



Multiserve Oasis Company Limited & 3 others v Compact Freight Systems Limited & 3 others (Petition E075 of 2025) [2025] KEHC 7172 (KLR) (Civ) (29 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7172 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
PETITION E075 OF 2025
LN MUGAMBI, J
MAY 29, 2025

BETWEEN

MULTISERVE OASIS COMPANY LIMITED 1ST PETITIONER
BASHIR MOHAMED NUR 2ND PETITIONER
AHMED MAALIM OSMAN 3RD PETITIONER
DAHIR FARAH MOHAMED 4TH PETITIONER

AND

COMPACT FREIGHT SYSTEMS LIMITED 1ST RESPONDENT
CHIEF MAGISTRATE'S COURT AT MILIMANI 2ND RESPONDENT
DIRECTORATE OF CRIMINAL INVESTIGATIONS 3RD RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS 4TH RESPONDENT

RULING

Introduction

1. By a Notice of Motion application dated 17th February 2025, the petitioner seeks orders that:
 - a. Spent.
 - b. Pending the hearing and determination of this petition, a conservatory order be issued staying further proceedings in Nairobi Chief Magistrate's Court Criminal Case No 1202 of 2024, Compact Freight Systems Limited v Multiserve Oasis Company Limited, Bashir Mohammed Nur Ahmed Maalim Osman and Dahir Farah Mohammed.



- c. The costs of this Application be provided for.

Petitioner's Case

2. The application is supported by the 2nd petitioner's affidavit of even date and the grounds on the face of the application.
3. The 2nd petitioner states that the 1st petitioner (Multiserve Oasis Company Limited) is a limited liability Company, where he and others are shareholders and directors.
4. He depones that the 1st petitioner lost a consignment of imported garments in a container (PCIU 8230479) that was in the 1st respondent's (Compact Freight Systems Limited) custody causing a financial loss to the 1st petitioner. In view of this, the 1st petitioner filed Mombasa HCCC No 252 of 2010, Multiserve Oasis Company Limited v The Kenya Ports Authority & Company Freight System Limited against the 1st respondent and obtained a judgement in its favour on 28th February 2020.
5. Dissatisfied with the judgment, the 1st respondent appealed the Judgment in Civil Appeal No E001 of 2021, Compact Freight Systems Limited v Multiserve Oasis Company Limited & Kenya Ports Authority which was dismissed on 2nd December 2022.
6. It is averred that the 1st respondent then proceeded to seek a review of the Judgment citing the petitioners' reliance on fraudulent documentation. This application was as well dismissed on 6th October 2023.
7. It is alleged that the 1st respondent in an attempt to stop execution of the Orders that were issued in both suits, lodged a criminal complaint against the petitioners. This was in respect of the alleged fraudulent documents that they had relied upon.
8. In addition, it is claimed that the 1st respondent in HCCRREV/E943/2023, Freight Systems Limited v ODPP, Oasis Multiserve Company Limited & 3 Others obtained an order on 31st October 2024 to institute private criminal prosecution against the petitioners. He informs that the petitioners appealed this matter in, COACR Appeal No E004/2025, Oasis Multiserve Company Limited & 4 Others v Compact Freight Systems Limited & 2 Others which is yet to be heard and determined.
9. He alleges that the 2nd respondent at the behest of the 1st respondent, summoned the petitioners to take a plea in Nairobi Chief Magistrate's Court Criminal Case No 1202 of 2024, Compact Freight Systems Limited v Multiserve Oasis Company Limited, Bashir Mohammed Nur Ahmed Maalim Osman and Dahir Farah Mohammed.
10. In view of the foregoing, the petitioners are apprehensive that they will be arrested and ordered to take a plea in this matter. It is asserted that the criminal suit was instituted so as to defeat the Judgment that was issued in Mombasa HCCC No.252 of 2010 which was a civil dispute. It is said that this is contrary to Article 10(1) and (2) of *the Constitution* which obliges the 2nd respondent to uphold the rule of law. It is on this premise that the petitioners pray that their application be allowed.

