



**Muhiato v Director of Criminal Investigations & 2 others (Constitutional
Petition E026 of 2023) [2024] KEHC 2093 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 2093 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E026 OF 2023**

OA SEWE, J

FEBRUARY 29, 2024

IN THE MATTER OF ARTICLE 22(1) AND 23 OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER THE CONSTITUTION OF KENYA,**

AND

**IN THE MATTER OF RULE 4 OF THE CONSTITUTION OF KENYA (PROTECTION OF
RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2012**

BETWEEN

FRANCIS NJUGUNA MUHIATO PETITIONER

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The Notice of Motion dated 27th April 2023 was brought herein by the petitioner, Francis Njuguna Muhiato, under Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Order 51 Rule 1 of the *Civil Procedure Rules*. He also invoked the inherent jurisdiction of the Court and any other enabling provisions of the Laws of Kenya, and prayed for the following orders:
 - (a) Spent
 - (b) Spent



- (c) That the Court be pleased to issue an order of injunction prohibiting the respondents, its officers, subordinates, agents, assigns, employees and/or any other person whatsoever from arresting, charging and/or prosecuting him on any issue in relation to his capacity as a director of Frahi Africa Investments Company Limited pending the hearing and determination of the Petition.
- (d) That the Court be pleased to direct that the Petition be heard and determined expeditiously.
- (e) That the respondents do bear the costs of the application.
2. The petitioner averred that he is being harassed, threatened and intimidated through arrests by the respondents on trumped up charges in an orchestrated scheme to unlawfully alienate his properties in the guise of enforcing contracts of a company where he is a director, namely Frahi Africa Investments Limited, (hereinafter, Frahi Africa). He further stated that he has always diligently and truthfully executed his duties as the director of Frahi Africa as provided for under the laws of Kenya; and that the company invited individuals to invest in it by advancing the company money in the form of loans for which contracts were executed. The petitioner further explained that, following the *Covid 19* pandemic, the company was adversely affected by constant expenditures with no income; and that it has taken the company some time to get on the path to financial recovery.
3. The petitioner further averred that as a result of the company's financial woes, individuals who invested in it resorted to legal action by moving to court for recovery of the monies lent. Others have opted to file complaints at various police stations. The petitioner added that, as a director of the company, he has been summoned and threatened with arrest and imprisonment if the sums owed are not repaid. He was of the firm view that the respondents have no intention of prosecuting him and are simply using the criminal justice system to blackmail, intimidate and harass him. Thus, the petitioner deposed that, since the respondents' actions are in blatant violation of the law as they have been influenced by extraneous considerations, it is only fair and just that the orders sought be granted to restrain the respondents from arresting and detaining him in breach of his fundamental rights and freedoms.
4. The application was supported by the petitioner's own affidavit, sworn on 27th April 2023, in which he reiterated and expounded on the grounds aforementioned. The petitioner also annexed documents to the said affidavit to augment his assertions. The documents included copies of the loan contracts, audited accounts for the years 2020 to 2022, pleadings, police summons and cash bail receipts. At paragraph 15 of his affidavit, the petitioner averred that the Court is enjoined by the provisions of Article 159(2) of the Constitution to protect and promote the purpose and principles of the Constitution at all times; and therefore it is within the province of the Court to prohibit abuse of the criminal process, as such abuse would be inconsistent with the values enshrined under Article 10 of the Constitution.
5. The application was resisted by the respondents vide their Replying Affidavit, sworn on 14th June 2023 by Joseph Ngatia, an investigator attached to the Directorate of Criminal Investigations. Mr. Ngatia averred that the investigations into the activities of Frahi Africa were triggered by a complaint by one Grace Wanja, who alleged to have entered into an agreement with Frahi Africa for the investment of some Kshs. 1,000,000/= with a view of earning interest thereon at the rate of 10% per annum, but lost both her investment and the anticipated interest.
6. Mr. Ngatia further averred that, as the investigations were ongoing, more complaints were filed against the same company by other victims. He stated that upon conducting a search at the Business Registration Service, he ascertained that Frahi Africa is duly registered and has the petitioner as its sole director. According to the 1st respondent, the preliminary findings revealed that the company was



