to put the criminal proceedings in abeyance pending determination of the Constitutional Petition to safeguard the integrity of the criminal justice system.

Response

12. The Application is opposed by the 5th Respondent vide her Replying Affidavit sworn on 25th March 2025. She deposed that she is the registered owner of Eldoret Municipality Block 12/31. That she learnt of the adverse possession proceedings taken out by the Petitioners/Applicants over the suit property in Eldoret Chief Magistrates Court vide Environment and Land Matter No. E012 of 2023, with shock and she made a report/complaint to the 3rd Respondent to investigate the same. She stated that she is aware that the investigations were undertaken by the police and they recommended charges against the Petitioners/Applicants.
13. The 5th Respondent maintained that she has no capacity to investigate, arrest and charge the Petitioners/Applicants herein hence the orders sought against her cannot legally issue. The 5th Respondent deposed that there is no law that has been cited that bars the police from undertaking investigations following complaints from Kenyan citizens, arresting and preferring charges against any suspect.
14. She maintained that the depositions made by the Petitioners/Applicants in the matter pending before the Chief Magistrate's court are all false and/or full of lies as the decree was set aside and therefore the Petitioners/Applicants ought to account for their actions.



15. The 5th Respondent further deposed that the instant petition and application before the court are an abuse of the court process and should not be entertained. That the grant of the orders sought in the application and the petition will not only defeat the course of justice but will also enable and promote illegal acts by individuals such as the Petitioners/Applicants herein and that if at all the Petitioners/Applicants are innocent and/or are not liable as they claim, then they should allow the criminal proceedings to proceed and they will have an opportunity during the hearing to give evidence that will exonerate them from blame and/or demonstrate their innocence.
16. That consequently, the criminal proceedings commenced should proceed to its logical conclusion so as to allow the trial court to make a decision with regard to the charges preferred against the Petitioners/Applicants following the intensive investigations undertaken by the 3rd Respondent. The 5th Respondent maintained that as much as the Petitioners/Applicants claim that their right to freedom is likely to be violated, her right to property which the Petitioners/Applicants have violated is equally important hence the need to have the criminal proceedings progress to conclusion.
17. According to the 5th Respondent, the move by the Petitioners/Applicants in the instant petition and application is intended to misuse the powers of this court and which move she asks the court to strongly frown at by denying the orders sought. Additionally, the 5th Respondent deposed that there is no evidence of any violation of the Petitioners/Applicants rights to warrant this court's intervention for reasons that in any event, prosecution of a suspect cannot by any stretch of imagination be said to be a violation unless evidence in that regard is demonstrated.
18. The 1st to 4th Respondents did not file responses to the application.

Submissions

19. The Application was canvassed vide written submissions. The Petitioners/Applicants filed submissions dated 2nd May 2025 while the 5th Respondent filed submissions dated 14th February 2025.

The Petitioners'/Applicants' Submissions

20. Counsel for the Petitioner submitted that this Court has the power to grant conservatory orders at any stage of the proceedings by virtue of Article 23(3) of the Constitution. Counsel added that the circumstances under which the Court will grant conservatory orders were discussed by Odunga J. in *Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another* [2016] eKLR.
21. Counsel urged that it is evident that the intended prosecution finds its basis in a land dispute between the Petitioners and the 5th Respondent. Counsel also relied on case of *Bundid & Another v Ministry of East African Community (EAC), the Asals and Regional Development & 3 Others* (Petition E002 of 2024) [2024] eKLR, with regard to the principles that guide the grant of conservatory orders.
22. Regarding a prima facie case, Counsel submitted that the Respondents' are seeking to arrest and prosecute the Petitioners with respect to a dispute over a parcel of land that is pending before the Court in Eldoret CMCELC Case NO. E012 OF 2023 (OS).
23. Counsel urged that this action by the Respondents is a clear disregard of the doctrine of sub judice in view of the facts the charges proffered against the accused are still contested facts before the Land Court. Counsel maintained that the decision to arrest and prosecute the Petitioners is malicious noting that the criminal justice system is being abused to address what is purely a civil dispute. According to Counsel it is unfair that the state agencies are allowing the 5th Respondent to abuse state machinery for her selfish interests. Counsel relied on the Court of Appeal decision in *Soy Developers Limited & 5*



Others v Cyrus Shakhhalaga Khwa Jirongo & 7 Others; Soy Developers Limited & 4 others (Interested Parties) [2019] eKLR wherein the court reiterated the grounds upon which criminal prosecutions may be prohibited.

