



Cattwright v Chief Magistrates Court Milimani Law Courts & 7 others (Environment & Land Petition E041 of 2024) [2024] KEELC 13263 (KLR) (19 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13263 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E041 OF 2024
JA MOGENI, J
NOVEMBER 19, 2024
IN THE MATTER OF: ARTICLES 2,10,19,20, 21, 22, 23,
24, 25, 27, 28, 19, 35, 48, 49, 50, 53
AND 159 OF THE CONSTITUTION
AND
IN THE MATTER OF: THE CONTRAVENTION OF THE
FUNDAMENTAL RIGHTS AND
FREEDOMS OF THE PETITIONER
UNDER ARTICLE 25, 27, 28, 40, 47,
48 AND 50
AND
IN THE MATTER OF: RULES, 4, 23 AND 24 OF THE
CONSTITUTION OF KENYA
(PROTECTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS) (PRACTICE
& PROCEDURE RULES)
AND
IN THE MATTER OF: SECTION 4,6 AND 12 OF THE
FAIR
ADMINISTRATIVE ACT NO. 4 OF
2015
BETWEEN



OWINO JACOB CATTWRIGHT PETITIONER

AND

THE CHIEF MAGISTRATES COURT MILIMANI LAW

COURTS 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATION 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

NATIONAL LANDS COMMISSION 5TH RESPONDENT

KENYA REVENUE AUTHORITY 6TH RESPONDENT

REALTY BROKERS LIMITED 7TH RESPONDENT

JAMES ISABIRYE MUGOYA 8TH RESPONDENT

RULING

1. The Petitioner has filed a Notice of Motion application dated 16/05/2024, in which he has sought for the following orders:
 1. Spent
 2. This Honorable Court be pleased to issue a conservatory order staying the proceedings in Milimani Chief Magistrate Criminal Case No. E271/2024 Republic Vs Mwadi Women Enterprise Ltd & 9 Others against the Applicant or arresting and charging of the Applicant by the 2nd and 3rd Respondents in relation to L.R. No 209/10211 pending and until hearing and determination of this application and petition.
 3. This Honorable Court be pleased to issue an order compelling the 5th Respondent to immediately supply this honorable court with information requested by the applicant as per the Applicants letter dated 19th April, 2024.
 4. This Honorable Court be pleased to issue an order compelling the Respondent to immediately supply this honorable court with information regarding the transaction between Eco Bank and Realty Brokers Limited in regards to the transfer of L.R.No.209/10211. In particular whether and/or when stamp duty was or has ever been remitted by 7th Respondent in regards to the canceled entry.
 5. This Honorable Court be pleased to issue a temporary injunction restraining the Respondents either by themselves or through their agents, juniors, servants or representatives from reopening or purporting to reopen, bringing, investigating, instituting or prosecuting any criminal proceedings against the Petitioner in connection with the transaction of Property known as Land Reference Number L.R.No. 209/10211 pending and until hearing and determination of this petition.
 6. Such other orders as may appear to the Court to be just and convenient
 7. Costs of this Application be provided for.



