



**Kaibe v Director of Criminal Investigations & 8 others (Constitutional Petition E009 of 2024) [2025] KEHC 3190 (KLR) (25 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 3190 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CONSTITUTIONAL PETITION E009 OF 2024  
WM MUSYOKA, J  
FEBRUARY 25, 2025**

**BETWEEN**

**VINCENT KUBASU KAIBE ..... PETITIONER**

**AND**

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 1<sup>ST</sup> RESPONDENT**

**OCS BUMALA POLICE STATION ..... 2<sup>ND</sup> RESPONDENT**

**JOHN OWINO WANDERA ..... 3<sup>RD</sup> RESPONDENT**

**JACINTA ANYANGO OCHIENG ..... 4<sup>TH</sup> RESPONDENT**

**OWINO TREZER AKINYI ..... 5<sup>TH</sup> RESPONDENT**

**GABRIEL OUMA OWINO ..... 6<sup>TH</sup> RESPONDENT**

**SHADRACK OWINO ..... 7<sup>TH</sup> RESPONDENT**

**GIDEON OWINO ..... 8<sup>TH</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 9<sup>TH</sup> RESPONDENT**

**RULING**

1. What is for determination is a Motion, dated 5<sup>th</sup> December 2024. In it, the petitioner seeks conservatory orders, pending hearing and determination of the petition herein. He specifically seeks that the 1<sup>st</sup>, 2<sup>nd</sup> and 9<sup>th</sup> respondents be restrained from harassing, detaining, charging or prosecuting him, in connection with the offence alleged by them. He also seeks an order of stay of any criminal charges or proceedings that may have been instituted against him, either before or during the pendency of the application and the petition.



2. The grounds, on the face of the Motion, are that the rights of the petitioner under the [Victim Protection Act](#), Cap 79A, Laws of Kenya, had been violated, and stood to be further breached should the 1<sup>st</sup>, 2<sup>nd</sup> and 9<sup>th</sup> respondents be allowed to charge him; there was an intention to charge him with causing actual bodily harm; that he was a complainant against the 3<sup>rd</sup> to 8<sup>th</sup> respondents, in a complaint he had made at Bumala Police Station; and that the 1<sup>st</sup> and 2<sup>nd</sup> respondents, in collusion with the 3<sup>rd</sup> to 8<sup>th</sup> respondents, had converted him into a suspect, and now want to charge him instead. He accuses the 2<sup>nd</sup> respondent and his officers of being biased against him, and not capable of conducting independent and credible investigations, and that their investigations were likely to prejudice him. He asserts that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were using the criminal justice system to settle personal scores.
3. The factual background is set out in the supporting affidavit of the petitioner, sworn on 5<sup>th</sup> December 2024. He avers to have been attacked, on 25<sup>th</sup> October 2024, at Rakare, where he had bought land from the 3<sup>rd</sup> respondent, by the 3<sup>rd</sup> to 8<sup>th</sup> respondents. He was injured, so he made a report at Bumala Police Station, vide Police Occurrence Book, OB, number 28/25/10/2024. The 2<sup>nd</sup> respondent and his officers did not act, forcing him, through his brother, to escalate the matter to the Independent Policing Oversight Authority, IPOA, which prompted the 2<sup>nd</sup> respondent to cause the arrest of the 4<sup>th</sup> and 5<sup>th</sup> respondents, leaving out the rest, yet they were the main perpetrators. The 4<sup>th</sup> and 5<sup>th</sup> respondents were subsequently released on police bond. When he sought an explanation, from the 2<sup>nd</sup> respondent, he was forced out of the police station, and he was, subsequently, arrested on 1<sup>st</sup> December 2024, by officers from Matayos Police Post, who transferred him to Bumala Police Station, where he was charged with causing actual bodily harm on the 3<sup>rd</sup> to 8<sup>th</sup> respondents, under facts like those the subject of his complaint.
4. He asserts that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are seeking to steal a march over his complaint, and are intent on punishing him over his approach to IPOA, after the 1<sup>st</sup> and 2<sup>nd</sup> respondents failed to investigate his complaint. He argues that the respondents are driven by ulterior motives, and, if a conservatory order is not granted, pending hearing and determination of his petition, he could be arrested and prosecuted, which would render his complaint nugatory.
5. The petitioner filed a further affidavit, sworn on 9<sup>th</sup> January 2025. He avers that when he presented himself in court for plea taking, on 8<sup>th</sup> December 2024, he had, by then, obtained temporary conservatory orders, on 5<sup>th</sup> December 2024. Plea was not taken on account of that conservatory order, but he was detained in custody, nevertheless, allegedly so that the validity of that order could be probed.
6. The Motion was placed before me, on 5<sup>th</sup> December 2024, under certificate of urgency. I directed that the same be served, and be mentioned on 18<sup>th</sup> December 2024, for directions on disposal. It was on that date that I granted the temporary conservatory orders, mentioned in paragraph 5, hereabove, in respect of prayers 3 and 4 of the Motion. The matter came up subsequently, on 18<sup>th</sup> December 2024 and on 15<sup>th</sup> January 2025.
7. The record before me reflects that the respondents did not file a reply to the Motion. I see, from the record, 2 affidavits of service, sworn on 16<sup>th</sup> December 2024 and 23<sup>rd</sup> December 2024, respectively, by a court process server, indicating that the requisite court papers were served on all the respondents.
8. I gave directions, on 18<sup>th</sup> December 2024, for disposal of the Motion, by way of written submissions. I have only come across written submissions by the petitioner, dated 9<sup>th</sup> December 2024. I have read and noted the arguments made in those written submissions, inclusive of the authorities cited, being Muslims for Human Rights (MUHURI) & 2 others vs. Attorney General & 2 others [2011] KEHC



