



**Kithi v Director of Public Prosecution & 2 others (Civil Appeal
E007 & E015 of 2020 & Constitutional Petition 2 of 2019
(Consolidated)) [2024] KECA 1760 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KECA 1760 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL E007 & E015 OF 2020 & CONSTITUTIONAL
PETITION 2 OF 2019 (CONSOLIDATED)**

KI LAIBUTA, LA ACHODE & GV ODUNGA, JJA

DECEMBER 6, 2024

BETWEEN

GEORGE KITHI APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

FRED TSOFA MWENI 2ND RESPONDENT

YEHUDA SULAMI 3RD RESPONDENT

*(Being an Appeal from the High Court of Kenya and Malindi (R. Nyakundi,
J.) delivered on 15th October 2019 in HC Constitutional Petition No. 2 of 2019)*

JUDGMENT

1. The consolidated appeals, being Malindi Civil Appeal Nos E007 of 2020 and E015 of 2020, are against the rulings delivered by the learned Judge (Nyakundi, J) in Malindi High Court Constitutional Petition No. 2 of 2019 on 15th October 2019 and 31st October 2019 respectively. For the purposes of this judgement, we shall refer to the parties as they appear in Malindi Civil Appeal No. E007 of 2020.
2. Before delving into the said applications, it is important to set out the genesis of this appeal. By a petition dated 15th January 2019 brought by the appellant, George Kithi, against the 1st respondent, the Director of Public Prosecution (as the respondent) and the 2nd and 3rd respondents (as the 1st and 2nd interested parties) respectively, the appellant contended that on 27th August 2018, he entered into a commercial investment funding agreement with the 3rd respondent, Yehuda Sulami, an Israeli national, in which USD 300,000 was to be invested through the appellant; that the said sum was meant to be disbursed on the said date and the investment was for a term not exceeding 21 days; that the said



disbursement was secured by land parcel no. Kilifi/Mtwapa/1058 belonging to the 2nd respondent, Fred Tsofa Mweni, measuring 3.64ha; that, pursuant thereto, the 3rd respondent registered a caveat on the said title, and transfer documents were executed in favour of and deposited with the 3rd respondent; that, in the event of default on repayment, the said security would be transferred to the 3rd respondent in whose favour the appellant executed an undertaking; that, pursuant thereto, Kshs 5,000,000 was paid in cash and evidenced by an invoice from Munyithya Advocate for the 3rd respondent; that Kshs 5,000,000 was transmitted from the 3rd respondent's Bank in Israel to Jamii Bora Bank on 31st August 2018, but that there was a delay in clearing the same; and that the balance was never paid.

3. According to the appellant, he borrowed funds from other sources and proceeded with the said transaction despite the effects of the delay occasioned by failure on the part of the 3rd respondent to avail the funds in time; that the said transaction was meant to mature sometime in early February 2019; that, as a result of the said delay and breach, the appellant's ability to guarantee returns against the disbursed amount of Kshs 10,000,000 within the stipulated 21 days was heavily compromised; that, consequently, the said Kshs 10,000,000 disbursed was not repaid by the appellant to the 3rd respondent within the stipulated timelines; that, due to the pressure mounted by the 3rd respondent for the refund of the said sum, the appellant made a partial payment of Kshs 4,000,000 to a company designated by the 3rd respondent, Blueridge Capital Limited, on 22nd November 2018 before the maturity of the transaction.
4. Notwithstanding the foregoing, the appellant pleaded that the 3rd respondent employed the services of the 1st respondent to help in the recovery of the said sum by levelling criminal charges against him for conspiracy to defraud contrary to section 317 of the Penal Code; and that the said charges were trumped up and amounted to an abuse of the criminal justice process since it was merely intended to coerce him to pay the balance of Kshs 6,000,000. The appellant therefore sought orders prohibiting the 1st respondent from arresting him, preferring charges against him or prosecuting him.
5. Together with the petition, the appellant filed a Notice of Motion dated 15th January 2019 in which he sought the following orders:
 - a. That this application be certified as urgent by its very nature and be placed before the duty judge for hearing *ex parte* in the first instance and issuance of the interim orders sought herein.
 - b. That pending hearing and determination of this application *inter partes*, this Honorable Court be pleased to issue an order of stay, staying any arrest and arraignment in Court, charging or prosecuting the Applicant in respect to any charges related herewith and in effect issue an order prohibiting the respondent or any person acting on its instruction howsoever from arresting or ordering the arrest of the petitioner, confining the person of the petitioner or any relations hereto in any way, producing or arraigning the petitioner before Court for plea taking, charging the petitioner or preferring or continuing to prefer charges in this matter or against the petitioner in matters related to the issues herein, prosecuting or continuing with prosecution in the matter or against the petitioner in matters relating to this dispute hereof and to do or cause any harm intended to prejudice the petitioner in any way howsoever.
 - c. That pending hearing of this application *inter partes*, the honorable Court be pleased to issue an order of injunction against the respondent either by itself or its servants or agents or any person howsoever working under its instruction prohibiting or restraining them from arresting or ordering the arrest of the petitioner, confining the person of the petitioner in any way, producing or arraigning the petitioner before court for plea taking, charging the petitioner or preferring or continuing to prefer charges in this matter or against the petitioner in matters