2. The grounds of the application are that on 17/07/2017, the 5th Respondent issued a gazette notice indicating that allocation was to a legal person who cannot be found hence the land was declared bona vacantia. Further that the 5th Respondent issued a report dated 21/09/2017 as per their investigation process clearly indicating that in the absence of a legal claimant that is Eco bank the Review Committee decided to gazette the land as having no legal and known owner otherwise known as bona vacantia
3. It is the Petitioner's case that the 5th Respondent recommended that the Chief Land Registrar be directed to cancel the entry to LR No. 209/10211 and instruct the Land Administration Committee to allocate the land. That the 5th Respondent wrote a letter to the Chief Land Registrar following the report detailing that the parcel of land has been the subject of fraud and illegal transactions by various persons and proceeded to direct the cancellation of entry and a subsequent entry to be made that the land declared bona vacantia and reverted to the Government for allocation.
4. That the duty of reviewing the file and making necessary entry in accordance with the report, letter and gazette notice was allocated to the applicant and he proceed to undertake this duty in utmost good faith. That in compliance with the directives from the 5th Respondent and further investigations it revealed that stamp duty was not remitted by the 7th Respondent for the alleged transfer.
5. Being a chief land Registration Officer, the applicant is invoking the provisions of Section 157(7) of the [Land Registration Act](#) which clearly provides that the Registrar shall not be personally liable in respect of any act done while exercising any powers under this Act and within the scope of official capacity, if the Registrar did that act in the honest belief that the Registrar was entitled to do it.
6. The applicant contends that the 3rd Respondent conveniently failed to summon the Applicant personally or through the Chief Land Registrar to record a statement in regards to the entry and give reasons as to what necessitated the cancellation of the initial entry confirming that fact that the 3rd Respondent already knew the reasons and still proceeded to institute criminal proceedings against the Applicant in a bid to enable and advance the fraud, illegality and irregularity that had been occasioned.
7. According to the applicant the 2nd and 3rd Respondents have resorted to selective charging as they have listed the witnesses as persons from the 5th Respondent despite the fact that they not only issued the directive but also proceeded to allocate the land. Yet the 2nd and 3rd Respondents have now opted to set in motion an illegal criminal process against the Applicant herein contrary to all the objects and purposes of the criminal justice system and in violation of the Applicant's rights under [the constitution](#) despite the fact that the Applicant was not involved in the investigations neither did he allocate the land to any party rather reverted the land back to the government as per the directive by the 5th Respondent.
8. It is the applicant's contention that the 2nd and 3rd Respondents actions of instituting trumped-up charges are not sustainable at law; their actions are therefore illegal, irrational, oppressive, an abuse of powers and the criminal justice system and process as encapsulated under Article 244(c) and (e) of [the Constitution](#) of Kenya 2010 and Section 157(7) of the Land Registration Act Cap 280.
9. To the Applicant, the 2nd and 3rd Respondents therefore is intend to exercise their discretion to achieve collateral purpose not geared towards vindication of the commission of criminal offence; they are abusing the discretion donated to them by [the Constitution](#) of Kenya 2010.
10. The Applicant states that the Respondents' illegal exercise of their jurisdiction was and is made in frustration of the Laws of Kenya, the National Police Service Act No. 11A of 2011 and [the Constitution](#) of Kenya which donates the discretion to the respondents, the respondents therefore have exercised the statutory discretion donated to them by the act irrationally and unreasonably



11. The applicant therefore states that he has satisfied the three requirements for grant of temporary injunction.
12. The 7th and 8th Respondents filed Grounds of Opposition dated 18/06/2024 alleging that the current application is subjudice since the issues raised are similar to the issues in HCJR E070 of 2024.
13. The 6th Respondent opposed this application vide a Replying Affidavit sworn by Helen Njoroge an officer of the 6th Respondent on 2/07/2024. She deposed that the applicant want the 6th Respondent to provide information relating to verification, processing, or recording of property title entries yet these functions fall under the mandate of the State Department of Lands and Physical Planning as outlined in the [Land Registration Act](#) (No.3 of 2012). It is her averment that the 6th Respondent is only responsible for collection of stamp duty and therefore cannot provide the transaction information leading to transfer of the suit property between Eco Bank and the 7th Respondent (Reality Brokers).
14. That the 6th Respondent's mandate is limited to collection of stamp duty and this does not include information whether or not/and when stamp duty was paid as that is information within the purview of the Chief Land Registrar and not the 6th Respondent. The 6th Respondent avers that the applicant has not raised any cause of action against the 6th defendant that is of any value since the documents sought are not in the custody of the 6th Respondent. Thus the Notice of Motion of Application is unmerited and should be dismissed with costs to the 6th Respondent.
15. In response to the Grounds of Opposition and the 6th Respondent's Replying Affidavit the Applicant filed supplementary affidavit sworn on 16/07/2024. It was his averment that the Grounds of Opposition filed were an abuse of the court process having failed to address the issue that the application raised about failure to pay stamp duty for the suit property which was the basis upon which the applicant cancelled the registration of the title pursuant to Section 79(2) of the [Land Registration Act](#).
16. He further averred that he had not filed any other case in any court and that this Honorable Court had jurisdiction to entertain the matter at hand.
17. It is the contention of the Applicant that by the time he cancelled the registration of the 7th and 8th Respondent no stamp duty had been paid at the time since the Stamp duty of Kshs 8,000,000 was only paid 6 years after the transfer of the suit property was executed and this was on 22/04/2024. This is evidence by stamp duty receipt number 00833787 which was annexed as OCJ1.
18. That this process of registration is in violation of Section 113 of the [Stamp Duty Act](#) which states that one commits a fraud against the government by procuring fraudulent registration. Yet whereas the 7th and 8th Respondents were aware of this they maintained that the cancellation of the title by the Applicant was arbitrary despite the letter from the Counsel for the Applicant dated 18/06/2024 produced as annexure OCJ 2.
19. The applicant avers that the complaint and charge is based on an illegality committed by the 7th and 8th Respondents is an illegality and an abuse of the criminal justice system. That the criminal charges are not meant to vindicate the Commission of criminal offence but it is meant to aid the 7th and 8th Respondents. The Applicant has sought this court's intervention to compel the 6th Respondent to produce the information he is seeking as way of assisting the court arrive at a just decision as per Section 1A of the [Civil Procedure Act](#)
20. The 1st to 5th Respondents did not file any response to the Application. The 6th Respondent on its part chose to file Grounds of Opposition