1st Respondent's Case

11. Opposing the petition and application, the 1st respondent filed its grounds of opposition dated 24th February 2025 on the premise that:
 - i. The petitioners have not observed the directions of this Court in terms of service of proper service of pleadings and as such is not entitled to interim reliefs sought based on the following facts;



- ii. The petitioners were directed to serve the pleadings by close of business 19th February 2025 and only served the firm of Daniel Henry & Company Advocates on 21st February 2025 in violation of the directions of the Court.
- iii. The petitioners did not serve the 1st respondents in person as is known practice of service of parties.
- iv. The petitioner's Counsel has not served the 1st respondent with written submissions to the application as directed by the Court.
- v. The application and petition are a legal misadventure aimed at relitigating the decision of Hon Justice A. Muteti issued on 31st October 2024, and effectively inviting this Court to exercise appellate jurisdiction over a Court of equal Status and standing which is a clear violation of Article 165 of *the Constitution* and should be dismissed sua sponte.
- vi. The legality, propriety and lawfulness of the decision to commence private prosecutions was determined by a Court of concurrent jurisdiction and as such the proceedings herein are res judicata.
- vii. The application and petition are filed by fugitives of the law being the petitioners who have failed to subject themselves to a lawful Court process as directed by the Hon. Justice Muteti and Hon.E. Ekhubi and as such the petitioners should first observe Court orders before seeking equitable reliefs crafted as constitutional violations.
- viii. The application and petition are an attempt by the petitioners to seek stay orders of the decision of Hon. Justice Muteti through the back door having been denied similar orders by the Court of Appeal.
- ix. The application and petition lack legal and factual foundation as there is no real or threatened violation rights of the petitioners that have not been safeguarded under Article 49 and 50 of *the Constitution*.
- x. Section 88 of the *Criminal Procedure Code* and as thoroughly expounded by multiple judicial pronouncements provides a legal and valid avenue where the petitioners are to be tried by way of private prosecutions.
- xi. The application and petition are defeated by the doctrine of ripeness since Section 95 of the *Criminal Procedure Code* provides the legal forum for determination on admission of Charge sheets.
- xii. Orders for Judicial review cannot be granted against private prosecutions.
- xiii. The petitioners have failed to present themselves before the Hon. Magistrate Court citing multiple disingenuous excuses such as being in China, Tanzania, (in) Northern Kenya, herding cattle all aimed at defeating the cause of justice.
- xiv. The petitioners have failed to aptly demonstrate the nexus between criminal conduct and the matter before the Court of Appeal as there is none.
- xv. The application and petition is an abuse of Court process unnecessarily convoluting litigation over proceedings that seek for justice before the Courts.
- xvi. There are constitutional and statutorily sufficient safeguards under Article 49 and 50 of *the Constitution* and other laws to assuage any concerns that the petitioners



- xvii. The petitioners have failed to demonstrate the nexus between taking plea and the Commercial Case where the High Court considered all the facts and arrived at the decision that the accused persons/petitioners must be tried in a criminal Court as commenced in Criminal Case No. E1202 of 2024.
12. Correspondingly, the 1st respondent filed a replying affidavit by George Mwangi, its Audit and Compliance Officer sworn on 24th February 2025.
13. He depones that pursuant to the leave of Court granted on 31st October 2023 by Hon. Justice A.M.Muteti in Criminal Revision No.E943 of 2024, the petitioners were directed to appear before a Magistrates Court to take plea. Consequently, Hon. Ben Mark Ekhubi following the 1st respondent's application ordered that the petitioners take a plea on 10th December 2024 and 15th January 2025.He avers that this summons were served on the petitioners.
14. He avers however that the petitioners advocate on 15th January 2025 sought time to avail the petitioners before Court. It is noted that the petitioners who were to appear in Court on 23rd January 2025 did not appear in Court as ordered. Instead, their Advocate vide Miscellaneous Criminal Application No. E229 of 2025 sought to quash the charges in Milimani Criminal Case No. E1202 of 2024.
15. The petitioners in a further mention dated 27th January 2024, also failed to appear in Court citing in their affidavits that they were in China, Tanzania and taking care of their camels. As a result, the 1st respondent's advocates sought warrants of arrest from the Court against the petitioners which were issued. The petitioners however did not also appear in Court on 17th February 2025 when they were scheduled to take their plea.
16. He asserts that *the Constitution* provides for sufficient legal safeguards to guarantee a person's rights in such a process and thus the petitioners sought to subject themselves to the Court process. He further points out that there is no relationship between the Civil Appeal and the Criminal Case. He contends that the instant suit has been instituted to intimidate the 1st respondent's pursuit of justice.

2nd and 3rd Respondents' Case

17. The 2nd and 3rd respondents' responses and submissions to the application are not in the Court file or Court Online Platform (CTS).

4th Respondent's Case

18. In rejoinder, the 4th respondent filed grounds of opposition dated 20th February 2025.This is on the grounds that:
- i. The instant application/petition is a disguised appeal against the Ruling in HCCRREV/E943/2023, Compact Freight Systems Limited v Odpp And Oasis Multiserve Company Limited And 5 Others which gave room for the Nairobi Chief Magistrate's Court Criminal Case No. E1202 of 2024, Compact Freight Systems Limited v Multiserve Oasis Company Limited, Bashir Mohammed Nur Ahmed Maalim Osman, and Dahir Farah Mohammed to be commenced.
 - ii. Section 193A of the *Criminal Procedure Code* Cap 75 provides that notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings shall not be a ground for any stay, prohibition or delay in criminal cases.