24. Counsel further submitted that the that the malice with which is the basis of the prosecution of the Applicants by the 5th Respondent can be gleaned from the attitude portrayed by the 5th Respondent at paragraph 12 of her response. Counsel submitted that in the case of Maina & 4 others v Director of Public Prosecutions & 4 Others (Constitutional Petition No. E106 & 160 of 2021 (Consolidated)) [2022] the Court gave the circumstances in which a court could block concurrent civil and criminal proceedings.
25. Counsel urged the Court to look at the conduct of the Respondents who moved behind the back of the Petitioners and sought warrants of Arrest vide the Eldoret CMCR NO. E216 OF 2025 by creating an impression that they had declined to attend court and submits that this points to an ulterior motive on their part. Counsel further submitted that this was aimed at poisoning the trial court's mind against the Petitioner in order to deprive them of their right to bail and bond.
26. Counsel observed that it is in a situation like this that the Court had in mind when it held in the case of Kuria & 3 others v Attorney General [2002]2 KLR 69 that:

“The court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform....here the prosecution is an abuse of the process of court as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and or prohibiting prosecutions brought to bear for ulterior and extraneous considerations.”

27. Counsel pointed out that the 5th Respondent has argued that if the Petitioners are innocent as they claim, they should allow the criminal proceedings to proceed and they will have an opportunity during hearing to give evidence that will exonerate them from blame. Counsel however submitted that this is a violation of the Petitioners fundamental rights enshrined under the *Constitution* and several internal human rights instruments. Counsel added that the fact that one will have a chance to defend oneself does not obviate the need to protect innocent person from being dragged through unnecessary criminal trial. Counsel urged the Court to consider the decision in R. vs. The Judicial Commission into the Goldenberg Affair and 2 Others Ex parte Saitoti HC Misc Appl.102 of 2006 where it was stated that the Court has a constitutional duty to ensure that a flawed threatened trial is stopped in its tracks if it is likely to violate any of the applicants' fundamental rights.
28. Counsel cited the holding in Republic v Attorney General Ex parte Kipngeno Arap Ngeny (2001) to further submit that the 5th Respondent act of giving a condition before the investigation officer while at the Langas Police Station, that she will only withdraw the complaint should the Applicant's accede to her Application for setting aside and forfeit their rights over the subject parcel of land is a clear contravention to their rights as protected under Article 40 of the *Constitution*. The court stated therein as follows;

“It is an affront to our sense of justice as a society to allow the prosecution of individuals on flimsy grounds. Although in this application we cannot ask the Attorney General to prove the charge against the accused, there must be shown some reasonable grounds for mounting



a criminal prosecution against an individual. There must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will achieve nothing more than embarrass the individual and put him to unnecessary expense and agony. The Court may, in a proper case, scrutinize the material before it and if it is determined that no offence has been disclosed, issue a prohibition halting the prosecution."

29. Counsel urged that the Respondents will steal the match from the Petitioners should they be allowed to prosecute them before the conclusion of the Land Case in view of the fact that the intended arrest and arraignment is unconstitutional and lacks proper factual and legal basis. Counsel submitted that in fact the Court Order annexed by the 5th Respondent shows that the Honourable Court directed for the matter to start denovo in order for the Court effectually and completely adjudicate upon and settle all matters involved in the suit as there was a third party who was also seeking rights over the same property. Counsel relied on the decision in Republic v Director of Public Prosecutions & another ex parte Patrick Ogola Onyango & 8 others [2016] eKLR, where the Court stated that a prosecution which lacks a foundational basis must not be allowed to stand.
30. Counsel maintained that the Petitioners have not in any way misled this court since the Court Order annexed by the 5th Respondent was pursuant to an Application lodged by an Intended Interested Party who wanted to be joined as a party to the suit and not pursuant to an Application lodged by the 5th Respondent and that in any case a Court setting aside a Judgment/Decree is not a criminal indictment against the parties to the suit. Counsel added that the parameters for determination of disputes in civil courts are different from the parameters to be considered in a criminal court and that a claim in a civil court does not in any way amount to a criminal offence however frivolous a suit can be deemed to be.
31. On the submission that prosecution and police powers are public resources which should not be abused to settle personal scores, least of all land disputes, Counsel cited Article 157(11) of the Constitution of Kenya in support thereof and urged the Court to return a finding that the Petitioners have established a prima-facie case with an intervention through a grant of the prayers sought in the instant Application. Counsel maintained that without a rebuttal to the facts alluded by them, then they have certainly disclosed a prima facie case as envisaged in the case of David Ndii & others v Attorney General & others [2021] eKLR.
32. On the issue that the Petitioners will suffer prejudice, Counsel submitted that the entire Petition will be rendered nugatory should the arrest and prosecution occur before its hearing and determination noting that the Petitioners cannot be adequately compensated for the harm that would have been caused to them by the arrest and prosecution. Counsel urged the Court be persuaded by the decision in Ongaga v County Assembly of Nyamira & Another (Petition E001 of 2023) [2023] eKLR where the Court opined as follows;

