

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KIAMBU

PETITION NO. E035 OF 2023

IN THE MATTER OF ARTICLES 22 (1), 23 AND 258 OF THE
CONSTITUTION OF KENYA, 2010

IN THE MATTER OF ARTICLES 23(3)(F), 48 AND 50(1) OF
THE CONSTITUTIONAL PRINCIPLES, RIGHTS AND
FUNDAMENTAL FREEDOMS UNDER ARTICLES 3(1), 10, 19,
20 AND 238 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF THE ARTICLES 23 (3)(F), 48 AND 50(1)
OF THE CONSTITUTION OF KENYA 2010 AND THE
ADVOCATE ACT CAP 16 LAWS OF KENYA

BETWEEN

RENE & HANS	ADVOCATES	LLP.....	1ST
PETITIONER			
ISAAC RENE	OKUMU.....		2ND
PETITIONER			
OICHOE HANS	KEVIN.....		3RD
PETITIONER			

AND

DIRECTOR OF	CRIMINAL	INVESTIGATIONS.....
.....RESPONDENT		

JUDGMENT

1. Before this Court for determination is the Petition dated 10th July, 2023 brought under various provisions of law including **Articles 22(1), 23, 48, 50, 238 and 258** of the Constitution

and the Advocates Act, Cap 16 Laws of Kenya. The Petition seeks for the following orders:-

- a) A declaration be and is hereby issued that the Respondent's initiation of criminal investigations against the Petitioners and any person on any and all facts relating to and flowing from the Petitioners' legal representation rendered to their clients in **Nairobi Commercial Petition No. E010 of 2022** and in so far as the same relates to and flowing from the Petitioners' receipt of legal fees and costs pursuant to the Ruling and Order issued by the High Court on 27th March, 2023 in **Nairobi Miscellaneous Application No. E804 of 2022** is unconstitutional, unreasonable, irrational, illegal, unlawful, null and void *ab initio*.
- b) An order of Prohibition be and is hereby issued prohibiting the Respondent from initiating or continuing any criminal investigations, issuing any summons, effecting any arrests and/or recommending criminal prosecution whatsoever against the Petitioners and any person on any and all facts relating to and flowing from **Nairobi Commercial Petition No. E010 of 2022** and in so far as the same relates to and flowing from the Petitioners' receipt of legal fees and costs pursuant to the Ruling and Order issued by the High Court on 27th March, 2023 in **Nairobi Miscellaneous Application No. E804 of 2022**.
- c) An order of Certiorari removing into the High Court for purposes of being quashed and quashing the Warrants to

Investigate Accounts dated 4th July, 2023 issued in **Kiambu Chief Magistrate's Court Criminal Application E233 of 2023** and directing the lifting of preservation orders in so far as the same relates to the 1st Petitioner's and 2nd Petitioner's Bank Accounts held at **I & M Bank Ltd** and all other transactional accounts and transactions emanating from Petitioners' earned legal fees and costs from the Petitioners' Bank Accounts at **I & M Bank Ltd**, more specifically accounts held in the following names:-

ITEM	ACCOUNT NAME	BANK
1.	Arcoverde (K) Limited	I & M Bank
2.	William K Gitau	I & M Bank
3.	Kenneth W. Odhiambo Ojwang	Stanbic
4.	Sharon Mirela Wakho	KCB
5.	Ivio Law Advocates LLP	NCBA
6.	Squire Afrilaw Consult	Stanbic
7.	JW Weke & Company Advocates	KCB
8.	MMA Advocates LLP	Equity bank
9.	Isaac Rene Okumu	I & M Bank
10.	Simon Munene Mwendia	Equity Bank
11.	Joel Gichui Ngari	Ecobank

d) Costs of the Petition be borne by the Respondent.

2. The Petition, the attendant Notice of Motion and the Supporting Affidavit all dated 10th July, 2023 set out the following facts;-
3. The Petitioners rendered legal services to their clients in Nairobi High Court **Commercial Petition No. E010 of 2022** **MAINA STEPHEN NJENGA & 2 OTHERS V KIWIPAY (K) LIMITED & OTHERS** vide a Resolution Under seal and the Matter was concluded on 14th November, 2022. The Petitioners filed **Nairobi Miscellaneous Application No. E804 of 2022** **RENE & HANS ADVOCATES LLP V KIWIPAY (K) LIMITED** seeking to enforce payment of legal fees on account of legal representation rendered in **Nairobi High Court Commercial Petition No. E010 of 2022**.
4. On 27th March, 2023 the High Court in **Nairobi Miscellaneous Application No. E804 of 2022** issued an Order directing **Ecobank (K) Limited** to transfer the sum of **USD 2,502,675.00** to the 1st Petitioner's firm of advocates the same being agreed legal fees and costs on account of legal representation in **Nairobi High Court Commercial Petition No. E010 of 2022**. The Bank complied with the court order and transferred the legal fees to the 1st Petitioner.
5. The Respondent commenced a contrived criminal investigation in respect to the legal fees and costs paid to the Petitioners through the Ruling and Order of the High Court delivered and issued on 27th March, 2023 in **Nairobi Miscellaneous Application No. E804 of 2022**.
6. In pursuit of the contrived investigations, the Respondent applied before the Magistrate's Court at Kiambu on 4th July,