21. Directions were given on 20/06/2024 to canvass the motion by way of written submissions. The Applicant having set out the factual background to the motion proceeded to submit on the three issues that he identified namely, whether the Applicant should be provided with the information sought from the 5th and 6th defendants, whether the application is sub judice and whether the applicant should be issued with conservatory orders sought. Citing the relevant legal provisions and case law and the DPP's duty to uphold the rule of law, the Applicant reiterates his complaints to the circumstances in which the complaint against him was filed, investigated and the manner in which the decision to prosecute him was made.
22. The parties were directed to file their submissions which I have considered.

Analysis and Determination

23. Having considered the rival affidavits and submissions made in respect to the application I find that the following issues arise for determination:
 - a. Whether this suit is sub judice
 - b. Whether the Petitioner is entitled to the reliefs sought in the application
 - c. The cost of this application

Whether the suit herein is subjudice

24. The 7th and 8th Respondents in their Grounds of Opposition contended that the Petitioner's claim is sub judice since there is in existence HCJR E070/2024. In response to the claim by the 7th and 8th Respondents about existence of a suit seeking similar prayers, the Petitioner has denied knowledge of the said suit and has also stated that he is not a party to the said suit. The law governing the doctrine of sub judice is provided for in Section 6 of the [Civil Procedure Act](#), as follows;

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”.
25. Therefore, for a party to maintain a plea of sub judice, they must present evidence to show that the suit relates to the same parties or parties litigating under the same title, and the matter in issue is substantially the same as that in an earlier filed suit. It therefore follows that to prove that a suit is sub judice, it will be necessary that pleadings in respect of a previously instituted suit are exhibited, for the court to determine whether the parties and the issues are the same. The 7th and 8th Respondents did not exhibit the pleadings in HCJR E070/2024 and therefore I am not able to authoritatively address myself on this issue.
26. The court considered this issue in the case of *Oraro vs Mbaja* 2005 eKLR,. Indeed, in the instant suit, while the 7th and 8th Respondents argue that there is an ongoing suit addressing the same issues, the Petitioner/ Applicant has emphasized that he is not even a party to the said suit and he is not aware what the cause of action is and the reliefs being sought. I subscribe to the view that a plea of sub judice may be raised by way of a Notice of Motion where pleadings in the two cases are exhibited. In the instant suit it has only been pleaded in passing in



Grounds of Opposition. I therefore find that the plea of sub judice in so far as the facts thereof are in dispute, is not validly raised and the same must fail.

On whether the Petitioner is entitled to the Reliefs Sought

27. In the case of *Judicial Service Commission vs. Speaker of the National Assembly & Another* [2013] eKLR the court defined the nature of conservatory orders as follows:

“Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under *the Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”

28. Further, in the case of *Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012*, it was held that:

“In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission.”

29. The courts have settled the principles governing the grant of conservatory orders. For example in the oft-quoted case of *Centre for Rights Education and Awareness (CREAW) and 7 Others v Attorney General* Petition No. 16 of 2011 Musinga J (as he then was) stated that:

“...It is important to point out that the arguments that were advanced by Counsel relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner’s Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires demonstrating 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*.”

