



**Sakwa v Directorate of Criminal Investigation & another (Environment & Land  
Petition E034 of 2023) [2024] KEELC 14182 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 14182 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E034 OF 2023  
LN MBUGUA, J  
OCTOBER 30, 2024**

**BETWEEN**

**MICHAEL OSUNDWA SAKWA ..... PETITIONER**

**AND**

**DIRECTORATE OF CRIMINAL INVESTIGATION ..... RESPONDENT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTION ..... DEFENDANT**

**RULING**

1. Before me is the Petitioner’s application dated 29.6.2023 seeking a conservatory order to stop the arrest and prosecution of himself and one Francis Nyaga Njeru in connection with the parcel L.R No. 3734/27, (the suit property). The application is premised on grounds on its face and on the Petitioner’s supporting affidavit sworn on 29.6.2023. He avers that he is the registered proprietor of the suit property, having purchased the same from its previous owner, Francis Nyaga Njeru vide a sale agreement dated 29.5.2018 and a further addendum dated 29.11.2018.
2. That subsequently, the estate of Adonijah Onyango-deceased filed the case Nairobi ELC E054 of 2020 Victor Owuor Ayoki & Roselyn Ayoki v Multistage Investments Limited & 7 Others challenging the legality of title held by the purported directors of Multistage Investments Limited and himself and in which suit he (the petitioner) appears as a party together with the Registrar of Titles. The petitioner avers that the court in the above mentioned case Nairobi ELC E054 OF 2020 has issued a status quo order.
3. He avers that despite the said orders, the 1<sup>st</sup> Defendant’s officers and strangers not known to him have threatened him with arrest in connection with the ownership dispute over the suit property. Adding that on 22.6.2023, officers of the 1<sup>st</sup> respondent unlawfully and maliciously arrested Francis Nyaga



Njeru allegedly because he irregularly obtained ownership of the suit property, though he was released and has not been charged to date.

4. In his submissions dated 14.5.2024 and 24.7.2024, the petitioner contends that the threats of arrest and physical harm, detention and prosecution in connection with the suit land violates his constitutional rights. Adding that the use of the criminal justice system for ulterior motives such as to aid a litigant in a pending civil suit constitutes an abuse of legal process that is outlawed under *the constitution*.
5. To this end, the petitioner has proffered a raft of authorities including; Commissioner of Police & Director of Criminal Investigations Department & Another v Kenya Commercial Bank Limited & 4 Others [2013] eKLR, The Law Society of Kenya v Officer of the Attorney General & Another; Judicial Service Commission (Interested Party) [2020] eKLR as well as the case of Alfred N Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 Others [2016] eKLR.
6. Further, the petitioner has invoked the provisions of Article 245 (4) (a) of *the constitution* which prohibits anyone from directing the Inspector General and the DCI on how to conduct investigations, Article 13 of the UN guidelines on the role of prosecutors as well as Article 4.2 of the International Association of Prosecutors (IAP) Standards which demand that prosecutors shall perform their roles objectively, impartially and professionally.
7. The application is opposed by the 2<sup>nd</sup> Respondent vide Grounds of Opposition dated 11.7.2023 where it is argued that the application does not disclose any cause of action against the 2<sup>nd</sup> respondent which is an independent office. It is further stated that the petitioner has not demonstrated that the 1<sup>st</sup> respondent acted without or in excess of powers conferred by the law.
8. It is also argued that Section 24 of the *National Police Service Act* mandates the police to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed.
9. The 2<sup>nd</sup> Respondent's submissions are dated 9.7.2024 where it is argued that the Petitioner has failed to demonstrate the manner in which the 2<sup>nd</sup> Respondent has violated his rights under Article 47 of *the Constitution* and that the petition does not raise any real vital controversy, infringement or threat of a violation or right by the 2<sup>nd</sup> respondent to warrant the intervention of this court.
10. It is argued that the petitioner's case is based on hypothetical, speculative and abstract arguments and that the respondents are independent offices, thus it is not for this court to direct them on how to exercise their powers unless it is proved that it has been exercised unfairly, improperly or illegally.
11. To buttress its arguments, the 2<sup>nd</sup> Respondent has relied on the cases of Musyoki Kimanthi v Inspector General of Police & 2 Others [2014] eKLR, Wanjiru Gikonyo & 2 Others v National Assembly of Kenya & 4 Others [2015] eKLR, Legal Aid South Africa Mzoxolo Mgaidiwana and the President of the Supreme Court of Kenya and Another [2016] ECLR as well as Anarita Karimi Njeru v The Republic [1976-1980] KLR 1272.
12. The issue falling for determination is whether a conservatory order should be issued herein suspending the arrest, charging, prosecution and detention of the petitioner.
13. The petitioner contends that he is apprehensive that he might be arrested after being threatened with arrest over his ownership of the suit parcel which is contested in Nairobi ELC E054 of 2020.