related to the issues herein, prosecuting or continuing with prosecution of the petitioner in matters relating to this dispute hereof and to do or cause any harm intended to prejudice the petitioner in any way.

- d. That pending hearing and determination of this application and petition, this honorable Court be pleased to issue an order of stay, staying the arrest and arraignment in Court, charging or prosecuting the applicant in respect to any charges related herewith and in effect issue an order prohibiting the respondent or any person acting on its instruction howsoever from arresting or ordering the arrest of the petitioner, confining the person of the petitioner in any way, producing or arraigning the petitioner before Court for plea taking, charging the petitioner or preferring or continuing to prefer charges in the matter or against the petitioner in matters related to the issues herein, prosecuting or continuing with prosecution of the petitioner in matters relating to this dispute hereof and to do or cause any harm intended to prejudice the petitioner in any way.
 - e. That pending hearing and determination of this application and petition, this honorable Court be pleased to issue an order of injunction against the respondent either by itself or its servants or agents or any person howsoever working under its instruction prohibiting or restraining them from arresting or ordering the arrest of the petitioner, confining the person of the petitioner in any way, producing or arraigning the petitioner before Court for plea taking, charging the petitioner or preferring or continuing to prefer charges in the matter or against the petitioner in matters related to the issues herein, prosecuting or continuing with prosecution of the petitioner in matters relating to this dispute hereof and to do or cause any harm intended to prejudice the petitioner in any way.
 - f. Costs of this application be provided for.
6. The application was substantially based on the same grounds as those set out in the petition.
 7. In response to the application, the 1st respondent relied on the replying affidavit sworn on 12th March 2019 by the investigating officer, PC Sammy Oyaro, according to whom the 3rd respondent made a complaint against the appellant at Mtwapa Police Station on 26th October 2018; that upon investigations, it was revealed that the appellant was given USD 30,000 by the 3rd respondent through the 3rd respondent's advocate, Joseph Munyithya, on the undertaking by the appellant that he would repay the same in 21 days; that, pursuant to that arrangement, the appellant released to the 3rd respondent's advocates the original title for land parcel No. Kilifi/Mtwapa/1058 as well as transfer forms for the same parcel of land executed in favour of the 3rd respondent by the appellant's client; that, upon realising that the money had not been paid into his account, the 2nd respondent reported the matter to Central Police Station, Nairobi, admitting that he had given his title document to the appellant and at the same time reporting the loss of the said title; that, upon being summoned by the DCIO, Kilifi, the appellant promised to repay the 3rd respondent within a week, a promise that he did not honour; that, at the conclusion of the investigations, the file was forwarded to the 1st respondent for advice, and that it was recommended that the appellant be charged; that, consequently, charges were preferred against the appellant at Shanzu Law Courts in Criminal Case No. 56 of 2019; that, upon his arrest, the appellant was released pending his court appearance on 14th January 2019 but, instead of appearing in court, the appellant commenced legal proceedings against the 1st respondent; and that the decision to charge the appellant was neither actuated by malice nor an abuse of the process, but was based on sound evidence, facts and the law.
 8. In the deponent's view, the appellant had sufficient safeguards under [the Constitution](#) to ensure that he received a fair trial, and he urged the court to dismiss the application.



