



Kalya & 2 others v Director Public Prosecutions & 3 others (Constitutional Petition E006 of 2025) [2025] KEHC 15677 (KLR) (31 October 2025) (Ruling)

Neutral citation: [2025] KEHC 15677 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CONSTITUTIONAL PETITION E006 OF 2025**

JRA WANANDA, J

OCTOBER 31, 2025

BETWEEN

**WILSON KIPLAGAT KALYA 1ST PETITIONER
KAREN JEROP CHESOO 2ND PETITIONER
DEBORAH CHIRCHIR 3RD PETITIONER**

AND

**THE DIRECTOR PUBLIC PROSECUTIONS 1ST RESPONDENT
THE DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT
THE KENYA POLICE SERVICE 3RD RESPONDENT
THE ATTORNEY GENERAL 4TH RESPONDENT**

RULING

1. By the Petition dated 19/02/2025 filed through Messrs Mwinamo Lugonzo & Co. Advocates, the Petitioners sought, basically, a declaration that their alleged intended criminal investigations and/ or prosecution for alleged offences arising from their execution of their duties and instructions as Advocates, specifically in relation to the drawing, attestation and certification of the Last Will of one David Kiptoo Cheluget dated 1/07/2022, is unconstitutional and in violation of their fundamental rights and freedoms. Consequently, they have sought an order of prohibition barring the intended investigations or prosecution, award of damages, and costs of the Petition.
2. Together with the Petition, the Petitioners also filed the Application the subject of this Ruling, namely, the Notice of Motion also dated 19/02/2025 by which they seek orders as follows:
 - i. [.....] spent.
 - ii. [.....] spent.



- iii. A conservatory order is hereby issued, prohibiting the Respondents, jointly and severally, their employees, agents, representatives and all other persons acting on their behalf or under their instructions, from investigating and/or prosecuting the Petitioners for any alleged offence arising from the 1st and 2nd Petitioners' execution of their duties and instructions as Advocates of the High Court of Kenya, specifically in relation to the drawing and attestation of the Last Will and Testament of David Kiptoo Cheluget dated 1/07/2022 as well as the 3rd Petitioner's certification of a copy of the said Will as a true copy of the original pending the hearing and determination of this Petition.
 - iv. Costs be awarded to the Petitioner.
 3. The Application is supported by the lengthy but repetitive Affidavit sworn by the 1st Petitioner, Mr. Wilson Kiplagat Kalya. He deponed that the Petitioners are Advocates practicing in the style and name of Messrs Kalya & Co. Advocates, that on or about 01/07/2022, acting upon the instructions of David Kiptoo Cheluget (Deceased), he prepared the latter's Last Will and Testament which was then executed by the deceased-testator and attested by 3 witnesses, namely himself, the 2nd Petitioner, and one Claire Nyambura Karuga Advocate, who was then a member of his firm but has since left and joined the Office of the Director of Public Prosecutions. He urged that he took all necessary steps to ensure that the legal formalities for the preparation, execution, and attestation of the Will were adhered to, particularly, that the deceased, although personally known to him for over 3 decades, and having acted as his Legal Counsel in various matters over those years, nevertheless formally identified himself by presenting his original National Identity Card, ensured that the Will was drafted in accordance with the instructions and wishes of the deceased, he confirmed that the deceased fully understood the nature and contents of the Will before appending his signature, personally witnessed the deceased sign the Will in his presence, the presence of the 2nd Petitioner, and the said Claire Nyambura Karuga, all of whom were present at the same time and attested to the execution as witnesses.
 4. He deponed that he confirmed, based on his professional assessment as a Legal Practitioner of 36 years, that the deceased was of sound mind and acted voluntarily, without any undue influence, coercion, or duress, and that this conclusion is grounded in the conversations he had with the deceased, during which the deceased lucidly articulated his intentions, provided clear instructions, and demonstrated a thorough understanding of the nature and consequences of the Will, specifically, he engaged the deceased in discussions to ascertain his comprehension of the document, his awareness of the beneficiaries named, and his reasons for distributing his estate in the manner set out in the Will. He urged that in his professional judgment, informed by decades of experience in drafting and executing Wills, the deceased was fully competent and acting of his own free will. He deponed further that the deceased died on 15/06/2024, that in the Will, the testator appointed Hellen Chepkoech Cheluget, Geoffrey Kipkemboi Rono and John Kibiy Koskei as executors of his estate, who then fil Eldoret High Court Probate and Administration Cause No. E111 of 2024, in which the Petition was advertised in the Kenya Gazette on 4/10/2024 under Notice No. 12918, the Grant of Probate was issued to the executors and confirmed on 7/02/2025, and that to date, no individual has filed any application challenging the authenticity of the Will, its contents, or the manner in which it was executed, or its validity.
 5. He then contended that on 6/02/2025, an individual identifying himself as Mr. Kuloba, a police officer attached to the 2nd Respondent, and based at the Directorate of Criminal Investigations (DCI) in Nairobi, contacted him via phone and informed the 1st Petitioner that he was required to record a statement regarding a matter in which the Petitioners and the said Claire Nyambura Karuga are being investigated as potential suspects in connection with the alleged forgery of the same Last Will referred to