- iii. The petition is filed in bad faith, misconceived, premature, and an abuse of the Court process and meant to derail and defeat the cause of justice.

Petitioners' Submissions

19. Havi and Company Advocates for the petitioner filed submissions dated 24th February 2025.
20. Counsel submitted that the 1st respondent having lost the appeal against the decision of the High Court in Civil Appeal No E001 of 2021, Compact Freight Systems Limited v Multiserve Oasis Company Limited & Kenya Ports Authority resorted to instigating the impugned private criminal prosecution against the petitioners.
21. Counsel asserted that this pursuit violates the petitioners' rights to a fair administrative action and a fair hearing. It was also argued that the 1st respondent seeks to employ the criminal process to force the petitioners to settle their civil dispute. For this reason, Counsel stressed that the petitioners had proved that they have a prima facie case with a likelihood of success.
22. Reliance was placed in Centre for Human Rights and Democracy & Another v The Judges and Magistrates Vetting Board & 4 Others [2012] eKLR where 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. Our determination is not in any way a final definition or determination of the dispute. It is meant to give an interim protection as sought by the applicants.”

23. Comparable reliance was placed in Vincent Kibiego Saina v The Attorney General, No 839 and 1088 of 1999(UR), Samuel Kamau Macharia & Joseph Gilbert Kibe v The Attorney General & Another, No 356 of 2000 (UR) and Grace Sarapay Wakhungu & 2 Others v Republic No E039 of 2022.
24. Counsel additionally submitted that the petitioners would be greatly prejudiced since they are being forced to face an unconstitutional criminal prosecution. To support this point reliance was placed in Stanley Munga Githunguri v Republic [1986] eKLR where it was held that:

“What kind of a mad man who has an opportunity to apply for Prohibition would opt for a trial, the risk of conviction and imprisonment. Review would not be available to him for Section 364(5) of the Criminal Procedure Code lays down that where there is a right of appeal, review ought not to be granted.”

1st Respondent's Submissions

25. On 24th February 2025, the 1st respondent through Daniel Henry and Company Advocates filed submissions in opposition to the application.
26. To commence with, Counsel submitted that private prosecutions are provided in law under Section 88 of the Criminal Procedure Code. It is noted that the impugned criminal proceedings were ordered



by Hon. Justice Muteti thus the instant application is an appeal from his decision. Counsel added that the issues raised herein were addressed by Hon. Justice Muteti thus matters res judicata.

27. According to Counsel, the instant matter does not raise a prima facie case and is frivolous as the issues do not disclose any arguable constitutional matters. Furthermore, Counsel averred that the petitioners had also not demonstrated the real danger that they would suffer should the orders not be granted.
28. Counsel as well urged that in considering such applications it is necessary to consider the principle of proportionality. Counsel submitted that the petitioners had not obeyed Court Summons. Considering this, it was argued that proportionality does not tilt in their favour. This is because the sought orders would be tantamount to acquiescing to immunity for active disobedience of Court orders. Dependence was placed in *Martin Nyaga Wambora v Speaker of The County of Assembly of Embu & 3 Others* [2014] eKLR where it was held that:

“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.”

29. Reliance was placed in *Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 Others* [2014] eKLR where the Supreme Court held that:

“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 applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

30. Counsel also submitted that halting of the private prosecution would be a drastic step which ought to be utilized as the last resort where there is demonstrable evidence, as the same goes against the architecture of *the Constitution*. In this matter, it was argued that the petitioners have failed to prove that they face actual danger and that they will suffer prejudice.

31. Reliance was placed in *Diamond Hasham Lalji & Another v Attorney General & 4 others* [2018] eKLR where it was held that:

“The exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases. The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach. The evidential burden shifts to the DPP to justify the prosecutorial decision.”

4th Respondent’s Submissions

32. Senior Assistant Director of Public Prosecutions Job Mulati for the 4th respondent filed submissions dated 26th February 2025 and outlined the issues for discussion as: whether the applicant has a prima facie case, whether the applicant stands to suffer irreparable harm or prejudice if the conservatory orders are not granted and whether the power of convenience favors the grant of conservatory orders.



