

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY
PETITION NO. E008 OF 2024

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 24, 27, 28, 29, 31, 40(3), 47(2), 48, 50, 129 AND 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF SECTIONS 36, 37(2) & 38 OF THE TOBACCO CONTROL ACT, NO. 245A OF THE LAWS OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE POLICE ACT, 2010

BETWEEN

BEATRICE ANYANGO OKEYO.....PETITIONER

VERSUS

POLICE CONSTABLE MWOLOLO.....1ST RESPONDENT

POLICE CONSTABLE ONSARIGO.....2ND RESPONDENT

POLICE CONSTABLE (W) ESTHER.....3RD RESPONDENT

THE OCS, ASUMBI POLICE STATION.....4TH RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....5TH RESPONDENT

THE ATTORNEY GENERAL.....6TH RESPONDENT

RULING

[1] Before the court for determination is the petitioner’s Notice of Motion dated 4th November 2024. It is expressed to have been filed pursuant to **Sections IA, 1B and 3A** of the Civil Procedure Act as read with **Order 51 rule 1** of the Civil Procedure Rules, 2010 for orders that:

[a] Spent.

[b] Pending the hearing and determination of the application, an injunction be issued restraining the respondents by themselves, their agents, employees or servants or any other persons acting under their instructions from harassing and/or infringing upon the constitutional rights of the petitioner.

[c] Pending the hearing and determination of the application, an order be issued staying the proceedings in **Homa Bay Magistrates Court Criminal Case No. E504 of 2024.**

[d] Pending the hearing and determination of the Petition, an order be issued staying the proceedings in **Homa Bay Magistrates Court Criminal Case No. E504 of 2024.**

[e] Pending the hearing and determination of the Petition, an injunction be issued restraining the respondents by themselves, their agents, employees or servants or any other persons acting under their instructions from harassing and infringing upon the constitutional rights of the petitioner.

[f] Pending the hearing and determination of the Petition, an order be issued directing the 5th respondent to issue a transfer from Asumbi Police Station to the 1st, 2nd and 3rd respondents in order to safeguard the political and socio-economic rights of the petitioner herein.

[g] Costs be in the cause.

[2] The application was supported by the affidavit of the petitioner in which she averred that the 1st, 2nd and 3rd respondents, being officials of a state organ, have ignored their duty of observing, respecting, protecting, promoting and fulfilling the rights and fundamental freedoms as enshrined in the Bill of Rights. The petitioner contended that the respondents have limited her fundamental freedoms, namely, the right to privacy, security and personal freedom.

[3] The petitioner averred that the actions of the 1st, 2nd and 3rd respondent have also made it difficult for her to work peacefully at her shop in that they went to her place of business in plain clothes without identifying themselves, and proceeded to conduct a search in the premises without presenting a search warrant. The petitioner further complained that the 1st, 2nd and 3rd

respondents solicited for a bribe from her and when she refused to comply, they attempted to implicate her by placing contraband items in her handbag.

[4] She further complained that the 1st, 2nd and 3rd respondents went further to forcefully take her fingerprints at the police station without her consent and without informing her of the reasons for the same; and that they also confiscated and detained her handbag, which had Kshs. 200,000/=, keys and two mobile phones, unlawfully and without any justification. She added that, although the said hand bag was later returned, the money that was never returned.

[5] The petitioner was further aggrieved by the fact that the 1st, 2nd, 3rd and 4th respondents caused her to record a statement and proceeded to charge and arraign her before Homa Bay Magistrate's Court in **Criminal Case No. E504 of 2024**. The petitioner annexed to her affidavit a copy of the Charge Sheet filed in **Homa Bay Magistrate's Criminal Case No. E504 of 2024** to buttress her averments. She therefore deposed that it is in the interest of justice that her application be allowed as she stands to suffer irreparable loss and damage if the orders sought are not granted.

[6] The respondents opposed the application. They relied on the Replying Affidavit sworn on 27th March 2025 by **PC Benedict Mwalolo**, the investigating officer in Homa Bay Criminal Case No. E504 of 2024 and the 1st respondent herein. He deposed that they were on patrol with other officers on the 25th October 2024 when they received information that there were suspected counterfeit cigarettes being sold at Asumbi Trading Centre, which was within Asumbi Police Station. They proceeded to the said sop and found the petitioner. According to the 1st respondent, they introduced themselves to her and informed her of the purpose of their visit.

[7] The 1st respondent further averred that upon searching the shop and the petitioners bag, they found supermatch cigarettes and banned polythene bags; and when they asked the petitioner to accompany them to the police station, she disappeared through the back door of the shop. One of her friends came and closed the shop on her behalf and they had no alternative but to take the

recovered items to the police station. When the petitioner finally presented herself at the police station, she was processed, charged and arraigned before the Magistrate’s Court at Homa Bay in the criminal matter aforementioned on the advice given by the Office of the Director of Public Prosecutions.

[8] The 2nd respondent further confirmed that the petitioner was charged with three counts of offences under the Excise Duty Act, among others. He annexed a copy of the Charge Sheet to his affidavit as Annexure BM1 along with other pertinent documents and added that two witnesses had already testified by 27th March 2025 when he made the deposition.

