

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL, HUMAN RIGHTS & JUDICIAL REVIEW
DIVISION
PETITION NO. E003 OF 2025

NOMAN ADAMALI TAYABALI.....1ST PETITIONER
BURHANUDDIN NOMAN ADAMALI.....2ND PETITIONER

-VERSUS-

ATTORNEY GENERAL.....1ST RESPONDENT
INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT
DCIO MOMBASA URBAN.....3RD RESPONDENT
METSEC CABLES LIMITED.....INTERESTED PARTY

RULING

1. The motion, the subject of this ruling, seeks a conservatory order pending the hearing and determination of the petitioner’s petition. In particular, the petitioner prays for the order that:

“3... this Honourable Court be pleased to issue a Conservatory Order prohibiting the Respondents from arresting, charging or in any manner interfering with the Petitioners on account of debts unpaid to the interested Party pending the hearing of this Petition.”

2. The motion is dated 5 February 2025 and is expressed to be filed under article 22 (4) of the Constitution Rule 20 and 21 of the Constitution of Kenya (Supervision Jurisdiction and Protection of Fundamental Rights and Freedom of the Individual) High Court Practice and Procedure Rules.
3. According to the affidavit sworn by the 2nd petitioner in support of the application, the petitioners are father and son respectively. The 2nd

petitioner is also a director of company known as Lightwares Company Limited (hereinafter “Lightwares”).

4. Lightwares has been trading with the interested party for a long time. The nature of their business relationship is that the interested party supplies goods to the Lightwares which the latter, apparently, sells at a profit.
5. In the course of their trading, more particularly in the year 2022, Lightwares’ business went down to the extent that it was unable to meet its financial obligations to the interested party.
6. Lightwares acknowledged its debt to the interested party and, apparently, issued the interested party with several cheques for settlement of its debt in instalments after the parties had agreed to this arrangement. However, two of the cheques were dishonoured upon presentation for payment. According to the 2nd petitioner, the cheques were not paid because they were not dated. However, subsequent payments were made and the petitioners have ever since continued to make their payments towards settling the debt.
7. Despite the arrangement between the interested party and Lightwares, and notwithstanding that the company was making the payments as agreed, the petitioners were arrested by police and taken to police custody apparently after the interested party lodged a complaint against them on the outstanding debt due to the interested party. The petitioners were only released after they paid a cash bail.

8. The petitioners are aggrieved that the involvement of the police in their affairs with the interested party is meant to bring pressure to bear upon them to settle a civil debt.
9. Police constable Charles Katwai swore a replying affidavit for the 1st, and 3rd respondents opposing the application. He has stated that he is attached to Directorate of Criminal Investigation at Urban Police station in Mombasa. According to Constable Katwai, no evidence has been provided of the petitioners' arrest and neither has the Director of Public Prosecutions given any greenlight for the prosecution of the petitioners.
10. That notwithstanding, constable Katwai has sworn that one Sanjay Kanani, the interested party's credit manager, made a report to the police to the effect that Lightwares owed it the sum of Kshs. 14, 679,250/=. This claim was supported by invoices and delivery notes. Kanani's complaint was booked as OB. No. 21/14/01/2015.
11. The police investigated the complaint and established, *inter alia*, that Lightwares had issued the interested party with 18 undated cheques. The signatories to the company's bank account from which the cheques were drawn were the petitioners. Two of the cheques that were presented for payment were not honoured because the account on which they were drawn did not have sufficient funds.
12. The petitioners presented themselves to DCI Urban police station for interview and recording of their statements after they were served with

the summonses for that purpose. They, however, declined to record their statements but promised to come back later. It is at that point that the petitioners were granted cash bail. At no time were the petitioners were placed in police custody.

13. After conclusion of the investigations, the investigation file was forwarded to the office of Director of Public Prosecutions for directions. As the time constable Katwai filed his affidavit, no response had been received from the Director of Public Prosecutions.

14. Against this background, it is contended that the respondents have not violated any of the petitioner's constitutional rights as to warrant any orders against the respondents.

15. Sanjay Kanani swore a replying affidavit on behalf of the interested party and stated that he is the credit controller of the interested party. His depositions are a repetition of constable Katwai's affidavit.

16. However, as far as the dishonoured cheques are concerned, Sanjay has sworn that the Lightwares Company's bank's reason for non-payment of the cheques was that the petitioners had stopped them. According to the interested party this was "*a flimsy reason*" because he was aware that there no sufficient funds in the account. Since he believed that the petitioners had issued bad cheques, he reported the matter to the police.

17. According to the Supreme Court in **Munya v Kithinji & 2 others [2014]**

KESC 30 (KLR)

“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.”

18.I suppose that by saying that the court should consider “*the inherent merit of the case*”, as one of the factors to consider in granting a conservatory order, the Supreme Court meant that the court is to consider whether the petitioner has a case, which on its face, is worth of consideration in view of the constitutional questions raised. It is a case that is not frivolous or, rather, it is a prima facie case. It cannot be that by imploring the court to consider “*the inherent merit of the case*”, the Supreme Court was thereby saying that the court can, at an interlocutory stage of the proceedings, in an application for conservatory orders, delve into the merits of the substantive petition.

19. Turning back to the petitioners' application, the prayer in the application that this court is concerned with at this stage of the proceedings is whether this Honourable Court can "*issue a Conservatory Order prohibiting the Respondents from arresting, charging or in any manner interfering with the Petitioners on account of debts unpaid to the interested Party pending the hearing of this Petition.*"

20. As far as I understand the respondents, their investigations on the interested party's complaint have been concluded and the investigation file forwarded to the Director of Public Prosecutions for his advice or directions.

21. No doubt the respondent's action in this regard is informed by article 157 (6) of the Constitution which vests the Director of Public Prosecutions with the powers to prosecute. This provision of the law reads as follows:

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 clause (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).

22. Clause (10) of this article reiterates that “*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*”.

23. Having concluded their investigations, there is no possibility that the respondents will arrest the petitioners on the same interested party’s complaint; if the petitioners have to be arrested again, it can only be for the reason of arraigning them at the instance of the Director of Public Prosecutions.

24. But the Director of Public Prosecutions who only has powers to prosecute is not a party in these proceedings and, therefore, the order not to arrest the petitioners for purposes of their arraignment would be a futile order. This sort of order cannot be directed at any of the respondents who have no say in the decision to prosecute the petitioners, assuming they are eventually charged.

25. For these reasons, I find no merits in the petitioner’s application, it is hereby dismissed. I make no order as to costs. Orders accordingly.

Signed, dated and delivered on 17 April 2026

Ngaah Jairus
JUDGE