30. In the case of *Martin Nyaga Wambora v Speaker of the County Assembly of Embu & 3 Others, Petition No. 7 of 2014*; (2014) eKLR these same principles were reiterated and the Court held that;

(59) In determining whether or not to grant conservancy orders, several principles have been established by the courts. The first is that: “... [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*.”

[60] To those erudite words I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious; so



much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention.

- (61) The second principle, which naturally follows the first, is whether if a conservancy order is not granted, the matter will be rendered nugatory.
- (62) The third principle is one recently enunciated by the Supreme Court in the election petition case of Gatirau Peter Munya v Dickson Mwenda Githinji and 2 Others, SCK Petition No 2 of 2013. The principle is that the public interest must be considered before grant of a conservatory order. Ojwang and Wanjala JJSC stated that: “[86] ‘conservancy orders’ bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within the 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.
- (63) Thus, where a conservancy order is sought against a public agency like a legislative assembly that is mandated to carry out certain functions in the normal course of its business, it is only to be granted with due caution. The interruption of the lawful functions of the legislative body should take into account the need to allow for their ordered functioning in the public interest.”
31. The key complaints raised by the Applicant herein are that the Petitioner was the Chief Land Registration Officer of the 5th Respondent, rightfully discharging the vast responsibilities bestowed upon him by the 5th Respondent and is subject to protection from victimization or discrimination for performing the functions of office as is required of him subject to Article 236 of *the Constitution*.
32. The Applicant has contended that the Director of Public Prosecution and Director of Criminal Investigation who are the 2nd and 3rd Respondents respectively have set out to charge the Applicant while disregarding the letter, report and gazette notice from the National Land Commission directing the Chief Land Registrar to effect the changes. He argues that if indeed the investigations were impartial and meant to vindicate the Commission of a criminal offence, officers from the National Land Commission would be charged and all persons who handled the process of Allotment from initiation to conclusion.
33. He further states that the 2nd and 3rd Respondents selectively skewed the evidence in favour of the 7th and 8th Respondents while deliberately choosing to disregard the offence they had committed which the Petitioner refers to as having defrauded the government and all officers who were involved in the fraudulent registration.
34. The Petitioner herein is asking the court to consider staying the criminal proceeding against him and to temporarily suspend any investigation or criminal charges against him. Now for this court to consider the application, it must exercise maximum caution in reaching its verdict lest it prejudices the intended or pending criminal proceedings. Coterminal with this, the court should be alive to the fact that it must not to usurp the constitutional and statutory mandate of the Director of Public Prosecutions and neither should it curtail with the investigatory powers of the Directorate of Criminal Investigations. However, should it become apparent that the discretion accorded to the 2nd and 3rd respondents in the execution of their mandate is being exercised unlawfully and in bad faith; such as where it is being abused or being used for achievement of some collateral purpose which are not geared towards the



vindication of the commission of a criminal offence then the court must intervene to provide the necessary reliefs. In the case of Eunice Khalwali Miima v Director Public of Prosecutions & 2 others [2017] eKLR the Court stated:

“The circumstances under which the Court will grant stay of a criminal process in these kinds of proceedings is now well settled. 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. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.”

35. For the investigatory agencies, in this case the 3rd respondent, it is not in doubt that where it is suspected that a criminal offence has been committed, then the police do have a duty to investigate any complaint once it has been made. The DCIO need only establish a reasonable suspicion that an offence has been committed in order to prefer charges. This was the position taken in the case of Republic v Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR held:

“the police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”.

36. As already stated above, the prosecutorial powers of DPP are constitutionally and statutorily provided for under Article 157 (10) of *the Constitution* and Section 4 of the Office of the Director of Public Prosecution *Act No. 2 of 2013*, which provides that the DPP does not require the consent of any person or authority to commence any criminal proceedings and in exercise of his/her powers and functions, shall not be under the direction or control of any person or authority. The exercise of that power is however subject to Subsection (11) of Article 157 and Section 4 of the DPP Act, which provides that in exercise of the said power, the DPP shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of legal process. Only in circumstances where it is manifest that the DPP acted unlawfully by failing to exercise their own independent discretion; acting under the control and direction of another person; failing to take into account public interest or interest of the administration of justice in all their manifestations; abusing the legal process; and by acting in breach of fundamental rights and freedoms of an individual will the High Court intervene.