[9] It is notable that the application is expressed to have been filed under the provisions of the **Civil Procedure Rules**, yet the applicable procedural rules in constitutional petitions and the applications made thereunder are the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** (otherwise known as **the Mutunga Rules**). In this regard, I entirely endorse the position taken by **Hon. Musyoka, J.** in **Francis Angueyah Ominde & Another v Vihiga County Executive Committee Members Finance Economic Planning and 3 others; Controller of Budget and 10 others (Interested Parties) [2021] eKLR** that:

“...constitutional petitions are governed and regulated by the **Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013**, so far as procedures and processes are concerned. They are not subject to the **Civil Procedure Rules**, which governs processes that are brought under the **Civil Procedure Act, Cap 21, Laws of Kenya**. So far as procedure is concerned, the **Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013** captures the spirit of **Article 159(2)(d) of the Constitution**, which is an injunction against constitutional proceedings being hostage to technicalities of procedure, and which enjoins courts to protect and promote the principles of the Constitution. The focus is trained on substance rather than process. The **Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013** are more flexible compared with the provisions of the **Civil Procedure Rules**, with respect to who may bring proceedings and the manner of initiating the proceedings.

[10] The foregoing notwithstanding, there can be no doubt that the Court has the jurisdiction to issue an order of injunction as sought by the petitioners should justifiable cause be shown for such an order; for **Article 23** of the **Constitution** is explicit that:

(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

- (a) a declaration of rights;
- (b) **an injunction;**
- (c) **a conservatory order;**
- (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- (e) an order for compensation; and
- (f) an order of judicial review.”

[11] Hence, in **South Imenti Bar Owners S.H.G through its Chairman James Gikunda**

Ntaragwi v County Government of Meru [2018] eKLR, it was held:

“Provision of the relief of an injunction in constitutional petitions is doubtless a development of law...Such development of law on injunctions orchestrated by the new Constitution justifies what Ojwang Ag. J. (as he then was) stated in the case of SULEIMAN vs. AMBOSELI RESORT LTD (2004) eKLR 589 at page 607 that:-

‘...counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago in Giella Vs Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel on that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:-

“A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong”...”

Traditionally, on the basis of the well accepted principles set out by the court of Appeal in Giella Vs Cassman Brown the court has had to consider the following questions before granting injunctive relief.

- i) *Is there a prima facie case...*
- ii) *Does the applicant stand to suffer irreparable harm...*
- iii) *On which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice...”*

[12] Moreover, **Rule 23** of the **Mutunga Rules** states:

(1) **Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders.”**

[13] Therefore, the key issue for determination is whether the petitioner has satisfied the conditions for the grant of the injunctive and stay orders sought by her. At this stage, the Court need not examine the merits of the case closely. Hence, I bear in mind the caution expressed by

Hon. Ibrahim, J. (as he then was) in the **Muslim for Human Rights & 2 Others v Attorney General & 2 Others** [2011] eKLR in respect of conservatory orders 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-à-vis the case of either party. The principle is similar to that in temporary or interlocutory injunctions in civil matters..."

[14] What amounts to a *prima facie* case was aptly stated in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others** [2003] KLR 123 thus:

"A *prima facie* case in a civil application includes but not confined to a genuine and arguable case. 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."

[15] Similarly, in **Kevin K Mwiti & others v Kenya School of Law & others (supra)**, it was held that:

"A *prima facie* case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a *prima facie* case with a likelihood of success. Accordingly in determining this application, the Court is not required-indeed it is forbidden- from making definite and conclusive findings on either fact or law.

[16] With the foregoing in mind, I have considered the Petition in the light of the averments set out in the petitioner's Notice of Motion and its Supporting Affidavit. The petitioner is essentially seeking stay of her prosecution in **Homa Bay Magistrates Court Criminal Case No. E504 of 2024** pending the hearing and determination of the Petition, an order be issued staying the proceedings in **Homa Bay Magistrates Court Criminal Case No. E504 of 2024**.

[17] Authorities abound to show that the best forum for testing the validity of a charge and assessing evidence in proof thereof is the trial court itself. For instance, in **Erick Kibiwott & 2 Others v Director of Public Prosecution & 2 Others** [2014] eKLR it was held that:

"...In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial court. Dealing with the merits of the application, it is trite that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to

investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings...”

[18] This is in line with **Article 50(1)** of the **Constitution**, which is explicit that:

“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

[19] Thus, the Constitution itself recognizes that the subordinate courts, being its own creatures pursuant to **Article 162** and **169**, have the mandate and competence to hear and determine allegations of the sort complained of herein. It is for the trial court to inquire into the question whether the petitioner committed the alleged offences alleged; and whether respondents acted within the confines of the law or not in causing her arrest and prosecution. Indeed, **Article 50(2)** of the Constitution is explicit as to the rights of an accused person to the end that fairness prevails at the petitioner’s trial.

[20] In the premises, I underscore what was stated in **Michael Sistu Kamau & 12 Others v Ethics and Anti-Corruption Commission & 4 Others [2016] eKLR**, by a three-judge bench of the Court that:

“The trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words, unless the Petitioners demonstrate that the circumstances of the impugned process render it impossible for them to have a fair trial, the High Court ought not to interfere with the trial ... “

[21] In the premises, it is my considered finding that no justification has been shown as to why the Court should intervene in the prosecution of the petitioner by way of injunctive or stay orders. The application dated 4th November 2024 is accordingly dismissed. Costs thereof to be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY OF APRIL 2026

ORIGINAL

OLGA SEWE

JUDGE