

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**  
**MISC. CRIMINAL REVISION NO. E012 OF 2026**

**IN THE MATTER OF ARTICLES 2, 19, 20, 22, 23, 25, 27, 29,  
47, 48, 49, 50, 258, 259 AND 260 OF THE CONSTITUTION  
OF KENYA**

**AND**

**IN THE MATTER OF THE LIBERTY, FREEDOM AND SECURITY  
OF PERSONS**

**BETWEEN**

**HEZRON KIMUTAI.....1<sup>ST</sup>**  
**APPLICANT**  
**KEVIN KIMUTAI.....2<sup>ND</sup>**  
**APPLICANT**  
**NATHAN KIPKOECH.....3<sup>RD</sup>**  
**APPLICANT**  
**SYLVESTER SAINA.....4<sup>TH</sup>**  
**APPLICANT**

**VERSUS**

**OFFICE OF THE DIRECTOR OF PUBLIC**

**PROSECUTIONS.....1<sup>ST</sup>**  
**RESPONDENT**

**INSPECTOR GENERAL, NATIONAL**

**POLICE SERVICE..... 2<sup>ND</sup>**  
**RESPONDENT**

**DIRECTORATE OF CRIMINAL**

**INVESTIGATIONS.....3<sup>RD</sup>**  
**RESPONDENT**

**RULING**

1. Before this Court for determination is a Notice of Motion application dated 21<sup>st</sup> January 2026. The same is brought under

Articles 10, 22, 23, 25, 27, 28, 29, 47, 48, 49(1)(h), 50, 165(6) and 259 of the Constitution of Kenya, 2010, Section 123 of the Criminal Procedure Code, and all other enabling provisions of the law.

2. The Applicants seek, inter alia, conservatory orders restraining the Respondents, their servants, agents, junior officers and/or anybody from effecting and/or anybody from arbitrary arresting, charging, harassing or otherwise interfering with them without conducting investigations and according them an opportunity to be heard to wit issuing them with summons for them to appear at any offices to record statements if need be. They also sought costs.

3. The application is supported by the grounds set out in the Notice of Motion and the Supporting Affidavits of HEZRON KIMUTAI (1<sup>st</sup> Applicant), KEVIN KIMUTAI (2<sup>nd</sup> Applicant), NATHAN KIPKOECH (3<sup>rd</sup> Applicant), and SYLVESTER SAINA (4<sup>th</sup> Applicant), all sworn on 21<sup>st</sup> January 2026.

4. The Respondents oppose the application through their Statement of Grounds of Opposition dated 16<sup>th</sup> February 2026 and filed on even date, together with a List of Authorities dated 17<sup>th</sup> February 2026.

5. The Applicants' case, as distilled from the pleadings and oral submissions of Mr. Towett, is as follows;

6. The Applicants have received credible information from several reliable sources that officers of the Kenya Police are under express instructions to arbitrarily capture and arrest them with a

view to arraigning them in Court for ulterior motives emanating from Criminal Case E2402 of 2025 on trumped-up charges.

7. The Applicants contend that they have never been summoned to appear before any police station or investigative agency, and no arrest warrants have been issued against them. They argue that any arrest in the absence of summons or warrants would constitute a clear breach of due process. As a result of the Respondents' alleged unlawful actions, the Applicants claim to be living under a cloud of uncertainty as to their liberty and are justifiably apprehensive that their constitutional rights are being violated.

8. The Applicants profess to be law-abiding citizens who are ready and willing to submit themselves to a just and fair legal system in which their fundamental rights and freedoms are respected and protected.

9. During oral submissions, Mr. Towett informed the Court that one of the applicants has since been arrested, though he did not specify which one. He reiterated that the applicants are ready to go to the police station but complained that the police are harassing them. He clarified that they are not seeking blanket immunity from the law, but rather protection of their due process rights.

10. The Respondents oppose the application on the following grounds, as summarized from their Grounds of Opposition and the submissions of Ms. Maundu;

11. First, that the application is vague and incompetent. The Applicants refer to "several reliable sources" at paragraph 3 of their affidavits without providing any particulars of these sources. They also fail to specify which police station and/or department the alleged officers seeking to arrest them come from, or their identities. The fears of arrest, alleged harassment and/or prosecution are therefore speculative at best.

