



Ogogoh & 3 others v Directorate of Criminal Investigations (Child Protection Unit) & 3 others (Criminal Miscellaneous Application E223 of 2023) [2024] KEHC 6295 (KLR) (30 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6295 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL MISCELLANEOUS APPLICATION E223 OF 2023**

A. ONG'INJO, J

MAY 30, 2024

BETWEEN

**JULIUS OGOGOHO 1ST APPLICANT
JACKSON GITAHI GITONGA 2ND APPLICANT
PHYLLIS NJERI NGURE 3RD APPLICANT
COMMISSION FOR HUMAN RIGHTS AND JUSTICE 4TH APPLICANT**

AND

**DIRECTORATE OF CRIMINAL INVESTIGATIONS (CHILD PROTECTION UNIT) 1ST RESPONDENT
INSPECTOR GENERAL, NATIONAL POLICE SERVICE 2ND RESPONDENT
OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT**

RULING

1. The Notice of Motion application dated 13th December 2023 was brought under Certificate of Urgency pursuant to Articles 20, 21, 28, & 53 of the Constitution of Kenya, 2010, Sections 4, 8, 22, & 29 of the Children Act, 2022 and all other enabling provisions of the law.
2. The applicant seeks for the following orders from the Honourable Court: -
 1. That this Honourable Court do order the 1st and 2nd Respondents to forthwith launch investigations into generation of PRC forms dated 16th May 2023 and 31st May 2023 relating to a minor A.W.



2. That this Honourable Court do order the 1st and 2nd Respondents to recommend the prosecution of the perpetrators found culpable in the threatened violation of the rights of the minor A.W.
 3. That this Honourable Court be pleased to grant any other orders it deems just and fit in the circumstances.
 4. That costs be provided for.
3. The application was supported by grounds on its face and the supporting affidavit of the 1st applicant, Julius Ogogoh, sworn on 13th December 2023 that the 2nd and 3rd applicants who are the biological parents of the minor approached the 1st and 4th applicants that a report had been made by a sister of the 3rd applicant on defilement of the minor. That as a result, an examination was conducted at Coast General Teaching and Referral Hospital and a PRC form filled which showed that the minor had not been defiled. That the said relative being dissatisfied with the report and in cohorts with other unknown persons abducted the minor and subjected her to a second examination and a report filled indicating that the minor had been defiled.
 4. That further, with the aim of averting miscarriage of justice, the applicants herein moved the High Court at Mombasa vide Mombasa Judicial Review Case No. E027 of 2023 to have the two forms interrogated and an independent examination carried out to ascertain the correct position in the best interest of the minor. That the honourable court ordered an independent examination which was carried out on 28.11.2023 which showed that the minor had not been defiled. That the said report has now been adopted by the court in Mombasa Judicial Review Case No. E027 of 2023.
 5. The applicants prayed that this honourable court has supervisory mandate to ensure that officers from the 1st Respondent conclude their investigations and submit findings and recommendations to the office of the 3rd Respondent for their review and further action.
 6. In response thereto, the 4th Respondent filed Notice of Preliminary Objection dated 9th January 2024 that the application dated 13th December 2023 and orders sought therein offend the doctrine of separation of powers, Articles 157 and 245 of the Constitution of Kenya, Section 6 of the Office of the Director of Public Prosecutions Act, that it offends the doctrine of exhaustion of all available remedies, and that the High Court lacks jurisdiction to hear the matter.
 7. The applicants filed submissions thereto dated 31.1.2024 and argued that the application herein was not the first litigation on the subject matter which revolves around the rights, welfare and best interest of the minor, and that the instant application is peculiar and of paramount importance. The applicant relied on Sections 4, 8 and 242 of the Children Act, as well as the case of Commissioner of Police & The Director of Criminal Investigation Department & Another v Kenya Commercial BANK Limited & 4 Others (2013) eKLR and Kinoti & 7 Others v Chief Magistrates Court, Milimani Law Courts & 4 Others; Sanga & 2 Others (Interested Parties) (Constitutional Petition E495 of 2021 (2022) KEHC 11622 (KLR) (Constitutional and Human Rights) (23 May 2022). The Applicants submitted that they are at liberty and have a right to seek the court's intervention in the instant subject matter which has turned emotive and has previously threatened the best interest of the minor.