“On whether failure to grant the orders sought would render the Petition nugatory, I find that as correctly argued by Counsel for the Applicant, it would be absurd for this Court to litigate on issues concerning the impeachment process while the same process is at the same time proceeding. The obvious outcome of such a scenario is that the hearing of the Petition will be an exercise in futility because the nature of the subject matter will have been redefined by the ongoing impeachment process. On the other hand, should the Court arrive at a finding that the process was flawed, it would result in a state of confusion where the County Government may already be having another person occupying in the Applicant's position. My take is that in order to avoid such a convoluted outcome, the proper direction



is for this Court to preserve the substratum of the main Petition so that the subsequent proceedings are not rendered otiose."

33. Counsel urged that the Respondents have acted in a manner that will infringe the fundamental rights and freedoms of the Applicant's hence the need to put the criminal proceedings in abeyance pending the hearing and determination of the Constitutional Petition to safeguard the integrity of the Criminal Justice system. Counsel relied on the holding by the Court of Appeal in *David Munie Riunge v Dr. Ernest Muinde Kioko and another* (2023) eKLR.
34. Counsel further submitted that the intended arrest and prosecution will adversely affect the reputation of the Petitioners in the eyes of their friends, neighbours and business associates hence the need or an urgent intervention of this Honourable Court. Counsel added that the arrest and prosecution will taint the reputation of the Petitioners in the eyes of their friends and family members, acquaintances and associates who may never understand what transpired even after an acquittal by the criminal court.
35. Counsel maintained that on the contrary, the 5th Respondent will have an effective opportunity to contest her claim to the suit land through civil process and there is no compelling reason to invoke the criminal law process. Counsel relied on the case of *Shah Munge & Partners Ltd v National Social Security Fund Board of Trustees & 3 others*, Civil Application No.211 of 2016.
36. In conclusion, Counsel submitted that it is important for this Honourable Court to take cognizance of the fact that based on the conduct of the Respondents, there is a high likelihood that they are hell bent to further their malice in the criminal proceedings and trample on the rights of the Petitioners by manipulating the criminal trial process. Counsel maintained that there is a high likelihood that the Petitioners will be arrested and prosecuted on trumped up charges thereby depriving them of a level playing field on the resolution of the land dispute.

The 5th Respondent's Submissions

37. Counsel for the 5th Respondent on his part submitted that the Petitioners/Applicants have not met the conditions for the grant of the said orders. He cited the case of *Law Society of Kenya vs. Office of the Attorney General & Another, Judicial Service Commission (Interested Party)* [2020] eKLR and the case of *Wilson Kaberia Nkunja v Magistrates and Judges Vetting Board & another* [2016] eKLR. Counsel submitted that the Petitioners/Applicants have not met and/or satisfied and/or attempted to demonstrate any of the above conditions to warrant the grant of the orders sought.
38. On whether the Petitioners/Applicants have established a prima facie case with a likelihood of success, Counsel submitted that the Petitioners/Applicants have failed to demonstrate that they have a prima facie case with a likelihood of success. He submitted that in the case of *Mrao Limited Vs- First American Bank of Kenya and 2 others*, the Court of Appeal while defining what a prima facie case is to be construed to be held that;

“...a prima facie case in a civil application includes but not limited to a genuine and arguable case. It is a case which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later...”
39. Counsel pointed out that the Petitioners/Applicants have in the application and the Petition alleged that the Respondents have disregarded the doctrine of sub judice by commencing criminal proceedings during the pendency of the civil case before the Environment and Land Court. Counsel urged that this position is misplaced and unfounded in law for reasons that Section 193 A of the Criminal Procedure



Code CAP 75 Laws of Kenya allows for criminal proceedings to be commenced even where there are civil proceedings pending before the court.