12. Second, that if the Applicants' arrest may emanate from Criminal Case E2402 of 2025, then this Court is not the right forum to canvass those issues, as the trial court is yet to issue any warrants or pronounce itself on any application for warrants. The application is therefore pre-emptive and premature.

13. Third, that the orders sought are incapable of being granted as they seek to injunct the performance of constitutional and statutory functions. In particular;

a) Orders 3 and 4 of the motion seek to stop arrest and investigation, which would trespass into the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' constitutional independence enshrined under Article 245 of the Constitution and the National Police Service Act.

b) The orders also seek to restrain the charging of the Applicants, which would transgress into the constitutional mandate of the 1<sup>st</sup> Respondent under Article 157(10) of the Constitution and the Office of the Director of Public Prosecutions Act.

14. Fourth, that the Applicants have not met the test for the issuance of conservatory orders as established in **Wilson**

***Kaberia Nkunja v Magistrates and Judges Vetting Board & another [2016] eKLR.*** They have not demonstrated a prima facie case with a likelihood of success, nor that they will suffer prejudice if the orders are denied.

15. Fifth, that arrest, investigation, and being charged where there is evidence are all procedures countenanced by the law. There is neither a violation of rights if the Applicants are subjected to the same process, nor is there basis to exempt them from the process that applies to every other Kenyan.

16. Sixth, that there will be no prejudice if the orders sought do not issue, for the reasons that arrest is a lawful procedure with sufficient safeguards under Article 49 of the Constitution, and should charges be preferred, the process has safeguards in the form of the Decision to Charge Guidelines 2019 and the right to a fair hearing under Article 50.

17. During oral submissions, Ms. Maundu emphasized that the application is based on rumours and hearsay, and reiterated that the Applicants will not suffer any prejudice as they have constitutional protections in the event of arrest.

18. Having carefully considered the pleadings, the rival submissions, and the authorities cited, the following issues arise for determination;

a) Whether the Applicants have made out a case for the grant of conservatory orders;

b) Who should bear the costs of this application.

19. The principles governing the grant of conservatory orders were settled in ***Wilson Kaberia Nkunja v Magistrates and Judges Vetting Board & another [2016] eKLR***, where Lenaola J. (as he then was) stated;

***"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; Whether if a conservatory order is not granted, the Petition alleging violation of constitutional rights would be rendered nugatory."***

20. The Applicants have not demonstrated a prima facie case with a likelihood of success. Their case is built on vague and unsubstantiated allegations. They have not shown any real danger that they will suffer prejudice if the orders are not granted, as they have constitutional safeguards under Articles 49 and 50 in the event of arrest and charge.

21. Furthermore, the conservatory orders sought would have the effect of restraining the Respondents from performing their constitutional and statutory functions. In ***Nyambari Traders & Welfare Association v County Government of Kiambu & 2 others [2016] eKLR***, the court held;

***"...this court cannot be called upon to issue a restraining order to injunct the respondents from performing a***

***constitutional and statutory function. The court can only prohibit the performance of an illegal act. ...the court cannot injunct the performance of that which the law commands should be performed by a public body or authority or person."***

22. The police have a constitutional mandate under Article 245 to investigate crime, and the DPP has a constitutional mandate under Article 157 to institute criminal proceedings. The Applicants have not demonstrated that the Respondents are performing or threatening to perform an illegal act. They merely speculate that an arrest may occur without due process. Such speculation cannot be the basis for restraining constitutional bodies from executing their lawful mandates.

23. This Court finds that the Applicants have not met the threshold for the grant of conservatory orders as established in **Wilson Kaberia Nkunja** (supra).

24. On costs, the general rule is that costs follow the event. However, given the constitutional nature of this application and the fact that the Applicants sought to protect their fundamental rights, albeit unsuccessfully, I am inclined to order that each party bear their own costs.

25. The upshot is that the Applicants' Notice of Motion dated 21<sup>st</sup> January 2026 is devoid of merit and is hereby dismissed. Each party shall bear their own costs.

**Dated, signed and delivered at Kericho this 19th day of March, 2026**

.....  
**J. K. SERGON**  
**JUDGE**

In the presence of:

C/Assistant - Rutoh

Prosecutor - Kimaru

Applicant - No Appearance

No Appearance for Koech for the Applicant