above, that he later received a formal letter from the 1st Respondent to the same effect, which informed them that they were required to present themselves to record statements in relation to the matter, and that upon making further inquiries, he was informed that an undisclosed complainant had lodged a complaint with the 2nd Respondent, alleging that the said Will had been forged. He contended that the allegation of forgery of the Will automatically and logically implicates him and the 2nd Petitioner as potential suspects and persons under investigation, given their roles as the Advocates who prepared and attested to the execution of the Will, that this is despite the fact that the Will was drawn and executed in strict compliance with the law and in accordance with the instructions of the deceased, as confirmed by the due process followed during its preparation and attestation. He stated that by lodging a complaint with the 1st and 3rd Respondents challenging the validity of the Will without first contesting the same before the Probate Court in Eldoret High Court Probate and Administration Cause No. E111 of 2024, aforesaid, the complainant is seeking to gain a collateral and unfair advantage in his potential future applications in the Probate matter, that this is being done by instigating harassment of the Petitioners, which conduct is not only an abuse of the legal process but also undermines the integrity of the Probate proceedings, which has already confirmed the validity of the Will.

6. He added that by bypassing the Probate Court and initiating criminal investigations, the complainant and the 2nd and 3rd Respondents are attempting to exert undue pressure and prejudice on the Petitioners, thereby subverting the proper administration of justice, the decision by the Respondents to initiate parallel criminal investigations against them with the intention of charging them on the alleged forgery of the signature of the deceased, is unlawful, oppressive, and constitutes an abuse of the Court process and the criminal justice system, as well as a violation of their fundamental rights under *the Constitution* and this Court ought to restrain such improper, and collateral use of the justice system. He observed that the letter issued by the DCI on 7/02/2025 erroneously included the 3rd Petitioner, falsely alleging her involvement in attesting to the Will, yet the 3rd Petitioner neither attested to the said Will nor was she an admitted Advocate of the High Court as of 1/07/2022, and her role was strictly limited to certifying the Will as a true copy of the original.
7. He therefore urged that the decision to prosecute is oppressive, considering that the Petitioners acted solely in their professional capacity in drawing the Will as per instructions received, that they have no proprietary or beneficial interest in the estate of the deceased, their actions were purely undertaken in a professional capacity upon receipt of instructions and payment of legal fees, and that the 2nd and 3rd Respondents initiated investigations based on unfounded allegations without prima facie evidence, amounting to a fishing expedition and violating the principles of natural justice, that the intended prosecution is actuated by an ulterior motive, the invocation of the criminal process by the Respondents is intended to intimidate and interfere with the Petitioners' role as key witnesses in the ongoing Probate suit, it is designed to humiliate and embarrass the Petitioners rather than to further the interests of justice, it is based on extraneous considerations, and is not driven by the pursuit of justice, is a calculated misuse of the criminal justice system to unlawfully interfere with an ongoing probate dispute pending before a Court of competent jurisdiction, and it is vexatious, and contrary to the principles of fair play.
8. He deponed further that the actions of the Respondents in subjecting Advocates who attested to the Will to unwarranted criminal investigations constitute intimidation of legal practitioners, violating the protections afforded under the *Advocates Act*, and undermining the independence of Advocates in discharging their professional obligations without fear of retribution, which actions have compromised the sanctity of Advocate-client privilege, a cornerstone of the legal profession, thereby eroding public confidence in the legal system. He contended further that the Respondents, being public bodies, are bound by the national values and principles of governance as enshrined in