40. Counsel further submitted that while discussing the import of section 193A of the Criminal Procedure Code, the Court of Appeal in the case of Lalchand Fulchand Shah -Vs-Investments & Mortgages Bank Limited & 5 Others [2018] eKLR stated thus;

“In terms of Section 193A of the Criminal Procedure Code, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings does not bar the commencement of criminal proceedings. However, where the criminal proceedings are vexatious and an abuse of the court process, the High Court has the powers to intervene. But this power has to be exercised very sparingly as it is in the public interest that crime is detected and suspects brought to justice...”

41. Counsel urged that going by the above cited provisions of the law, it is clear that the law allows for civil and criminal proceedings to be commenced and/or proceed concurrently before the court and therefore the Petitioners/Applicants' assertion that the Respondents have disregarded the doctrine of sub judice does not hold water and is a total misapprehension of the law and should simply be ignored.
42. Counsel further observed that it is the Petitioners/Applicants contention that the 5th Respondent's application to set aside the interlocutory judgment obtained by the Petitioners/Applicants in the civil case has not been determined. He submitted that the said application was considered by the trial court which proceeded to unconditionally set aside the ex-parte proceedings and the judgment pursuant to which the Petitioners/Applicants had acquired title to the 5th Respondent's land vide a Ruling delivered 8th October 2024. Counsel maintained that Petitioners/Applicants are dishonest and have come to court with unclean hands and consequently they have failed to establish a prima facie case to warrant the grant of the orders sought.
43. Counsel relied on the case of Amir Lodges Ltd & another-vs-Mohammed Omar Shariff & another [2022] eKLR where the Court held that;

“...this Court, therefore, finds and hold that a Court cannot terminate a criminal case or criminal investigations solely on the basis of a pending civil case based on similar facts and circumstances. For a Court to so halt a criminal case or investigations, there must be more to the pendency of a civil claim. In this case, the Petitioners attempted to demonstrate how the investigations will prejudice the civil case and infringe their right to fair trial. However, from the foregoing analysis, this Court is unable to agree with the Petitioners. I say so because the Petitioner's claim is largely based on the fact that they filed a civil claim. The allegations of impropriety on the part of the Respondents remain too remote if any. In the end, this Court is persuaded that the Petitioners have not demonstrated any prima facie case at the moment.”

44. Counsel also cited the case of Kuria & 3 Others Vs-Attorney General (2002)2 KLR, in that regard.
45. On whether the Petitioners will suffer prejudice if the orders sought are not granted, Counsel submitted that apart from stating that there is an ongoing civil case, no evidence of prejudice or danger or threat of violation of the Petitioners/Applicants' constitutional rights has been tendered. Counsel urged that it is not enough just to allege a fact. Proof of the facts is fundamental. Counsel maintained that Criminal prosecutions are legal and provided for by statute and cannot be said to infringe on any rights without evidence of such infringement. Counsel added that in any event, the Petitioners/Applicants have a chance to vindicate themselves against the charges preferred against them by adducing evidence before the trial court.