- operating as a micro-finance institution without complying with the requisite licensing requirements. He consequently wrote to various institutions including the Capital Markets Authority, the Central Bank of Kenya, the County Government of Mombasa and the Association of Kenya Insurers, to inquire whether Frahi Africa had complied with various legislative requirements for running a money-lending institution.
7. At paragraphs 13 and 14 of his affidavit, Mr. Ngatia averred that already responses have been received by his office from the Capital Markets Authority and the Association of Kenya Insurers confirming non-compliance. He also deposed that he has already applied for search order in Miscellaneous Criminal Application No. E541 of 2022 and proceeded to conduct a search of the petitioner's premises from where he obtained relevant documents for purposes of further investigation and analysis at their Forensic Documents Section. Thus, the 1st respondent contended that the investigations are well within the law and are being carried out in a lawful manner and in accordance with the [Constitution](#) and the [National Police Service Act](#).
 8. At paragraphs 20 and 21, the 1st respondent explained that the petitioner is being investigated for several offences, including obtaining money by false pretences contrary to Section 313 of the [Penal Code](#); and that he is currently out on cash bail. He added that the petitioner has been reporting at Central Police Station, Mombasa, awaiting completion of investigations. Accordingly, the 1st respondent posited that the Petition has been filed with the sole intention of stifling the investigation process; hence the prayer for the dismissal of the petitioner's application with costs.
 9. The application was canvassed by way of written submissions, pursuant to the directions of the Court dated 24th May 2023. Accordingly, the petitioner relied on his written submissions dated 18th September 2023 and urged the Court to note the following:
 - (a) That the contracts in question are between Frahi Africa and third parties;
 - (b) That the complaints arise from the contractual relationship between the said third parties and Frahi Africa;
 - (c) That Frahi Africa exists and has its registered offices that are known to the respondents and the concerned third parties;
 - (d) That the complaints are basically that the third parties were unable to get their invested sums plus profit in good time; and therefore the issue is purely on delay;
 - (e) The petitioner has neither denied receiving monies from the complainants nor declined to refund the same; his constraint being lack of funds due to the economic downturn.
 10. Accordingly, the petitioner submitted that the dispute is purely a civil matter; and that it has been the tendency of the respondent's officers to arrest the petitioner, only to withdraw the charges and refer the complainants to the Small Claims Court. He therefore posited that the arrests are used as an intimidation tool and submitted that, in any event, the parties entered into an arbitral agreement to have all their disputes resolved through arbitration. He therefore argued that it was malicious for the complainants to invoke the criminal justice process in disregard of the arbitral agreement and the provisions of Article 159(2) of the [Constitution](#).
 11. The petitioner made specific reference to Articles 3, 10, 22, 23, 29 and 244 of the [Constitution](#) as well as the [International Covenant on Civil and Political Rights](#) (ICCPR), the [African Charter on Human and Peoples' Rights](#) (ACHPR), [Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment](#), and the [Universal Declaration of Human Rights](#), 1948 to demonstrate that the unlawful arrests and arbitrary summons by the respondents amount to a blatant disregard