Article 3(1) and 10 of *the Constitution*, which principles have been disregarded in this instance. He averred that the decision to subject the Petitioners to criminal investigations and possible prosecution is thus outrightly illegal, unlawful, and unconstitutional, as they will be greatly prejudiced and will suffer irreparable harm and damage if the intended prosecution proceeds, as their reputation will be unjustifiably tarnished, and their dignity severely compromised, that they a prima facie case with high probability of success, and that the Petition herein will be rendered nugatory and overtaken by events if this Application is not allowed.

9. The Application is opposed by the 2nd, 3rd and 4th Respondents by way of the Replying Affidavit sworn on 4/04/2025 by Corporal Patrick Kuloba, who described himself as attached at the DCI. He deponed that they received a letter dated 4/12/2024 from a firm known as Glascote Rose requesting them to conduct investigations in respect to the Last Will and Testament of the late David Kiptoo Cheluget on allegations that the Will is a forgery.
10. He deponed that the reasons given for the allegation of forgery was that the signature thereon is different from the signatures the deceased was previously using, that the deceased suffered glaucoma leading to vision loss as a result any document signed post-2020 were by way of thumbprint, that the deceased made funeral and last expense wish in his Will that were not disclosed before his funeral, that the Petitioners' law firm had sought an out of Court settlement in respect to a suit property, as such had there been a Will there would be no reason for settlement, and that the deceased in an Affidavit, swore that he is a joint owner of the parcel of land No. LR Uasin Gishu/Koimet Scheme 57, and would not have indicated in his Will that he is the sole owner. He deponed further that the complainant's Advocates attached to the said letter a statement from one Abraham Kipruto Cheluget and Mike Cheluget, copies of the Will dated 1/07/2022, letters dated 3/07/2024 and 14/07/2024, and email dated 15/07/2024 in support of their averments, that on a cursory look at the attached samples of signatures of the deceased on the documents provided, more specifically the pleadings in respect to Eldoret ELC No. 115 of 2020; David Kiptoo Cheluget V Abraham Kipruto Cheluget, they noted a discrepancy in the signatures, and have also noted that indeed the deceased may have used a thumbprint in the year 2020, and the documents are yet to be subjected to further examinations and forensic analysis, and that before then, they needed to hear from the Petitioners to enable them obtain more information in respect to the issue, and make an informed decision on the way forward.
11. He added that on 9/01/2025, one of the complainants, Mike Kipkorir Cheluget, attended their chambers and recorded a statement to wit that the Will drafted by the Petitioners' law firm is a forgery, and reiterated the grounds advanced through the letter dated 4/12/2024, and that as a consequence, they decided that they needed to hear from the Petitioners whom they summoned to attend their offices for the purpose of hearing their side of the story and conducting further investigations into the matter. He maintained that there is no law barring the commencement of criminal investigations at any point, that the Succession Court did not look into the issue of forgery, and even if it did so, the ends meant to be achieved in civil proceedings is not similar to the remedies in criminal proceedings, and that criminal and civil proceedings in respect to the same subject matter can proceed simultaneously. He denied that they have harassed the Petitioners, and pointed out that all they have done is to call the Petitioners and inform them to attend their offices for the purposes of "shedding more light" on the allegations put forth by the complainants, and that as they were waiting for them to come at their convenient time they were served with these constitutional proceedings.
12. According to him, these proceedings were only initiated after a complaint was made with the police, whose mandate under *the Constitution* and under the *National Police Service Act* is to receive such complaints, conduct investigations and, where necessary, recommend prosecution to the Director of Public Prosecutions (DPP). He contended further that the manner in which the investigations have