46. Counsel submitted that indeed, it is the 5th Respondent, the owner of the property in issue who is the one to be greatly prejudiced should the orders sought issue as the Petitioners/Applicants will walk scot-free despite the heinous acts of fraud they have committed and continue to commit. Counsel thus urged that the Petitioners' rights have not been violated and/or threatened since the Petitioners will still have a chance to defend themselves in the Criminal case.
47. On whether if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory, Counsel submitted that a cursory look at the grounds advanced in the Petition are simply that the Petitioners/Applicants will be deprived of a level playing field on the prosecution of the civil suit if the criminal case is allowed to proceed. Counsel maintained that the Petition, therefore, hinges on the provisions of Section 193A of the Criminal Procedure Code, Cap. 75 of the Laws of Kenya which as submitted herein above allows for concurrent criminal and civil proceedings to be commenced and/or proceed before the court.
48. Counsel added that in any event no single event and/or action has been cited that precludes the Petitioners/Applicants from being accorded a fair hearing. Counsel contended that if anything, the civil case was already filed and all parties put in their documents that they are relying on and therefore the institution of the criminal proceedings does not change anything in the civil case. Counsel urged that the Petitioners/Applicants have yet again failed to satisfy this condition as the Petition will not be rendered nugatory if the orders sought are not granted and the application should therefore fail.
49. On whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order, Counsel submitted that it will not be in the interest of the public to grant the orders sought as it will amount to enabling the heinous acts of fraud committed by the Petitioners/Applicants to the detriment of the members of the public and the 5th Respondent herein. Counsel maintained that denying the Petitioners/Applicants' the orders sought favours the larger public interest as opposed to the grant of the orders. Counsel therefore submitted that the Petitioners/Applicants have not demonstrated how the grant of the orders sought will serve public interest and Counsel urged that the application be dismissed with costs to the 5th Respondent.
50. Counsel further submitted that the Petitioners/Applicants have not come to court with clean but tainted hands on account of non-disclosure of material facts which they knew will not favour their case if disclosed to the Court. Counsel contended that the Petitioners/Applicants have failed to disclose that the decree upon which they got registered as the owners of the suit land that they obtained ex-parte after misleading the court was set aside unconditionally vide the ruling delivered on 8th October 2024 with the sole intention of misleading the court to issue the orders sought.
51. Counsel submitted that on account of the fact that the Petitioners/Applicants are dishonest and are therefore undeserving of this Court's discretion to grant the orders sought and Counsel urged this Honourable Court to dismiss the application with costs. He relied on the case of *Halima Haji Sarah v Multiple Hauliers (E.A) Limited & Ajman Company Limited ELC Case 12 of (2021) [2022] KEELC912(KLR) (15March,2022) (Ruling)* where the court held that;

“Thus, when a party comes to Court on an application supported by an Affidavit under oath and fails to outline and disclose matters that are material to the granting of orders, such a party is acting in a manner suggesting that they are peddling falsehood while under oath. The consequences of such conduct are well settled in law. Any advantage gained by such non-disclosure. The grant of ex-parte orders will be taken away from the offending party.....It is now settled that any party seeking an equitable relief must disclose all the necessary facts that may aid the court in rendering justice to the parties...”



Determination

52. The only issue for determination herein is whether the conservatory orders sought herein should be granted for the reasons advanced by the Applicants.

53. The meaning and purpose of a conservatory order was stated in the case of *Invesco Assurance Co v MW (Minor suing thro' next friend and mother (HW))* [2016] eKLR to be as follows:

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

54. The principles that guide courts in determining whether to grant conservatory orders are now well settled. The Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR stated as follows on the issue:

“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.

The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

- (i) the appeal or intended appeal is arguable and not frivolous; and that
- (ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the *Constitution* of Kenya, 2010, a third condition may be added, namely:

- (iii) that it is in the public interest that the order of stay be granted.

(89) This third condition is dictated by the expanded scope of the Bill of Rights, and the public-spiritedness that run through the *Constitution...*”

55. It is the duty of an applicant for conservative orders to show that his/her rights are under threat. The Court in the case of *Centre for Rights Education and Awareness (CREAW) & another v Speaker of the National Assembly & 2 others* [2017] eKLR held that:

“A party who moves the Court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation, are being violated or will



be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending cause or petition...

56. Similarly, in the case of *Platinum Distillers Limited v Kenya Revenue Authority* [2019] eKLR, Korir, J (as he then was) had occasion to consider an application for conservatory orders. The learned judge stated:

The guiding principles upon which Kenyan courts make findings on interlocutory applications for conservatory orders within the framework of article 23 of the *Constitution* are settled. The law, as I understand it, 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 the applicant.

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

58. As to what real danger entails, the court in *Martin Nyaga Wambora vs Speaker of The County Assembly of Embu & 3 others* Petition No. 7 of 2014 was of the view that;

“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”.

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

“It therefore follows that an applicant must satisfy three key principles in order to make out a case for the grant of conservatory orders that is:

- a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the *Constitution*;
- b. Whether if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
- c. The public interest must be considered before grant of a conservatory order.”



60. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, the Court of Appeal addressed the issue of proof of a prima facie case and stated:

3The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation.

61. What constitutes a prima facie case in civil cases was defined in *Mrao Ltd v First American Bank Ltd & 2 others* [2003] KLR 125 (Supra) as follows:

“So, what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

62. The court must however be careful not to grant final orders at interim stage. In the case of *Okiya Omtatah Okoiti vs Attorney General & 2 others* (2011) eKLR, it was stated that:

The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.