37. In the case of Diamond Hasham Lalji & Another v A.G. & 4 others [2018] eKLR the Court of Appeal stated:-

(34) It is also indubitable that the constitutional prosecutorial power of DPP is reviewable by the High Court as Article 165(2)(d)(ii) of *the Constitution* ordains. However, the doctrine of



separation of powers should be respected and the courts should not unjustifiably interfere with the exercise of discretion by DPP unless it is exercised unlawfully by, inter alia, failing to exercise his/her own independent discretion; by acting under the control and direction of another person; failing to take into account public interest or interest of the administration of justice in all their manifestations; abusing the legal process; and by acting in breach of fundamental rights and freedoms of an individual.

The DPP is entitled to make errors within his constitutional jurisdiction and the decision will not be reviewed solely on the ground that it was based on misapprehension of facts and the law. (*Matululu and Anor v. DPP* [2003] 4 LRC 712). Further, authority show that courts are generally reluctant to interfere with prosecutorial decisions made within jurisdiction.”

38. I further seek to associate myself with the decision referred to by the Petitioner *Chris Achieng & Others Vs Director of Public Prosecution & Another; Jude Anyiko (Interested Party)* 2021 eKLR where the court outlined a comprehensive list of instances where a court ought to exercise its discretion and stop prosecution. These are: -
- i. Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court;
 - ii. Where the quashing of the impugned proceedings would secure the ends of justice;
 - iii. Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceedings, e.g. want of sanction;
 - iv. Where the allegations in the First information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged;
 - v. Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge;
 - vi. The Prosecution is not in the public interest;
 - vii. The prosecution is not in the interest of administration of justice;
 - viii. The prosecution is oppressive, vexatious and an abuse of the court process;
 - ix. The prosecution amounts to breach of rights and fundamental freedoms;
 - x. The investigation and prosecution amounts to abuse of power and discretion and is aimed at achieving ulterior or improper motives;
 - xi. The investigation by the prosecution are tainted with illegalities, irrationality and procedural impropriety;
39. Having set out the mandate of the 2nd and 3rd respondent through the preceding judicial authorities, I now turn my focus to establishing whether the petitioner/applicant’s prayer for conservatory orders staying proceedings in *Milimani Chief Magistrate Criminal Case No. E271/2024 Republic Vs Mwadi Women Enterprise Ltd & 9 Others* against the Applicant or arresting and charging of the Applicant by the 2nd and 3rd Respondents in relation to L.R. No 209/10211 is warranted. In order to do this, I need only establish whether the Petitioner has demonstrated a prima facie case with a chance of success and whether, should the prayer sought be denied, the Petitioner stand to suffer real prejudice. Given that conservatory orders have a public law leaning, a decision to grant them rests on the inherent merits of the case; taken in tandem with the public interest, the constitutional values, the proportionate magnitudes, and priority levels attributable to the relevant causes.



40. At this point as already stated being an interlocutory juncture I will not delve into the merits of the petition. The Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR succinctly sets it out thus:

(86) “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.”

41. The Learned Judge in *Speedex Logistics Limited & 2 others v Director of Criminal Investigations & 3 others* [2018] eKLR held that:

15. It has severally 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, this Court is not required, and is in fact forbidden from making any definite and conclusive findings on either fact or law. I will therefore not make any determinations on matters of fact or law as that would have the effect of prejudicing the hearing of the main Petition.”

42. The Majority bench in *The Centre for Human Rights and Democracy & Others v The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012*, held:

“In our view where a legal wrong or a legal injury is caused to a

person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission.”

43. In view of the judicial authorities set out above, it is my task now to state whether whether the Petitioner has established a prima facie case. A prima facie case is not a case which must succeed at the hearing of the main case. Nonetheless, it is not a case which is frivolous. As such, an applicant must show that they have a case which discloses arguable issues; and in a case alleging violation of rights, arguable constitutional issues. This was the decision in *Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others* [supra].

