



Otieno & another v Director of Public Prosecution, Siaya & another (Constitutional Petition E003 of 2024) [2025] KEHC 3952 (KLR) (28 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3952 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CONSTITUTIONAL PETITION E003 OF 2024**

**DK KEMEL, J
MARCH 28, 2025**

BETWEEN

PETER OTIENO 1ST APPLICANT

GEORGE OCHIENG 2ND APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTION, SIAYA 1ST RESPONDENT

THE SENIOR PRINCIPAL MAGISTRATE COURT, SIAYA ... 2ND RESPONDENT

RULING

1. The Petitioners herein have filed a Petition dated 10/12/2024 and contemporaneously filed the instant application dated 10/12/2024 pursuant to Articles 165(6)(7) of *the Constitution*, section 362 of the *Criminal Procedure Code*, Rules 19, 23(2) of *the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules* 2013.
2. The Petition seeks the following declaratory orders:
 - a. Declaration that the 1st Respondent’s decision made on the 4th April, 2023 in withdrawing the Siaya Criminal Case No. MCCR/161/202: Republic Vs Caleb David Onyango and Alfred Omulo Onyuka and ratified by the 2nd Respondent was in violation of Articles 10, 25, 27, 47, 50, 157(11), 159 of *the Constitution* of Kenya 2010 and hence unconstitutional.
 - b. A declaratory order that the selective continued prosecution of Siaya Criminal Case No. MCCR/165/2020: Republic v. Peter Otieno and George Ochieng and the arbitral withdrawal of Siaya criminal case No. MCCR/161/2020: Republic v. Caleb David Onyango and Alfred Omulo Onyuka by the 1st Respondent amounts to abrogation of *the Constitution* of Kenya, and a violation of sections 4 and 14 of the *Office of the Director of Public Prosecutions Act*.



- c. A declaratory order that the manner in which the 1st Respondent withdrew Siaya criminal case no. MCCR/161/2020: Republic v. Caleb David Onyango and Alfred Omulo Onyuka violated the Petitioner's right to fair trial.
 - d. An order directing the 1st Respondent to cause the production of the police file in Siaya criminal case no. MCCR/161/2020: Republic v. Caleb David Onyango and Alfred Omulo Onyuka before the 2nd Respondent for reinstatement, hearing and determination on merit.
 - e. Costs of the Petition.
 - f. Any further relief or orders that this Honourable Court may deem just and fit to grant.
3. The application seeks the following orders:
- i. Spent.
 - ii. Spent.
 - iii. The Honourable court do issue a temporary injunctive order staying the proceedings in Siaya Criminal Case No. 165 of 2020: Republic Vs Peter Otieno and George Ochieng pending the hearing and determination of this Petition.
 - iv. The Honorable court do issue appropriate reliefs under Article 23 of *the Constitution* to meet the ends of justice.
 - v. That the Respondents do bear the costs of the application
4. The application is supported by an affidavit sworn by the 1st Petitioner/ Applicant Peter Otieno and on behalf of the 2nd Petitioner/Applicant dated 10th December 2024 wherein he averred inter alia; that they are aggrieved by the 1st Respondent's decision to selectively and without impartiality withdraw criminal case number MCCR/161/2020: Republic versus Caleb David Onyango & Alfred Omulo Onyuka and in turn to actively prosecute criminal case number MCCR/165/2020 *Republic versus Peter Otieno & George Ochieng*; that the two criminal cases MCCR/161/2020 and MCCR/165/2020 involve the same set of transaction in that the complainants in MCCR/161/2020 are the accused persons in MCCR/165/2020 while the complainants in MCCR/165/2020 are the accused persons in MCCR/161/2020 that has since been withdrawn; that the 1st Respondent under Article 157(11) is enjoined by *the Constitution* of Kenya to exercise its powers having regard to administration of justice and the need to avoid the abuse of the court process; that the 1st Respondent under section 4 of the guiding principles as per the Office of the Director of Public Prosecutions is called upon in fulfilling their mandate to exercise impartiality, promote constitutionalism, observe democratic values and principles, prevent abuse of the legal process, promote public confidence in their work, observe the rules of Natural Justice and act on behalf of the people of Kenya; that on the 4th April 2023 when the criminal case number MCCR/161/2020 came up for hearing, the 1st Respondent decided to withdraw the matter on account that the police file was missing; that on that material day, the police officer in charge was present in court and could not fathom why the 1st Respondent proceeded to withdraw the case when key witnesses had already testified; that since the withdrawal of the charge under section 87(A) of the *Criminal Procedure Code*, the 1st Respondent has not made any efforts to ensure the police file which is present and available is retrieved and the matter fixed for hearing and determination on merit; that instead, the 1st Respondent has been actively pursuing criminal case number MCCR/165/2020 wherein the Applicants are the accused persons; that the Applicants /Petitioners have endeavored to produce their witnesses and testify in court as and when required in which all the key witnesses already testified; that the actions of the 1st Respondent amounts