63. The court in *Kuria & 3 Others vs. AG* (2002) 2 KLR (Supra) discussed the viability of existence of concurrent civil and criminal proceedings before reaching the following conclusion: -

“...A prerogative order should only be granted where there is an abuse of the process of the law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution... It is not enough to state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the Applicant are under serious threat of being undermined by the criminal prosecution. In the absence of concrete grounds.... it is not mechanical enough that the existence of a civil suit precluded the institution of criminal proceedings based on the same set of facts. The effect of criminal prosecution on an accused person is adverse but so also



are their purpose in the society, which are immense... an order of prohibition cannot also be given without any evidence that there is manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial...”

64. Section 51 of the *National Police Service Act*, Cap. 84 provides the powers of a police officer as follows:

“51. Obedience to orders and warrants and detection of crimes, etc.

(1) A police officer shall—

- (a) obey and execute all lawful orders in respect of the execution of the duties of office which he may from time to time receive from his superiors in the Service;
- (b) obey and execute all orders and warrants lawfully issued;
- (c) provide assistance to members of the public when they are in need;
- (d) maintain law and order;
- (e) protect life and property;
- (f) preserve and maintain public peace and safety;
- (g) collect and communicate intelligence affecting law and order;
- (h) take all steps necessary to prevent the commission of offences and public nuisance;
- (i) detect offenders and bring them to justice;
- (j) investigate crime; and
- (k) apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient ground exists.”

65. In *Republic v Commissioner of Police and Another Ex Parte Michael Monari & Another* [2012] eKLR, it was observed thus:

“The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court...As long as the prosecution and those charged with the responsibility of making the decisions to charge or act in a reasonable manner, the High Court would be reluctant to intervene.”



66. The powers of the police to investigate crime were outlined by Warsame, J (as he then was) in Ex-parte Michael Monari (supra) as follows:

“Under Article 157(4) of the Constitution, the Director shall have power to direct police to investigate any information or allegation of a criminal conduct and it is mandatory for the police to comply with any directions or instructions given by the Director of Public Prosecution. Under article 157(10) the Director of Public Prosecution shall not require the consent of any person or authority for commencement of criminal proceedings and shall not be under the direction or control of any person. It is also clear in my mind that the police have a duty to investigate on any complaint once a complaint is made. In deed the police would be failing in their constitutional mandate to detect and prevent crime. The Police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said not to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.

It is not the duty of the court to go into the merits and demerits of any intended charges 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 the merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct, which amounts to an offence and on that account is deserving punishment.”

67. Article 157 of the Constitution establishes the Office of the Director of Public Prosecutions. It also stipulates the scope of the mandate as follows in sub-articles (4), (6), (10) and (11) as follows: -

- (4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.
- (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 clauses (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).
- (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.
68. In *Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 others* [2016] eKLR the court held that;
- “Is threat of arrest or arrest with reasons given a violation or threatened violation of fundamental rights and freedoms? We think not. What the law seeks to prevent is arbitrary arrest without probable cause. An objective justification must be shown to validate arrest of any individual. The Kenya Constitution recognizes that if a criminal offence is committed, investigation arrest and prosecution might ensue. In this context, the Constitution anticipates arrest of individuals and that is why Articles 49 and 50 (2) make provision for the rights of arrested persons. In our view, a threat of arrest or any arrest per se is not unconstitutional so long as due process of law is followed and the rights of the arrested person are observed.”
69. Mumbi Ngugi, J (as she then was), in *Kipoki Oreu Tasur vs. Inspector General of Police & 5 Others* (2014) eKLR stated that:
- The criminal justice system is a critical pillar of our society. It is underpinned by the Constitution, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated...
70. The Court in *Henry Aming’a Nyabere v Director of Public Prosecutions & 2 others; Sarah Joslyn & another (Interested Parties)* [2021] eKLR dealt with several instances where a Court may intervene and stop a prosecution. They include where: -
- i. There is no ostensible complainant in respect to the complaint;
 - ii. The prosecution fails to avail witness statements and exhibits without any justification;
 - iii. There is selective charging of suspects; or
 - iv. An Advocate is unfairly targeted for rendering professional services in a matter.
71. Guided by the above Constitutional and Statutory provisions as well as Case Law, I find that the Petitioners/Applicants have failed to satisfy the test for granting the conservatory orders sought. In this regard, their Application lacks merit and the same is dismissed in its entirety with costs to the 5th Respondent

READ DATED AND SIGNED AT ITEN ON 2ND OCTOBER 2025

E. OMINDE

JUDGE