44. The foremost question is whether the applicant’s plight raise arguable constitutional issues? To answer this, I will restate briefly since I have already stated above the pertinent facts of the case. It is averred that after the 5th Respondent issued the gazette notice indicating that the allocation of the suit property was to a legal person that cannot be found and the land was declared bona vacantia, it recommended to the Chief Land Registrar through its report dated 21/09/2017 to cancel the entry of LR No. 209/10211. Based on that recommendation from the 5th Respondent, who had written a letter following the report



that the parcel of land has been the subject of fraud and illegal transactions that the cancellation of title was done and the land reverted back to Government.

45. Thus the duty of reviewing the file and making necessary entry in accordance with the report, letter and gazette notice was allocated to the applicant who noted that stamp duty was not remitted by the 7th Respondent for the alleged transfer. He then invoked the provisions of Section 157(7) of the [Land Registration Act](#).
46. It is the contention of the applicant that the 3rd Respondent conveniently failed to summon the Applicant personally or through the Chief Land Registrar to record a statement in regards to the entry and give reasons as to what necessitated the cancellation of the initial entry.
47. It is the applicant's averment that the 2nd and 3rd Respondents have resorted to selective charging as they have listed the witnesses as persons from the 5th Respondent despite the fact that they not only issued the directive but also proceeded to allocate the land. Yet the 2nd and 3rd Respondents have now opted to set in motion an illegal criminal process against the Applicant.
48. As I see it, while it is not in doubt that the 2nd respondent has the mandate to charge the applicant where they decide that an offence worthy of such charge has been committed and the 3rd respondent is expected to investigate every complaint once it has been made, in the current instance it is my considered view that the applicant has made a prima facie case. I say so because from my gleaning of the pleadings and from the testimony of the applicant, he has established that the process of cancellation of title to the suit property was handled through due process. As a Land Registrar he used the law to execute the task that was assigned to him by the Chief Land Registrar. He also averred that the transfer was done before payment of stamp duty which indeed came to be paid six years later as seen through the documentation provided by the 7th and 8th Respondents.
49. By the fact that the petitioner was undertaking his responsibility as provided under Section 157 of the [Land Act](#), I am persuaded that he has a prima facie case. I am therefore inclined to give him some leeway I find that the petitioner has established a case for the grant of the conservatory orders by virtue of the task he undertook under the direction of the Chief Land Registrar.
50. Given the above persuasion it also follows that there is an arguable case to question whether the 2nd and 3rd respondents actions were circumspect their respective mandates with both the decision to charge and the investigations into the Applicant's action.
51. In conclusion, it is my finding, and I do so hold that the Notice of Motion application dated 16/05/2024, on a prima facie level, raises constitutional issues relating to the exercise of the mandate of the DPP and the DCIO. This is certainly worthy of further interrogation. The applicant is therefore deserving of the conservatory order sought.
52. In view of the reasons given hereinabove, I make the following orders;
 - a. A Conservatory Order is hereby issued staying the proceedings in Milimani Chief Magistrate Criminal Case No. E271/2024 Republic Vs Mwadi Women Enterprise Ltd & 9 Others against the Applicant or arresting and charging of the Applicant by the 2nd and 3rd Respondents in relation to L.R. No 209/10211 pending and until hearing and determination of the petition.
 - b. The 5th Respondent is directed to immediately supply this honorable court with information requested by the applicant as per the Applicants letter dated 19th April, 2024.
 - c. An order is hereby issued compelling the 6th Respondent to immediately supply this honorable court with information regarding the transaction between Eco Bank and Realty Brokers



Limited in regards to the transfer of L.R.No.209/10211. In particular whether and or when stamp duty was or has ever been remitted by 7th Respondent in regards to the canceled entry.

- d. A temporary injunction is hereby issued restraining the Respondents either by themselves or through their agents, juniors, servants or representatives from reopening or purporting to reopen, bringing, investigating, instituting or prosecuting any criminal proceedings against the Petitioner in connection with the transaction of Property known as Land Reference Number L.R.No.209/10211 pending and until hearing and determination of this petition.
- e. Costs of this Application shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19TH DAY OF NOVEMBER 2024

.....

MOGENI J

JUDGE

In the virtual presence of:

Ms. Kemunto holding brief for Ms. Miima for applicant

Ms. Njoroge for the 6th Respondent

Mr. Moriasi holding Brief for Mr. Divo for 7th and 8th Defendant/Respondent

No appearance for 2nd – 5th Respondents

Caroline Sagina - Court Assistant

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