2023 in **Kiambu Magistrate Miscellaneous Criminal Application No. E223 of 2022** and obtained Warrants to Investigate Accounts dated 4th July, 2023 freezing the 1st and 2nd Petitioners' Bank Accounts and permitting the Respondent to obtain information relating to the banking affairs of the 1st Petitioner and its partners in respect of the legal fees and costs received by the 1st Petitioner vide the Ruling and Order issued in **Nairobi Miscellaneous Application No.E804 of 2022.**

7. The Petition was undefended. The Respondent was duly served but opted not to respond to the Petition. Learned counsel for the Respondent, *Mr. Gacharia*, stated that he had difficulty getting instructions. Nevertheless, he urged this Court to proceed with determining the Petition. The court directed that the matter be canvassed by way of written submissions. The Petitioners filed written submissions in support of the Petition stating the following;-

PETITIONERS' SUBMISSION

8. The court has jurisdiction to halt an investigation which is malicious, lacks *bona fides* and one which is contrary to public policy. The Petitioners relied on **COMMISSIONER OF POLICE & THE DIRECTOR OF CRIMINAL INVESTIGATIONS DEPARTMENT & ANOTHER V KENYA COMMERCIAL BANK LIMITED & 4 OTHERS (2013) eKLR**. Investigative powers of the National Police Service under Article 243 of the Constitution and the National Police Service Act must not be misused and

must be exercised *bona fides* and in compliance with the Constitution.

9. The intention of the contrived criminal investigation is to use the criminal justice and the court process to countermand and circumvent a lawful and valid court order issued by the High Court on 27th March, 2023 upon which the Petitioners received legal fees and costs, to criminalize the petitioners' legal representation rendered in **Nairobi High Court Commercial Petition No. E010 of 2022** and to further criminalize the Petitioners' receipt of legal fees and costs in execution of the Ruling and Order of the High Court delivered and issued on 27th March, 2023 in **Nairobi High Court Miscellaneous Application No. E804 of 2023** together with the transactions emanating from the 1st Petitioner's bank account.
10. In pursuit of the contrived investigations, the Respondent applied before the Magistrate's Court at Kiambu on 4th July, 2023 in **Kiambu Magistrate Miscellaneous Application No. E223 of 2022** and obtained Warrants to Investigate accounts dated 4th July, 2023 freezing the 1st and 2nd Petitioners' Bank Accounts and permitting the Respondent to obtain information and documentation relating to the banking affairs of the Petitioner and its partners in respect of the legal fees and costs received by the 1st Petitioner vide the Ruling issued in **Nairobi Miscellaneous Application No. E804 of 2022**.
11. There was no legal basis for the issuance of the warrants to Investigate Accounts dated 4th July, 2023 in **Kiambu Magistrate Miscellaneous Application No. E223 of 2022**

and the attendant freezing of the 1st and 2nd Petitioners' Bank Accounts. The warrants to Investigate were issued *ex parte* contrary to Articles 48 and 50 (1) of the Constitution. They were obtained through deceit, misrepresentation and material non-disclosure by the Respondent. Magistrate's Courts are not mere judicial conveyor belts and that investigators ought not to be granted a *carte blanche* whenever they apply for warrants.

ISSUE FOR DETERMINATION

12. The only issue framed for determination is whether the Petition meets the constitutional threshold to warrant the grant of the orders sought. In other words, the issue is whether the Respondent acted in breach of the constitutional rights of the Petitioners as to entitle the Petitioners to the reliefs sought.

ANALYSIS

13. The crux of this Petition is that the Respondent commenced contrived criminal investigations with respect to some legal fees and costs paid to the Petitioners through a court order. The Petitioners contend that there is no criminality in advocates rendering legal representation and receiving payment of legal fees. The investigation is malicious and unconstitutional because it seeks to countermand and circumvent a lawful court order granting the Petitioners advocates their legal fees for legal services they rendered.