- 4291 (KLR) (Ibrahim, J) and Makumi & 4 others vs. Speaker County Assembly of Kitui & another [2024] KEHC 2812 (KLR)(Limo, J).
9. There is only 1 issue for determination, whether a conservatory order should issue, pending hearing and determination of the petition.
  10. What a conservatory order entails was defined in Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [2014] eKLR (Ojwang & Wanjala, SCJJ), where it was stated:

“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.”
  11. It was observed, in the matter, that is Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [2014] eKLR (Ojwang & Wanjala, SCJJ), that a court, faced with an application where such orders are sought, ought to consider whether the substantive matter is arguable and not frivolous; that unless the order of stay sought is granted, the substantive matter, were it to eventually succeed, would be rendered nugatory; and that it is in the public interest that the order of stay be granted.
  12. Similar considerations were stated, in Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board & others [2016] eKLR (Lenaola, J), where the court summarised into 3 the main principles to be considered, in the case of a constitutional petition, where consideration on whether or not to grant a conservatory order, pending the hearing of the main petition, comes up, being demonstration of a prima facie case with likelihood of success, that there was a real danger that the petitioner would suffer prejudice as a result of the violation or threatened violation of the Constitution; whether, if the conservatory order is not granted, the petition alleging violation of rights would be rendered nugatory; and public interest must be considered.
  13. At the core of it is whether a prima facie case is established. Prima facie was defined, in Mrao Ltd vs. First American Bank of Kenya Ltd [2003] KLR 125 (Kwach, Bosire & O’Kubasu, JJA), as including, although not confined to, a guide and arguable case, being a case which, on the material presented to the court, the court can conclude that there exists a right which has apparently been infringed by the opposite party, and which calls for an explanation or rebuttal.
  14. There is also the element of public interest, which largely means the welfare of the public, or the collective needs and concerns of society, emphasising the concept of acting for the benefit of the community. Public interest is defined by the Black’s Law Dictionary, 10<sup>th</sup> Edition, Thomas Reuters, St. Paul, 2014, 1425, as the general welfare of the public, that warrants recognition and protection; or something in which the public has a stake, especially an interest that justifies governmental regulation. The controversy herein turns around criminal prosecution. What would constitute public interest, for the purpose of a criminal prosecution, is delineated in the National Prosecution Policy, as the positive presumption that prosecution should ensue where the evidence discloses a contravention in criminal law.
  15. The case, by the petitioner, is that he made a complaint to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, concerning the 3<sup>rd</sup> to 8<sup>th</sup> respondents, causing him grievous bodily harm, after they had attacked him. However, the 2<sup>nd</sup>