been carried out so far including informing the Petitioners of the complaint and requesting them to attend their offices to respond thereto does not violate any provisions of *the Constitution*, and that the investigations have been conducted in good faith and in pursuit of justice with no intention whatsoever to intimidate, humiliate, harass, embarrass and or interfere with ongoing probate proceedings.

13. I note that the Petitioners subsequently filed the Further Affidavit sworn on 10/07/2025. The Court having closed the filing and exchange of Affidavits on 16/06/2025, that Further Affidavit was therefore clearly filed irregularly and more so, without leave. I however recall that when the matter came up in Court on the said date, only Mr. Mwinamo, appearing for the Petitioners attended Court and submitted that he had not been served with any Replying Affidavit, and thus asked the Court to treat the Application as unopposed. I will therefore grant the Petitioners the benefit of doubt and presume that they were not aware of the Replying Affidavit. I will thus admit the Further Affidavit on record. Having so said however, I note that the Further Affidavit basically reiterates and repeats the matters already deponed in the Petitioner's Supporting Affidavit. I therefore do not deem it necessary to recount its contents.
14. I gave the parties the liberty to file written Submissions. However, only the Petitioners appear to have filed Submissions (dated 11/06/2025) as I have not come across any Submissions filed by, or on behalf of the Respondents, not in the Court file, and not in the Judiciary Case Tracking System (CTS) online portal.

Petitioners' Submissions

15. Counsel for the Petitioners, in another very lengthy and repetitive narrative, submitted that it is trite law that an application for conservatory orders under Article 23(3) (c) of *the Constitution* must satisfy the defined threshold. He cited the case of Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board & others Nairobi High Court Constitutional Petition No 154 of 2016 [2016] eKLR, and also Rule 23 of the so-called "Mutunga Rules".
16. Regarding prima facie case, he cited the case of Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR, and submitted that the foremost thing that an Applicant must do is to demonstrate a case with a likelihood of success, and that he is likely to suffer prejudice in the absence of the conservatory orders. He pointed out that the Petitioners are aware that an application for revocation of the Grant of Probate has now been filed in Eldoret HCP&A No. E111 of 2024, which, he urged, confirms that the complainants have now invoked the proper civil forum under the *Law of Succession Act*, to challenge the validity of the Will. He argued that this reinforces the Petitioners' contention that the intended prosecution is not only premature, but also abusive, as it seeks to criminalize conduct before the civil Court has made a determination on the allegations. He urged that the Probate Court is the appropriate forum to determine the validity of the Will, and to pre-emptively prosecute the Petitioners in parallel offends the doctrine of exhaustion and due process. He maintained that until such time as the grant is lawfully revoked, it remains a valid judicial instrument, and that any prosecution premised on its alleged invalidity therefore amounts to a contradiction of existing judicial authority, contrary to *the Constitution*.
17. He urged that the Constitutional issues raised including the right to a fair trial, abuse of legal process and the integrity of Court judgments are weighty and substantive, that the fact that the Will was confirmed as valid by a High Court Grant of Probate and a Certificate of Confirmation of Probate which have neither been set aside nor appealed successfully, and yet the Respondents seek to treat it as a forgery, itself presents an absurd and arguable Constitutional question: namely, whether the criminal justice agencies can lawfully mount a case that inherently contradicts a standing Court decision and submitted that such action prima facie offends *the Constitution*, by undermining the rule of law and



judicial authority. On the issue of risk of irreparable harm and prejudice, Counsel submitted that unless restrained by this Court, the Respondents' actions will occasion irreparable harm to the Petitioners and render the pending Petition nugatory. He cited the case of Centre for Rights Education and Awareness (CREAW) & 7 Others [2017] eKLR. He submitted that the Petitioners, as Advocates, face imminent arrest, detention, and possible charging in a criminal Court, which not only exposes them to the deprivation of liberty, a harm that cannot be adequately compensated by damages, but also gravely endangers their professional standing, reputation, and ability to practice law.