14. It is trite that this Court is bound to adopt the interpretation that most favors the enforcement of fundamental rights and

freedoms on allegations of violation of the Bill of Rights. Article 2(1) of the Constitution provides that the Constitution is the supreme law of the Republic and binds all persons. The Supreme Court in the case of **CHARLES MUTURI MACHARIA & 6 OTHERS V. STANDARD GROUP & 4 OTHERS SC** ***Petition No. 13 (E015) of 2022***, highlighted this position as follows:-

“The canons of constitutional interpretation that have been infused in our judicial system over the years and which are today expressed in Article 259 of the Constitution, adjure the courts to interpret the Constitution in a manner that promotes its purposes, values and principles and contributes to good governance. Those constitutional values and principles are expressed in the Preamble to include a commitment to nurturing and protecting the well-being of the individual, the family, communities and the nation: the recognition of the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. This is in addition to the consideration of national values and principles of governance under Article 10 of the Constitution. They are also discoverable through purposive, holistic, organic and liberal interpretations of the Constitution.”

15. It is noteworthy that in all allegations of contravention of the Bill of Rights, the Petitioner has the burden throughout to prove the alleged violations of the Constitution and the Bill of Rights. They must state and specifically so and prove the manner in which the alleged constitutional provisions were

threatened or violated. This is captured in **Miscellaneous Criminal Application 4 of 1979, Anarita Karimi Njeru v Republic [1979] KLR** where the court observed as follows: -

“If a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed”

16. The Petitioners allege the Respondent misused its investigative powers and sought to use the criminal justice process and the court process to countermand and circumvent a lawful court order granting them legal fees. The Office of the Inspector General of the National Police is established under Article 245 (1) of the Constitution. The power to investigate crimes is vested in the Inspector General by dint of Article 245 (4) of the Constitution which provides that:-

“(4) The Cabinet Secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to:-

(a) The investigation of any particular offence or offences;

(b) The enforcement of the law against any particular person or persons; or

(c)The employment, assignment, promotion, suspension, or dismissal of any member of the National Police Service.”

17. Further Article 243(1) of the Constitution establishes the National Police Service. The National Police Service Act gives full effect to this article. Under Section 28 of the National Police Service Act, No 11 of 2011 there is established the Directorate of Criminal Investigations which is under the direction, command, and control of the Inspector-General. These provisions show that the Inspector General and the Director, DCI have the mandate to perform various functions including investigations as provided under Articles 244 and 245 of the Constitution.

18. The apex court in ***Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment)*** stated the following on the strictly circumscribed circumstances under which a Court may interfere with the investigative powers of the Inspector General and the Director, DCI:-

“Accordingly, Article 244 provides for the objects and functions of the National Police Services and Article 244(c) in particular requires the National Police Services to comply with constitutional standards of human rights and fundamental freedoms in the discharge of its mandate. This is important because human rights and fundamental freedoms and the rule of law are founding values in our Constitution.

A court should only interfere with the powers granted to the Inspector General and the DCI under Articles 244 and 245 of the Constitution and under the provisions of the National Police Service Act if the constitutional and statutory provisions are not adhered to or if the actions are illegal and unlawful.”

20. Did the Respondent herein act outside its constitutional mandate and infringed the Petitioners’ rights so as to warrant the intervention of this Court? The answer is a resounding no. In the said **Kiambu Magistrate Miscellaneous Criminal Application No. E223 of 2022**, the investigating officer clearly seeks to undertake investigations into an offence of conspiracy to commit a felony contrary to Section 393 of the Penal Code, stealing by directors contrary to Section 282 of the Penal Code, Money laundering contrary to Sections 3, 4 and 7 of the Proceeds of Crime and Anti-Money Laundering Act No.9 of 2009 and related offences. All the Respondents in the application are various commercial banks in Kenya. The bank accounts connected to the Petitioners do not seem to be specifically targeted and they are merely incidental to the said investigations.

In ***Leonard Otieno vs. Airtel Kenya Limited [2018] eKLR*** it was held:-

“It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a

factual vacuum. To attempt to do so would trivialize the constitution and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”

21. The Petitioners have failed to demonstrate the manner in which the investigation in respect of the bank accounts connected to them was done without legal basis. They have failed to show with a degree of specificity how the investigation contravenes their rights. The Petitioners did not demonstrate that the alleged investigation was conducted unlawfully and unconstitutionally. This Court sees no nexus between the warrants to investigate issued in **Kiambu Magistrate Miscellaneous Criminal Application No. E223 of 2022** and the court order granting the Petitioners legal fees in **Nairobi Miscellaneous Application No. E804 of 2022**.

22. The substratum of the Petition is unsustainable since the Petitioners have failed to show how investigative powers were used contrary to law and to countermand a court order.

FINDINGS AND DETERMINATION

22. This Court finds the Petition to be devoid of merit and it is hereby dismissed.

21. So as not to discourage future litigants from approaching this Court to challenge administrative actions of investigative authorities each party shall bear their own costs.

Orders Accordingly.

**DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU
THIS 31ST DAY OF OCTOBER, 2025**

A. MSHILA

JUDGE

In the presence of;

Sanja - Court Assistant

Isaac Rene for the 1st to 3rd Petitioners

N/A by the Respondent