- respondent, who was directly in charge, neglected to act on the complaint, prompting the escalation of the complaint to IPOA. The 2<sup>nd</sup> respondent then reacted, by arresting the 4<sup>th</sup> and 5<sup>th</sup> respondents, who he later admitted to bond. Subsequently, the events turned, for he, the petitioner, was himself arrested, and booked for the offence of assault and causing actual bodily harm to the 3<sup>rd</sup> to 8<sup>th</sup> respondents, who were the subject of his own complaint, made earlier. He complains that his rights, under the [Victim Protection Act](#), were violated, as he was the one who was injured, yet he was now the one being arrested and detained, which, to him, suggested that the actions of the respondents were not legal.
16. His further affidavit points out that despite obtaining a temporary order to stop his prosecution, pending the hearing and determination of the Motion, he was still presented in court, and forced to pay a cash bail. He argues that the conduct of the 1<sup>st</sup>, 2<sup>nd</sup> and 9<sup>th</sup> respondents, of presenting him to court, and insisting that he pays a cash bail, to secure his freedom, pending the constitutional litigation, despite the High Court having granted interim conservatory orders and stay of criminal charges, was illegal.
  17. Does a prima facie case exist here for grant of the conservatory orders sought, which calls for an explanation or a rebuttal from the other side? I believe that there is. The petitioner had reported to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, that he was a victim of violence from the 3<sup>rd</sup> to 8<sup>th</sup> respondents. The 1<sup>st</sup> and 2<sup>nd</sup> respondents then flipped that, and made him the perpetrator of the alleged violence, against the persons in respect of whom he had complained, to wit the 3<sup>rd</sup> to 8<sup>th</sup> respondents. The 1<sup>st</sup> and 2<sup>nd</sup> respondents arrested and detained him instead, and, in the end, he was the one charged in court, instead of the 3<sup>rd</sup> to 8<sup>th</sup> respondents. All that happened against the background of his complaint to IPOA, that his report to the 1<sup>st</sup> and 2<sup>nd</sup> respondents was not being properly acted upon. The picture emerging would be that there is more than meets the eye in the whole affair. A possible manipulation or abuse of the system, perhaps, to achieve some end. It could be a mere perception, but that is what comes out, and which begs for some explanation to be offered. The case presented by the petitioner is, no doubt, arguable, for it is not frivolous.
  18. Is there a right which has apparently been infringed? It is my finding and holding that there is. It would appear, from the material, presented by the petitioner, that the 1<sup>st</sup> and 2<sup>nd</sup> respondents went after the petitioner, after he reported them, as it were, to IPOA, and they flipped the case, that he had reported to them against the 3<sup>rd</sup> to 8<sup>th</sup> respondents, to make him the suspect. On the face of it, it would suggest that his rights were infringed, meaning that there would be need for an explanation or a rebuttal from the 1<sup>st</sup> and 2<sup>nd</sup> respondents, with respect to what exactly transpired, and whether whatever happened violated any rights.
  19. The matter before me is in the nature of constitutional litigation. It is about the [Constitution](#) of Kenya. Constitutional values have to come into play. I am talking about social justice and the rule of law, about human dignity, equity and equality. I have in mind good governance, integrity, transparency and accountability, and fair administrative action. All these are set out in the Preamble and Article 10 of the [Constitution](#) of Kenya. The question would be whether the treatment, that was allegedly meted out on the petitioner, by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, could measure up to these national values. There is an obligation, under Article 3(1) of the [Constitution](#), for “every person ... to respect, uphold and defend” the [Constitution](#).
  20. Was there social justice, in the way the 1<sup>st</sup> and 2<sup>nd</sup> respondents acted with regard to the petitioner, as against the 3<sup>rd</sup> to 8<sup>th</sup> respondents? Was rule of law observed, which enables him to voice his complaints, about how his report was handled or acted upon, without him fearing reprisals or retaliation, from him that he questions? Was he treated with human dignity, after he made his initial report, and after he made a complaint to IPOA, which the law allows him to make? Can it be said that there was equity and equality in the manner his complaint was handled, vis-à-vis the way the 3<sup>rd</sup> to 8<sup>th</sup> respondents