9. By a further application dated 29th March 2018, the petitioner sought an order that the firm of Munyithya, Mutugi, Umara & Muzna Company Advocates be barred from representing or appearing for the 3rd respondent, and that all pleadings filed by the said firm be struck out. The grounds upon which the said application was based were that , in the subject transaction between the appellant and the 3rd respondent, the said firm was acting for both the appellant and the 3rd respondent; that the said firm was privy to confidential information initially acquired by virtue of the said transaction; that the appellant would be prejudiced if the said firm continued representing the 3rd respondent; and that, Mr Munyithya having recorded a statement against the appellant, could only be a prosecution witness but should not represent the 3rd respondent.
10. {}The said application was opposed by an affidavit sworn by Joseph Manzi Munyithya, an advocate practicing in the firm of Munyithya, Mutugi, Umara & Muzna Company Advocates on 8th April 2029. In that affidavit, the deponent denied participating in the negotiation of the loan agreement; that the negotiations were between the appellant, himself a lawyer, and the 3rd respondent, also a trained but non-practicing lawyer; that the three documents upon which the agreement was based were all prepared by the firm of Kithi & Co Advocates, and that the deponent only ensured that there were records of the transaction; that, while the appellant was represented by his firm in the transaction, the firm of Munyithya, Mutugi, Umara & Muzna Company Advocates represented the 3rd respondent; and that there was no retainer agreement between the appellant and the firm of Munyithya, Mutugi, Umara & Muzna Company Advocates.
11. {}In opposition to this application, the 3rd respondent filed grounds of opposition dated 8th April 2019 stating that there never existed any Advocate-Client relationship between Munyithya, Mutugi, Umara & Muzna Company Advocates and the appellant; that there was no evidence of breach of ethics; that George Kithi through M/s Kithi & Co Advocates authored all the impugned documents; and that the application was frivolous and was for striking out.
12. Upon hearing the application, the learned Judge found that the affidavit evidence of the appellant raised no serious issues for the court to exercise its discretion to appropriately grant a conservatory order against the 1st respondent; that in considering an application for conservatory orders, the court was not concerned with the merits of the petition or claim given the fact that the determination is normally made from contested material in the affidavit evidence; that, on the authority of the case of R v Cameron 2017 ABQB 217 (CanLII) whether the subject matter was purely a civil claim or a criminal one, were factual issues to be ventilated before the trial court; that it was not proved at that interlocutory stage that the criminal process was tinted with illegality or irregularity that could give rise to a breach of a constitutional right in order to justify grant of the conservatory order sought; that, on the tentative assessment of the material presented by the petitioner, it was not established that there was a serious question or arguable case for the court to intervene; and that, under Article 50(2)(a) of *the Constitution*, which guarantees to the appellant the right to be presumed innocent unless the contrary is proved, the appellant could rest in the belief that his rights to a fair trial were guaranteed.
13. With regard to the application dated 29th March 2019 by the petitioner seeking to disqualify the firm of Munyithya, Mutugi, Umara & Muzna Company Advocates from making any representation in the petition, the learned Judge relied on the case of Delphis Bank Ltd v Channan Singh Chatthe & Others [2005] 1KLR and held that, under Article 50(4) of *the Constitution*, the court has the power to exclude evidence where, having regard to all the circumstances, it finds that the evidence was obtained illegally, improperly or unfairly, and that allowing such evidence would have an adverse effect on a right of an accused to fair hearing; that whether or not the material alleged to be in possession of the said firm would be prejudicial to the appellant was to be decided on a case to case basis based on the content of



the communication; that, even if it were to be assumed that a bona fide conflict of interest between the firm of Munyithya, Mutungi, Umara and Muzna Advocates and the petitioner may have arisen out of the commercial funding agreement, it was not proper to preclude them from filing an affidavit when the conservatory order was sought by the petitioner; and that the appellant did not establish strong grounds to disqualify the firm from participating in the proceedings as an interested party.