18. He urged that being subjected to a criminal process founded on malice and illegality would tarnish the Petitioners' dignity and could result in the suspension of their Practicing Certificates, or other disciplinary consequences, and even if ultimately exonerated, that injury to their professional reputation and livelihood would be incalculable and long-lasting-, a quintessential form of irreparable harm. Counsel also asserted that the very act of prosecution would violate their non-derogable rights, such as the right to a fair trial in a manner that no subsequent remedy can adequately undo, that the real danger to the Petitioners' rights is "so actual, so imminent, and so evident" that immediate intervention by this Court is warranted, and that if Advocates are easily prosecuted for actions taken in the course of representing their clients, it would cast a chill on the legal profession, and that Advocates might shy away from robustly representing clients in contentious matters for fear of later being personally targeted, which then undermines the right of clients to effective legal representation under Article 50(2)(g). He cited the case of Alfred Nyandieka v DPP & IG [2020] eKLR, and submitted that by analogy, the Petitioners were performing their professional duty, namely, ensuring their client's Will was properly presented to Court, and submitted that to penalize them criminally for that would discourage other Advocates from taking on similar cases, or from exercising independent judgment on behalf of clients.
19. He submitted further that public interest favors the issuance of the conservatory orders in this case as the issues at stake transcend the private interests of the Petitioners and touch on the integrity of the justice system, thus it is in the public interest that judicial decisions are final and respected as members of the public must be able to trust that when a Court of law determines a matter such as the validity of a Will, that determination will not be casually undermined through parallel processes, and that it is also in the public interest that state agencies exercise their powers within the confines of the law, and free from abuse or ulterior motives. He cited the case Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69. He submitted further that allowing prosecution that appears to re-litigate a Succession matter would erode public confidence in the administration of justice and set a perilous precedent, that on the other hand, granting the conservatory orders will uphold the rule of law, respect for Court judgments, and the independence of the judiciary, all of which are cardinal tenets of public interest. He cited the Supreme Court in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others. Counsel asserted that that the conservatory orders will not prejudice the Respondents in any legitimate way as the same merely seeks to preserve the status quo ante-namely, the position as it stood following the High Court's confirmation of the Grant of Probate-pending outcome of the Petition, and thus, allowing parallel criminal proceedings at this stage would risk "muddying the waters".

Determination

20. The one broad issue arising herein for determination is "whether conservatory orders should be issued pending hearing and determination of the Petition herein".



21. The term “conservatory orders” was defined in the case of Nairobi Civil Appeal 151 of 2011 Invesco Assurance Co. Ltd vs. MW (Minor suing thro’ next friend and mother (HW) [2016] eKLR, by Mulwa J 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”

22. Regarding the nature and application of conservatory orders, the Supreme Court, in Civil Application No. 5 of 2014 Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others (2014) eKLR, guided 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 Applicant’s case for orders of stay.”

23. Further, in Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR, Odunga G.V. (as he then was), expressed himself in the following terms:

“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.”

24. “Conservatory orders” are therefore basically aimed at preserving the substratum of majorly, a public law matter pending the determination of the main dispute (see also the Ruling of Mrima J, in the case of Damour Florian Emmeric v Director of Immigration Services [2022] eKLR.

25. On the need to observe boundaries when handling Applications for conservatory orders, in the case of Muslim for Human Rights (Milimani) & 2 Others vs Attorney General & 2 Others (2011) eKLR, Ibrahim J, (as he then was) held as follows:

“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.”