- were handled, despite he having lodged a criminal complaint against them earlier? Did the 1<sup>st</sup> and 2<sup>nd</sup> respondents exercise good governance in their decisions, in the handling of his complaint against the 3<sup>rd</sup> to 8<sup>th</sup> respondents, and in their reaction to the complaint filed with IPOA by him?
21. Was there integrity in their actions, particularly with regard to the decision to initiate charges against him, before they had acted against the 3<sup>rd</sup> to 8<sup>th</sup> respondents, based on the earlier complaint by the petitioner? Was there transparency and accountability in all those actions by the 1<sup>st</sup> and 2<sup>nd</sup> respondents? Was his complaint acted upon in the spirit of fair administrative action, as stipulated in Article 47 of the Constitution, with respect to expedition, effectiveness, lawfulness, reasonableness and procedural fairness?
  22. From the material filed by the petitioner, it would appear that the conduct by the 1<sup>st</sup> and 2<sup>nd</sup> respondents falls short of the constitutional threshold. I have only measured or assessed the situation based on the filings by the petitioner, as the respondents did not file replies to those filings. There is no measuring up with the constitutional values. Based on that alone, going by *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others* [2014] eKLR (Ojwang & Wanjala, SCJJ), the petitioner was exposed to violation of rights, by way of violation of or non-compliances with constitutional values in the manner the whole affair appears to have been handled, thereby establishing a prima facie case with likelihood of success, to justify grant of temporary relief, by way of a conservatory order.
  23. Would there be prejudice, to be suffered, should the conservatory orders not be granted? Would the petition be rendered nugatory; in the event the investigations and proposed prosecution is not stopped? I believe there would be prejudice. Should this court find the actions of the 1<sup>st</sup>, 2<sup>nd</sup> and 9<sup>th</sup> respondents to be illegal or improper, the petitioner would, by then, have been subjected to an unnecessary trial, where he would have probably incurred expenses in defending himself. If the said prosecution would have been conducted to its logical conclusion, and terminated in his favour, the petition would be rendered academic, as the orders in his favour would come too late in the day, to prevent his being subjected to an unfair and needless trial.
  24. Would grant of the temporary orders sought be in public interest? Although the intended prosecution is an issue affecting a private individual, the petitioner herein, it touches on public institutions and offices, to wit the 1<sup>st</sup>, 2<sup>nd</sup> and 9<sup>th</sup> respondents. The said public institutions and offices have a responsibility to uphold the Constitution, during the discharge of their respective mandates under the Constitution and the relevant statutes.
  25. The petitioner alleges that he is the subject of harassment from the 1<sup>st</sup>, 2<sup>nd</sup> and 9<sup>th</sup> respondents, for they appear to be acting under or are driven by ulterior motives. The background given by the petitioner, to his predicament, in the hands of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, suggest that something could be amiss, and there would be need, for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, to explain the anomaly. I have material before me, which indicates that the court papers filed herein were served on all the parties, including the 1<sup>st</sup> and 2<sup>nd</sup> respondents. None of the respondents have filed responses, which would suggest that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have not disputed the allegation against them, that their actions were guided by ulterior motives.
  26. A conservatory order, made herein, would be in public interest, to preserve the status quo, as the court evaluates whether the investigations in question, and the contemplated prosecution, would be mounted with public interest at heart, that they would be for the purpose of securing enforcement of criminal law. It would not be in public interest, for a citizen or a resident of Kenya, to be prosecuted for purposes other than mere enforcement of the law.