14. Based on the foregoing, the learned Judge dismissed both applications.
15. That was the decision that formed the basis for Civil Appeal No. E007 of 2020, which is substantially grounded on the issue as to whether the learned Judge erred in failing to find that the appellant established a case that warranted the grant of conservatory order pending the hearing and determination of the petition.
16. We heard the appeal on the Court's virtual GoTo platform on {}29th July 2024 when learned counsel, Ms. Murage, appeared for the appellant while learned counsel, Mr. Mutugi, appeared for the 3rd respondent. Despite due service of the hearing notice on the 1st and 2nd respondents, they were not represented. The appellant and the 3rd respondents relied on their written submissions with minimal highlights.
17. We find it prudent to first deal with Civil Appeal No. E007 of 2020 since it is our view that the determination therein may, depending on its outcome, dispose of or render Civil Appeal No. E015 of 2020 moot.
18. It was submitted on behalf of the appellant: that, based on the decision in Center for Rights Education & Awareness (CREAW) & 7 Others v Attorney General Petition No 16 of 2011, the learned Judge erred in treating the application as if he was dealing with the main petition; that the trial court erred {}by failing to appreciate the circumstances set out by the appellant, who had raised serious constitutional issues that warranted the grant of conservatory orders; that, based on the decision in Combi (Singapore) Pte Limited v Ramnath Sriram and another 1997 EWCA 2164, a proper approach must be made to make an order which best accords with the interest of justice, and that the rights and harm to the litigants must be balanced in a way that is less likely to produce prejudice; that the trial court erred in failing to determine the issue as to whether it was right and proper for the 1st respondent's office to commence prosecution against the appellant prior to recording the latter's statement; that the trial court erred when it failed to determine in what capacity the National Police Service was operating when its officers arrested the appellant and sought to coerce him into paying the Kshs 10,000,000 lent by the 3rd respondent; that the trial court did not shed light on whether police officers, being agents of the 1st respondent, were debt collectors or in charge of preserving law and order; and that the trial court did not carefully analyse the evidence, law and justice as would be required in fairly solving the dispute.
19. {}On behalf of the 3rd respondent, it was submitted: that, since certified copies of the ruling and order were not exhibited in the record, based on the case of James Abich Odera v Kegule Onguka [2019] eKLR, the appeal is incompetent and should be struck out; that the main petition has substantially progressed, the parties having filed their submissions, and that, therefore, this Court should not issue orders in vain; that, based on the case of R v Commissioner of Police and Another exp Michael Monari and Another [2012] eKLR, the appellant did not demonstrate that the investigations and prosecution constituted an abuse of the police powers, or that the same were malicious or in bad faith; that, based on the case of Paul Nganga Nyaga and 2 Others v Attorney General and 3 Others Pet 518 of 2012, the very fact that the appellant faces charges, including fraud brings in the element of public interest which may not be dealt with in civil proceedings; and that the appellant did not demonstrate the existence



of imminent danger that the trial would be concluded before the petition was determined, hence the learned Judge exercised his discretion in dismissing the application.

20. We have considered the record as placed before us and the submissions made on behalf of the parties.
21. Before we deal with the merits of the appeal, the 3rd respondent has taken issue with the appellant's failure to incorporate in his record certified copies of the ruling and order. The short answer to that submission is to be found in rule 94(1) of the Rules of this Court which provide that:

If a respondent is of the opinion that the record of appeal is defective or insufficient for the purposes of the respondent's case, he or she may lodge in the appropriate registry four copies of a supplementary record of appeal containing copies of any further documents or any additional parts of documents which are, in his or her opinion, required for the proper determination of the appeal.

22. Nothing barred the 3rd respondent from filing a supplementary record of appeal incorporating the alleged omitted documents if, in its view, they were necessary for the purposes of determining the appeal. The introduction of this rule was, in our view, meant to avoid appeals which were otherwise properly before the Court from being struck out merely because of omission of documents some of which were unnecessary for the purposes of determination of the appeal.
23. Malindi Civil Appeal No. E007 of 2020, as we have stated at the beginning of this judgement, arose from the decision of the learned Judge declining to grant conservatory orders pending the hearing of the petition. This being an interlocutory appeal, care must be taken to obviate expressing a conclusive view of the matter as the petition is still pending before the High Court. The practice is, and has always been that, at interlocutory stage, the court may only express its views in the matters in controversy on a prima facie basis. A concluded view is likely to tie the hands of the Judge who eventually hears the case, and is likely to cause embarrassment. See *Mansur Said & Others vs. Najma Surur Rizik Surur Civil Appeal No. 186 of 2005* and *Niazons (K) Limited vs. China Road & Bridge Corporation (Kenya) Civil Appeal No. 157 of 2000* [2001] KLR 12; [2001] 2 EA 502.m
24. The decision whether or not to grant conservatory orders is an exercise of judicial discretion. In determining the appeal, we are guided by the decision of the Supreme Court in *Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 Others* (2019) eKLR in which it was held that:

“We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of *Kacem v. Bashir* (2010) NZSC 112; (2011) 2 IVZLR 1 (*Kacem*) where it was held:

‘In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.’”