33. On the onset, Counsel submitted that the petition is an attempt to appeal the decision that was made by the High Court in HCCRREV/E943/2023 that authorized the institution of the private prosecution being Criminal Case No. 1202 of 2024. Counsel submitted that this decision had been made after the Court had revised the Ruling of the Chief Magistrate’s court in Misc. Application No. 35 of 2023.
34. Considering this, Counsel accused the petitioners of trying to bypass the appellate and review mechanism by turning this petition into an appeal. On this basis, Counsel submitted that this matter does not raise a prima facie case and thus urged that this application be dismissed.
35. Reliance was placed in *Amir Lodges Ltd & another v Mohammed Omar Sharif & another* [2022] eKLR where it was held that:
- “(a) 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 a real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.
 - (b) Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
 - (c) The public interest must be considered before grant of a conservatory order.”

Analysis and Determination

36. There is only one issue for determination in this Petition, namely:

Whether this Court should issue the Conservatory Order sought by the Petitioner/Applicant.

37. The purpose of a conservatory order was simplified by the Court in *Invesco Assurance Co v MW (Minor suing thro’ next friend and mother (HW))* [2016] eKLR as follows:

“A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.”

38. In constitutional matters, Article 23(3) (c) of *the Constitution* as read with Rule 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 are the anchor upon which conservatory orders are fastened. Rule 23 provides:

Conservatory or interim orders.

- a. Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders.
- b. Service of the application in sub rule (1) may be dispensed with, with leave of the Court.
- c. The orders issued in sub rule (1) shall be personally served on the respondent or the advocate on record or with leave of the Court, by substituted service within such time as may be limited by the Court.



39. In *Wilson Kaberia Nkunja v Magistrates and Judges Vetting Board & Judicial Service Commission* [2018] KEHC 9274 (KLR) the Court enunciated the three main principles for consideration in an application for conservatory order as follows:

- a. 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 a real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.
- b. Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
- c. The public interest must be considered before grant of a conservatory order.”

40. Likewise, in *Board of Management of Uhuru Secondary School v City County Director of Education & 2 others* [2015] KEHC 2174 (KLR) it was stated that:

25. Foremost, the applicant ought to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice....
26. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis....
28. Once the applicant has established to the court’s satisfaction a prima facie case with a likelihood of success the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights....
29. Thirdly, flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice....
30. The fourth principle which emerges from the various cases and is well captured by the Supreme Court of Kenya in the case of *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others* [2014] eKLR is that the court must consider conservatory orders also in the face of the public interest dogma.
31. Finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The court must consequently consider all relevant material facts and avoid immaterial matters. The court will consider the applicants credentials, the prima facie correctness of the availed information, whether the grievances are genuine legitimate and deserving and finally whether the grievances and allegations are grave and serious or merely vague and reckless.”



41. Lastly, the crux of public interest was aptly expounded on by the Supreme Court in *Gatirau Peter Munya*(supra) as follows:

“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 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 applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes”

42. A review of the pleadings and parties’ submissions shows that this Petition was triggered by the making of a successful private criminal prosecution against the petitioners by the 1st respondent. The petitioners contend that the 1st respondent is using the criminal justice system to arm twist him to forego or settle a civil the claim that was adjudged in favour of the Petitioner in the High Court-Mombasa HCCC 252/2010, where the 1st Respondent also in the Court of Appeal in Appeal No. E001/2021 and further, 1st respondent failed in his attempt to review the said judgment.

43. In response, the respondents described the petition as aimed at dodging the orders of the High Court, Muteti, J issued in HCCRREV/E943/2023.

44. It was submitted that this is an appeal disguised as a Constitutional Petition as the matters being raised were also addressed by Hon. Justice Muteti.

45. To qualify for conservatory order, one of the prerequisites for the issuance of a conservatory order is for the applicant to establish a prima facie case with a probability of success, alternatively, an arguable case. An arguable case is one that has a reasonable basis in law, that is one that is not frivolous. In this case, it is not disputed by the Petitioner that the private prosecution is as a result of the greenlight or orders granted by the High Court, Muteti J in HCCRREV/E943/2023 which is a Court of concurrent jurisdiction. The power of the High Court on review is provided for in Article 165 (6) & (7) as follows:

(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 a superior court.’

(7) For 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 clause (6), and may make any order or give any direction it considers appropriate to ensure fair administration of justice.’

46. The above constitutional provisions illustrate the futility of this application; it is premised on quicksand as it lacks a reasonable basis. It is hopeless and thus cannot constitute a prima facie case or arguable one that is worth of any further consideration.

47. The remedy for the tribulations of the Petitioner, if any, lie before the Court of Appeal or by way of review to the High Court that allowed the private prosecution to continue. This Court cannot make a decision that countermands an order emanating from decision of another High Court.

48. I need not bother considering any other issue in this Application. Granting the orders would be prejudicial to public interest as it will disgrace the administration of justice.

49. The application lacks merit and is hereby dismissed. Costs shall be in the cause.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF MAY, 2025.

.....

L N MUGAMBI

JUDGE