27. The court does have power to stay criminal charges or proceedings, where it is shown that investigators or prosecutors have overstepped their mandates, or have abused their powers. That was underscored in *Kuria & 3 others vs. Attorney General* [2002] 2 KLR (K. Mulwa, J), where it was held that the court has power and the duty to prohibit continuation of criminal prosecutions, if extraneous matters, divorced from the goals of justice, guided the preceding investigations. It was also held that it is the duty of the court to ensure that its processes are not used as a tool for vilification, on issues not pertaining to that which the system was formed to perform. It was also underscored that an order of prohibition should be granted, where compelling an accused person to stand trial would violate the fundamental principles of justice, which underlie the senses of fair play of a society, or where the proceedings are oppressive or vexatious.
28. I am alive, though, to the fact that the power to stay investigations and prosecution is discretionary. Secondly, I am alive to the truism that the courts ought to be cautious, and to exercise restraint, to avoid stopping investigative and prosecutorial institutions from doing their duties, as mandated them by the [Constitution](#) and the relevant legislation. See *Richard Muhindi Nzyoka & 3 others vs. David K. Langat & 6 others* [2020] eKLR (D. Kemei, J).
29. My attention has been drawn to the caution, sounded in *Republic vs. Chief Magistrate Milimani & another Ex-parte Tusker Mattresses Ltd & 3 others* [2013] KEHC 6807 (KLR)(Odunga, J), that:
- “ ... The Court must ... take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial. That this Court has power to quash impugned warrants cannot be doubted. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the police to investigate allegations of commission a criminal offence ought to be interfered with ... The High Court ought not to interfere with the investigative powers conferred upon the police or the Director of Public Prosecution unless cogent reasons are given for doing so.”
30. From the material on record, the petition alleges that the 1<sup>st</sup>, 2<sup>nd</sup> and 9<sup>th</sup> respondents were involved in retaliatory investigations and prosecution, prompted by the report made by him to IPOA, that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had failed to act on his complaint against the 3<sup>rd</sup> to 8<sup>th</sup> respondents. The 1<sup>st</sup>, 2<sup>nd</sup> and 9<sup>th</sup> respondents have not reacted or replied to these allegations against them. I have already found and held, above, that the petitioner has established a prima facie case with likelihood of success; that the petitioner would be prejudiced should the orders sought not be granted; and that there was need to establish whether the investigations and the prosecution were being conducted for the public good of enforcing criminal law. I am persuaded, in the circumstances, that the court should, in this case, exercise discretion to stay the investigations, and the intended criminal proceedings, pending hearing and determination of the petition.
31. Consequently, I do hereby allow the Motion, dated 5<sup>th</sup> December 2024, in terms of prayers 3 and 4, thereof, to subsist pending the hearing and determination of the petition herein, dated 5<sup>th</sup> December 2024, or until other or further orders.
32. To move the matter forward, I hereby direct, in accordance with Rules 20 and 21(a) of the [Constitution](#) of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, the petition herein shall be disposed of by way of the affidavits already filed, and written submissions to be filed and served within 14 days. The matter shall be mentioned, on 24<sup>th</sup> March 2025, to receive or confirm receipt of the written submissions, and to allocate a date for judgment. The petitioner shall serve a copy of these orders and directions.



33. Orders accordingly.

**DELIVERED VIA EMAIL, AND DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS  
25<sup>TH</sup> DAY OF FEBRUARY 2025.**

**W. MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Ms. Eva Adhiambo, Legal Researcher.

Advocates

Mr. Muriithi, instructed by Ntoiti & Company, Advocates for the petitioner.