- of the law, democracy, human rights and fundamental freedoms protected by the Constitution. He accordingly urged the Court to protect him by granting the orders prayed for in his Notice of Motion dated 27th April 2023.
12. On their part, the respondents relied on their written submissions dated 4th July 2023. They proposed the following issues for determination by the Court:
- (a) Whether the respondents have violated or are likely to violate the petitioner's rights;
 - (b) Whether the injunctive orders sought should be granted.
13. In respect of the first issue, the respondents submitted that it is the obligation of the 1st respondent to investigate criminal complaints according to Section 24(e) as read with Section 35 of the National Police Service Act, No. 11A of 2011; and that the 1st respondent has been acting pursuant to the *bona fide* complaints made by ordinary citizens. They further submitted that, contrary to the petitioner's allegations, he has been summoned to two police stations only, namely Central Police Station where the initial complaint was made; and Urban Police Station for the purpose of extending his cash bail.
14. The respondents relied on Republic v Commissioner of Police & Another, Ex Parte Michael Monari & Another [2012] eKLR to buttress their submission that it is the duty of the police to investigate complaints. They also took the view that the Petition has not been drawn with the precision contemplated by the Court in the *locus classicus* case of Anarita Karimi Njeru v Republic [1976-1980] KLR 1272. Accordingly, they were of the view that, since the petitioner has failed to demonstrate that his constitutional rights have been violated so as to be entitled to the prayers sought, his Notice of Motion dated 27th April 2023 is an abuse of the court process and ought to be dismissed with costs.
15. I have given careful consideration to the application, and in particular, the grounds relied on by the petitioner as set out on the face of the application and in the Supporting Affidavit. I have likewise considered the response filed on behalf of the respondents by Joseph Ngatia. It is worth stating at the outset that, at this stage, the Court need not examine the merits of the case closely. Hence, I bear in mind the caution expressed by Hon. Ibrahim, J. (as he then was) in the Muslim for Human Rights & 2 Others v. Attorney General & 2 Others [2011] eKLR in respect of conservatory orders that:
- “The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-à-vis the case of either party. The principle is similar to that in temporary or interlocutory injunctions in civil matters....”
16. That the Court has jurisdiction to grant temporary injunction is not in dispute. This was well-discussed in South Imenti Bar Owners S.H.G through its Chairman James Gikunda Ntaragwi v County Government of Meru [2018] eKLR, thus: -
- “Provision of the relief of an injunction in constitutional petitions is doubtless a development of law. See article 23 of the Constitution which gives court authority to grant appropriate orders including an injunction in order to uphold and enforce the Bill of Rights. Article 23 of the Constitution is reproduced below:
23. Authority of courts to uphold and enforce the Bill of Rights



- (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
- (2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
- (3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—
 - (a) a declaration of rights;
 - (b) an injunction;
 - (c) a conservatory order;
 - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
 - (e) an order for compensation; and
 - (f) an order of judicial review.”

17. The court, in the above case, went further to state: -

Such development of law on injunctions orchestrated by the new Constitution justifies what Ojwang Ag. J. (as he then was) stated in the case of *Suleiman v. Amboseli Resort Ltd* (2004) eKLR 589 at page 607 that:-

“... counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago in *Giella v Cassman Brown*, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel on that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of *Films Rover International* made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:-

“A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong”.....”

Traditionally, on the basis of the well accepted principles set out by the court of Appeal in *Giella v Cassman Brown* the court has had to consider the following questions before granting injunctive relief.

- i) Is there a *prima facie* case....
- ii) Does the applicant stand to suffer irreparable harm...



- iii) On which side does the balance of convenience lie? Even as those must remain the basis tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice..... ”

18. What amounts to a prima facie case was aptly stated in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 123 thus:

“A *prima facie* case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

19. Similarly, in *Kevin K Muwiti & others v Kenya School of Law & others* (*supra*), it was held that:

“A *prima facie* case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has 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, the Court is not required- indeed it is forbidden- from making definite and conclusive findings on either fact or law.”

20. With the foregoing in mind, I have considered the Petition in the light of the averments set out in the petitioner’s Notice of Motion and its Supporting Affidavit. The petitioner is seeking an injunction to stop his arrest and prosecution over complaints made by investors in Frahi Africa. It is noteworthy however that he has neither placed any evidence before the court to show he has been summoned more than once as alleged by him; nor has he shown the documents he has been forced to sign with a view of compelling him to transfer his personal properties to third parties. There is further no proof that the Respondents are using the criminal justice system to intimidate him.

21. On the other hand, the respondents have demonstrated that bona fide complaints were filed by some members of the public; and that investigations into those complaints are yet to be completed. They averred at paragraph 21 of their Replying Affidavit that the petitioner was arrested and released on police bond; and that he has since been making periodic reports as advised by the Police pending the conclusion of investigations.

22. There is no gainsaying that it is the duty of the police to investigate the commission of crimes. Accordingly, unless it is demonstrated that there is clear abuse of process for ulterior motives, the Court ought to be reluctant to intervene in the exercise of lawful duty imposed not only by dint of Articles 244 and 245 of the *Constitution* but also by Sections 24(e) and 35 of the *National Police Service Act*.

23. Indeed, in *Republic v Commissioner of Police & Another, Ex Parte Michael Monari & Another* (*supra*), it was emphasized that:

“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.”

24. In the premises, the application dated 27th April 2023 lacks merit and is hereby dismissed. The interim orders issued on 24th May 2023 are accordingly vacated. Costs of the application to be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 29TH DAY OF FEBRUARY 2024

OLGA SEWE

JUDGE