26. The principles to be considered when determining whether to grant conservatory orders have been therefore developed by the Courts over time. These principles were summarized in Wilson Kaberia Nkunya vs. The Magistrate and Judges Vetting Board and Others, Nairobi High Court Constitutional



Petition No.154 of 2016 (2016) eKLR, in which Lenaola J (as he then was), summarized the three principles for consideration as follows:

- (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 a 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.

27. Regarding the definition of “a prima facie case”, the same was explained in the case of *Mrao vs. First American Bank of Kenya Limited & 2 Others* (2003) KLR 125 where, in quoting the locus classicus case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358, the Court of Appeal defined the term to mean:

“..... In a civil application includes but is not confined 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.”

28. Additionally, In *Re Bivac International SA (Bureau Veritas)* (2005) 2 EA 43, the Court, while expounding on what a prima-facie case or arguable case was, stated that such a decision is not arrived at by “tossing a coin” or “waving a magic hand” or “raising a green flag”, but instead, a Court must undertake an intellectual exercise and consider without making any findings, the scope of the remedy sought, the grounds and the possible principles of law involved.

29. Applying the above principles to the facts of this matter, I observe that the Petitioners’ case is that they acted in their professional capacity in drawing the Last Will and Testament of the late David Kiptoo Chelugut as per instructions received. According to the Applicants, they are now being investigated as suspects by the Respondents who are looking into a complaint that the deceased’s signature on the aforementioned Will was forged. The Petitioners argue that the Respondents’ decision to prosecute them is oppressive and only designed to humiliate and embarrass them. The Respondents, however, assert that the investigations have been conducted in good faith and in pursuit of justice with no intention whatsoever to intimidate, humiliate, harass, embarrass and or interfere with the ongoing probate proceedings.

30. There is no dispute that the impugned Will was relied on by the High Court in issuing the Grant of Probate and a Certificate of Confirmation of Probate in the said Eldoret HCP&A No. E111 of 2024, and which orders have not been set aside, nor has any person, at least as at the time of commencement of the criminal investigations, filed any application challenging the authenticity of the Will, its contents, or execution, or its validity. Counsel for the Petitioner has submitted that the complainants have since filed an application seeking revocation of the Grant of Probate in the said Eldoret HCP&A No. E111 of 2024, on the ground of the alleged forgery.

31. According to the Petitioners, the act of filing of the Application seeking revocation of the Grant confirms that the complainants have now invoked the proper civil forum under the *Law of Succession Act*, to challenge the validity of the Will, and that this act also reinforces the contention that the intended prosecution is not only premature, but also abusive, as it seeks to criminalize conduct even before the civil Court has made a determination. This “revelation” of the filing of the Application for Revocation of the Grant, having been made by way of Submissions, rather than Affidavit, obviously



cannot be relied on by this Court. However, considering matter as a whole, the Petitioners have persuaded me, at least at this stage, that under the circumstances hereof, the said Eldoret HCP&A No. E111 of 2024 being already in existence, the complainants, rather than rushing to instigate the criminal investigations or prosecution, probably ought to have first raised the matter before the Succession Court which is seized of all matters pertaining to the succession of the estate of the deceased, and particularly, the validity of the Will. There is therefore merit in the submission that, in the circumstances of this case, the Probate Court may be the appropriate forum to determine the validity of the Will, and thus initiating investigations against or prosecuting the Petitioners in parallel proceedings when the said Probate Cause is very much in existence may not be the appropriate action. The Respondents have also not explained why it is so difficult for the complainants to have raised their grievances before the Probate Court, and then seek and obtain directions from that Court on the way forward.