to selective application of the law as there exists no reason whatsoever when the prosecution made a decision to withdraw a case against the complainants in criminal case number MCCR/161/2020 as against the complainants in MCCR/165/2020 and actively pursue the same; that the criminal case MCCR/165/2020 is actively ongoing against the Applicants/Petitioners herein and all the witnesses are clearly bonded and presented to court to testify by the 1st Respondent who has apparently developed cold feet in prosecuting MCCR/161/2020, hence the impartiality and inequality before the law; that from the proceedings, it is clear that criminal case MCCR/161/2020 was the first to be lodged by the applicants as against the complainants in MCCR/165/2020; that the 1st Respondent's actions and omissions are a violation of Articles 10, 20, 22, 23, 24, 25, 27, 28, 29, 47, 48, 50 of the Constitution of Kenya and sections 4 and 14(a), (b)(c) (6) and 25(2) of the Office of the Director of Public Prosecutions Act; that the Applicants claim against the 1st Respondent is that the 1st Respondent's actions are unconstitutional, arbitrary, wrongful, null and void and therefore they should be stopped forthwith; that this application and petition seeks to secure and protect the rights to fair trial, equal protection and benefit from the application of the law, access to justice for all, freedom against discrimination and the right to fair hearing as the applicants herein are likely to be adversely affected by the illegal and unlawful acts of the 1st Respondent; that it is indeed evidently clear that the 1st Respondent one year down the line has not done anything to ensure that the applicants in MCCR/161/2020 have the equality and protection and the benefit of the law just like the complainants in MCCR/165/2020 are having their matter proceeding.

5. None of the Respondents filed any responses to the application. Learned counsel for the 1st Respondent sought for time to do so but to no avail.
6. The application was canvassed by way of written submissions. However, it is only the Petitioners who complied.
7. I have given due consideration to the application together with the submissions filed. It is not in dispute that the 1st Respondent had been mandated to prosecute the two criminal cases before the trial court namely MCCR 161 of 2020 and MCCR 165 of 2020 wherein the complaints are accused in the other case respectively. It is also not in dispute that the 1st Respondent later withdrew MCCR 161 of 2020 and opted to proceed with MCCR 165 of 2020 which is currently ongoing before the trial court. It is also not in dispute that the Petitioners' Petition which raises weighty constitutional issues is yet to be determined. It is also not in dispute that already interim orders of stay of proceedings in the trial court were granted pending determination of this application. I find the issue for determination is whether an order of conservatory order is merited at this stage pending determination of the Petition.
8. The Petitioners herein have anchored their petition and application on the following salient provisions of the law namely:
 - a. Article 2 of the Constitution provides that:
 1. This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
 4. Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.
 - b. Article 10. National values and principles of governance provides thus:
 1. The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—



- a. applies or interprets this Constitution;
 - b. enacts, applies or interprets any law; or
 - c. makes or implements public policy decisions.
2. The national values and principles of governance include—
 - a. patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
 - b. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;
 - c. good governance, integrity, transparency and accountability; and
 - d. sustainable development.
 - c. Article 22(1) of *the Constitution* provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
 - d. Article 157(11) of *the Constitution* provides that:

‘In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.’
 - e. Article 165 (3)(a) and (b) provides that Subject to clause (5), the High Court shall have—
 - a. unlimited original jurisdiction in criminal and civil matters;
 - b. jurisdiction to determine the question of whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened
 - f. Article 165(6)(7) of *the Constitution* provides:
 6. The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 7. For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
9. In the instant case, the Petitioners’ gravamen is that the Criminal case No. MCCR 161 of 2020 was withdrawn under section 87A by the 1st Respondent on grounds that the police file was missing. I have perused the proceedings of the said case No. MCCR/161/2020 and which indicates that prior to the said date of withdrawal on 3rd April 2023, a total of six (6) prosecution witnesses had testified. From the lower court record, the matter had been adjourned severally for various reasons. On 17/11/2022 there no witnesses in court and that the matter was adjourned and summons issued to the investigating officer. On 28/11/2022, the matter was again adjourned on the grounds that the investigating officer was securing exams. On 17/1/2023, the police file was missing and that on 2/3/2023 they were



expecting a witness but he was not bonded and that the state was given a last adjournment. Finally, on 3/4/2023 the matter was withdrawn for lack of the police file and to allow them to re-organize themselves.

10. From the chronology of the events in the case No. MCCR 161 of 2020, it is clear that the state was given a last adjournment by the 2nd Respondent. However, since then, it is almost one year but the 1st Respondent seems to have developed cold feet towards prosecuting the said matter. I am of the view that this is a violation of the Petitioners right to have their matter heard and concluded before a competent court of law in accordance with the principles under Article 10(2) of *the constitution* which provides for the national values and principles of governance that include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;
11. From the foregoing, it is clear that the Petitioners Petition raises substantial and germane issues meriting consideration by the court and that the Applicants require the status quo to be maintained in the pending trial court matter as the said petition is canvassed. I find that the Applicants have shown that they deserve a conservatory order. A conservatory order is a remedy issued by a court to preserve a subject matter until the suit/petition is heard and determined. It is an order of status quo ante so that the substratum of the suit/petition is preserved so that the same is not rendered an academic exercise. In the case of *Mrao Ltd Vs First American Bank Ltd and 2 Others* [2003] eKLR it was held that the power of a court in an application for an interlocutory injunction is discretionary. It is necessary to grant such an order so as to ensure that the Petitioners' Petition is not rendered nugatory or an academic exercise. I find no prejudice will be caused to the 1st Respondent if the said order is granted.
12. In view of the foregoing observations, it is my finding that the Petitioners' application dated 10/12/2024 has merit. The same is allowed in terms of prayer No. 3 thereof. The costs shall abide in the Petition. The parties are directed to set down the Petition for hearing on priority basis.

Orders accordingly.

DATED AND DELIVERED AT SIAYA THIS 28TH DAY OF MARCH, 2025.

D. KEMEI

JUDGE

In the presence of:

Oduol ...for Petitioners

Soitafor 1st Respondent

N/A2nd Respondent

Mboya.....Court Assistant