25. In the same vein, it was held by this Court in *Price & Another v Hilder* [1986] KLR 95 that it would be wrong for the court to interfere with the exercise of the trial court's discretion merely because the Court's decision would have been different. The Supreme Court of Uganda, in *Kiriisa v Attorney-General and Another* [1990-1994] EA 258 held that it is settled law that the discretion must be



exercised judiciously, and that an appellate Court would not normally interfere with the exercise of the discretion unless it has not been exercised judiciously.

26. {}The established law is that, in considering an application for conservatory orders, the court is not called upon to make any definite finding of either fact or law as that is the province of the court that will ultimately hear the petition. The learned Judge was alive to this fact when he stated that:

“Whilst the petitioner has developed lengthy arguments contained in his affidavit evidence, I am of considered view that he raises no serious issues for this court to exercise discretion to appropriately make a conservatory order against the respondent. The court in considering an application for conservatory orders it is conscious of the fact that is not concerned with the merits of the petition or claim given the fact that the determination is normally made from contested material in the affidavit evidence. Having scrutinized the affidavits by the petitioner and submissions thereon, further evaluation of the affidavits by the respondent and the interested party it is noted whether the subject matter is purely a civil claim or criminal are factual issues to be ventilated before the trial court. Thus in a sequence of events commenced by the respondent the question whether to prohibit or recall any further criminal process has not been proved at this interlocutory stage to be tainted with illegality or irregularity giving rise to a breach of a constitutional right to stop any subsequent infringement by way of a conservatory order.”

27. {}At the stage of an application for conservatory orders, the petitioner is only required to establish a prima facie case with a likelihood of success without making definite and conclusive findings on either fact or law. However, where the conservatory orders sought have the effect of derailing the investigative and prosecutorial authorities from carrying out their constitutional and statutory mandate, unless the petitioner satisfies the court that what is intended to be carried out and his own apprehension cannot appropriately be dealt with in the available forum, the court should be reluctant to grant such orders. In the case of investigations, the right is available to the petitioner to present his own version of the accusations made against him and, by stopping the investigating agencies from carrying out their mandate, the court would in effect be disintitling the petitioner from putting forward his case before the investigative agencies for consideration.
28. {}Similarly, where a decision is made to prosecute a petitioner, there are in place constitutional and statutory safeguards that ensure that an accused person gets a fair trial. A petitioner ought not to seek conservatory orders in order to evade the legally established process merely because it may cause some inconvenience to him. This is not to say that, in all cases, conservatory orders ought not to issue in a criminal process. In deserving cases, where there are serious allegations of violation of the petitioner’s rights and fundamental freedoms or threats to such violations, the court may consider granting appropriate relief where, to continue with the trial may well render the petition merely academic. Each case will, however, depend on its own facts and, where the trial court has exercised its discretion, this Court will not interfere unless the above principles are satisfied.
29. We have considered the ruling by the learned trial Judge and are satisfied that he considered all the relevant matters and did not consider any irrelevant matters that he ought not to have considered.
30. Accordingly, we find no merit in Civil Appeal No. E007 of 2020.
31. {}As regards Civil Appeal No. E015 of 2020, it arises from the dissatisfaction by the appellant with the decision made on 31st October 2019. The said ruling was the subject of the Notice of Motion dated 16th October 2019 by which the appellant sought stay of execution of the ruling the subject of Civil Appeal No. E007 of 2020 dismissing his application for conservatory orders, pending this appeal. By



its decision, the learned Judge stayed his earlier decision made on 15th October 2029. In effect, the learned Judge temporarily granted the very orders he had declined to grant pending the hearing and determination of this appeal.

32. In light of our foregoing determination, it is no longer necessary to determine this appeal since the effect of our foregoing decision is to render Civil Appeal No. E015 of 2020 superfluous.
33. In effect, the consolidated appeals are unmerited and are hereby dismissed with costs to the 3rd respondent in Civil Appeal No. E007 of 2020. The said costs shall be borne by the appellant in Civil Appeal No. E007 of 2020.
34. Those shall be our orders.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2024

KABUYA IMANA LAIBUTA

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JUDGE OF APPEAL

LYDIA AWINO ACHODA

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JUDGE OF APPEAL

GEORGE VINCENT ODUNGA

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JUDGE OF APPEAL

I certify this is a true copy of the judgement

DEPUTY REGISTRAR