Analysis and Determination

8. The issues for determination by this court is whether the Preliminary Objection and the application are merited. This court will start by considering the Preliminary Objection to the effect that the court herein lacks jurisdiction to hear the matter.



9. The elements of a Preliminary Objection were set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 as follows:

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

...

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

10. Further, in the case of *Owners of Motor vessel Lillian 'S' v Caltex Kenya Limited* (1989) KLR 1 as follows: -

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

11. The 4th Respondent is opposed to the grant of the orders compelling the 1st and 2nd Respondents to recommend investigation and prosecution of perpetrators found culpable in the threatened violation of the right of AW for reasons that it offends the provision of Article 157 and 245 of the *Constitution* as well as Section 6 of the *Office of the Director of Public Prosecution Act, 2013* and Section 24 of the *National Police Service Act* No. 11 A of 2011.

12. Article 157 of the *Constitution* of Kenya provides:

157 (6) The Director of Public Prosecutions shall exercise state powers of prosecution and may: -

- a) Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.
- b) Take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority with the permission of the person or authority and
- c) Subject to clause (7) and (8) discontinue at any stage before Judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions under paragraph (b).

13. Section 6 of the Office of the Director of Public Prosecution Act, 2013 also states: -

“Pursuant to Article 157(10) of the *Constitution*, the Director shall: -

- a) Not require the consent of any person or authority for the commencement of criminal proceedings;



- b) Not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law and;
- c) Be subject only to the Constitution and the law.”

14. Article 245 (4) & (5) of the Constitution provides: -

- (4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector General with respect to: -
 - a. the investigation of any particular offence or offences;
 - b. the enforcement of the law against any particular person or persons; or
 - c. the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.
- (5) Any direction given to the Inspector-General by the Cabinet secretary responsible for police services under clause (4), or any direction given to the Inspector-General by the Director of Public Prosecutions under Article 157(4), shall be in writing.

15. Section 24 of the National Police Service Act No. 11 A of 2011 provides: -

The functions of the Kenya Police Service shall be the: -

- a. Provision of assistance to the public when in need;
- b. maintenance of law and order;
- c. preservation of peace;
- d. investigation of crimes;
- e. protection of life and property;
- f. collection of criminal intelligence;
- g. prevention and detection of crime;
- h. apprehension of offenders;
- i. enforcement of all laws and regulations with which it is charged; and
- j. performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

16. The functions of the Respondents as spelt out in the Constitution and their respective statutes is dependent upon a complaint being made and investigated or where an offence is detected and established and the 1st and 2nd Respondents recommending prosecution of the culprit to the 3rd Respondent. The 3rd Respondent has the exclusive duty to review evidence gathered by the 1st and 2nd Respondent and give instructions as to prosecution. The Applicants have not confirmed that they made a report requiring investigations by the 1st and 2nd Respondents and that they have declined to book such report and commence investigations.



17. The finding in Mombasa High Court Judicial Review No. E027 of 2023 may form the basis upon which the Applicants may file a report requiring investigations into any alleged violations of the subject minor but before such report is filed, it would be wrong to assume that the Respondents will decline to launch investigations.
18. As the Court of Appeal held in *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 Others* (2013) eKLR it would amount to interfering with functions of the Respondents if this court orders them to investigate claims of violation of rights before a complaint requiring such investigation is lodged and also ordering the 3rd Respondent to recommend prosecution before a report of investigations to a specific complaint is filed with them.
19. In the circumstances, this court finds that the Preliminary objection has merit and the same is upheld. The Notice of Motion application dated 13th December 2023 is therefore disallowed.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS
30TH DAY OF MAY 2024**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Etropia- Court Assistant

Mr. Ngiri h/b for Mr. Penda for the 4th Respondent

Mr. Masake Advocate for the Applicants – No appearance

Mr. Ngiri for 3rd Respondent

Court: Copy of ruling to be supplied to the advocates for parties.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

30/05/2024