14. The Supreme Court of Kenya in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* eKLR stated as follows on conservatory orders:
- “.....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.”
15. In *Association of Manufacturers & 2 Others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 Others* [2017] eKLR the court stated that;
- “In an application for a conservatory order, the court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the court which will ultimately hear the substantive dispute. The jurisdiction of the court at this point is limited to examining and evaluating the materials placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of a conservatory order. The court is also required to evaluate the materials and determine whether, if the conservatory order is not granted, the applicant will suffer prejudice. Thirdly, it is to be borne in mind that conservatory orders in public law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the court in the public interest.”
16. The provisions of Article 157 (4) of *the Constitution* state that:
- “The Director of Public Prosecutions shall have power to direct the InspectorGeneral of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction”
17. While subsection 6 (a) thereof provides that:
- “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”
18. Subsection (10) also provides 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”
19. It is crystal clear that the decision to charge lies with the 2<sup>nd</sup> respondent. The petitioner has rightly submitted that the jurisdiction to determine the question of ownership and title to land lies with the Environment and Land Court. It does not follow that no criminal activities can arise in property disputes. The nature and scope of such activities cannot be pursued in the land case which is a civil process.
20. Thus even if this court had given orders of maintenance of status quo in ELC E054 of 2020, such orders cannot be construed as being all encompassing so as to insulate any one or any party from any criminal processes. This court is satisfied that the law will take its course in the civil suit, while parties culpable for fraud or whatever crime shall similarly face the criminal process.



21. In any event the question of ownership is live in the file E054 OF 2020, hence other issues related to that question ought to be articulated in that particular matter and not in fresh suits. It is therefore clear beyond peradventure that the orders sought in this suit have the net effect of scuttling and convoluting the proceedings in the older file, a situation which is not only untenable, but it amounts to an abuse of the court processes.
22. The definition of ABUSE in The Black's Law Dictionary Sixth edition is outlined as follows;
- “ Everything which is contrary to good order established by usage that is a complete departure from reasonable use ....”..
23. In Republic v Paul Kihara Kariuki, Attorney General & 2 Others Ex parte Law Society of Kenya [2020] eKLR, it was stated that;
- “ Abuse of court process creates a factual scenario where a party is pursuing the same matter by two-court process. In other words, a party by the two court process is involved in some gamble; a game of chance to get the best in the judicial process.....
- litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. Pursuing two processes at the same time constitutes and amounts to abuse of court/legal process”.
24. This far I come to the conclusion that the application and the entire suit are dead on arrival.
25. A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law, See Mumba & 7 Others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Munyao & 148 Others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) (Petition 3 of 2016) [2019] KESC 83 (KLR) (8 November 2019) (Judgment). It is even noted that the alleged “decision to arrest and prosecute” the petitioner is anticipatory?. Which again buttresses the point that this court cannot be invited to adjudicate on an issue based on a future occurrence.
26. The upshot of the findings herein is that both the application and the entire suit are found to be unmerited, they are hereby struck out with costs to the 2<sup>nd</sup> respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>th</sup> DAY OF OCTOBER, 2024 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

In the presence of:-

Rapando for Petitioner

Court assistant: Vena