32. There is also the weighty contention by the Petitioners' that the letter issued by the DCI on 7/02/2025 erroneously includes the 3rd Petitioner by alleging her involvement in attesting the Will, yet the 3rd Petitioner neither attested to the Will nor was she even an admitted Advocate as of 1/07/2022, and that her role was strictly limited to certifying the Will as a true copy of the original. There is also the equally weighty allegation that the investigation is intended to intimidate and interfere with the Petitioners' role as potential key witnesses in the ongoing Probate suit. These contentions have not been responded to by the Respondents.
33. Under the above circumstances, the submission by the Petitioners that by bypassing the Probate Court and initiating criminal investigations, the complainant and the Respondents are attempting to exert undue pressure and prejudice on the Petitioners has merit. As aforesaid, the main Petition has not yet been heard and my above observation is only relevant for this interlocutory stage of the proceedings. The Court shall have a clear picture of the matter once the full Petition has been argued. For now, however, the Petitioners have disclosed existence of a clear prima facie case.
34. Regarding the risk of "irreparable harm", the Petitioners contend that they only performing their professional duty of ensuring that their client's Will was properly drafted and attested, and adhered to all the relevant requirements of the law. I agree with the Petitioners that unless restrained by this Court pending hearing and determination of the Petition, the Respondents' actions may very well occasion "irreparable harm" to the Petitioners. The Petitioners, as Advocates, may be arrested, detained, or charged in a criminal Court. Even if subsequently exonerated, the consequences of the above exposure may not be capable of adequate compensation by way of damages, as it is likely to jeopardize their professional standing and reputation as practicing Advocates, particularly the 1st Petitioner who asserts that he has practiced law for not less than 36 years.
35. I also agree that if Advocates are to be easily prosecuted and penalized criminally for actions taken in the course of acting for or representing their clients, the profession is likely to feel "scared" and shy away from robustly representing clients in contentious matters for fear of being targeted, which would, in turn, undermine the rights of citizens to effective legal representation as enshrined under Article 50(2)(g). Advocates may be discouraged from taking on similar cases, or from exercising independent judgment on behalf of clients. Allegations of violation of the protections afforded to legal practitioners under the *Advocates Act*, and of undermining the independence of Advocates in discharging their professional duties without fear of retribution, are taken seriously by the Courts since such actions, if not checked, has the dangerous potential of compromising the sanctity of the Advocate-client privilege, which is no doubt, one of the main cornerstones of the legal profession anywhere in the globe. I thus agree that for this further reason, public interest favours granting of the conservatory orders in



this case as the issues at play in this case transcend the private interests of the Petitioners and touch on the practice law generally, and also the integrity of the criminal justice system as a whole.

36. I am alive to the Respondents' averment that they have in no way harassed the Petitioners, and that all they have done is simply to call the Petitioners and inform them to attend their offices for the "harmless" purposes of shedding more light on the allegations put forth by the complainants. Indeed, this might be a reflection of the correct situation, and it is possible that the Petitioners have simply overreacted. However, all indication is that the Petitioners are being treated as "suspects". Considering the observations made earlier, I am persuaded that the appropriate action to do at this stage is to issue the conservatory orders.

Final Orders

37. In the premises, the Notice of Motion dated 19/02/2025 succeeds, and I rule and order as follows:
- i. Pending the hearing and determination of the Petition herein, a conservatory order is hereby issued, prohibiting the Respondents, jointly and severally, their employees, agents, representatives, and all other persons acting on their behalf or under their instructions, from investigating and/or prosecuting the Petitioners for any alleged offence arising from the 1st and 2nd Petitioners' execution of their duties and instructions as Advocates of the High Court of Kenya, specifically in relation to the drawing and attestation of the Last Will and Testament of one David Kiptoo Cheluget dated 1/07/2022, as well as the 3rd Petitioner's certification of a copy of the said Will as a true copy of the original,.
 - ii. Costs shall be in the Cause.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 31ST DAY OF OCTOBER 2025

.....

WANANDA JOHN R. ANURO

JUDGE

Delivered in the presence of:

Mr. Mwinamo for the Petitioners

Ms. Muriithi for the 1st, 2nd and 3rd Respondents

N/A for the 4th Respondent

Court Assistant: Brian Kimathi

