



**Abbey & another v Attorney General & 7 others; National Police Commission & 2 others
(Interested Parties) (Petition E008 of 2022) [2023] KEHC 17768 (KLR) (19 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17768 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA**

PETITION E008 OF 2022

JN ONYIEGO, J

MAY 19, 2023

BETWEEN

HASSAN NUR ABDI ABBEY & ANOTHER PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

DIRECTOR CRIMINAL INVESTIGATION 3RD RESPONDENT

THE OCS, ELWAK POLICE STATION 4TH RESPONDENT

THE DCIO ELWAK POLIC STATION 5TH RESPONDENT

THE OCS TAKABA POLICE STATION 6TH RESPONDENT

THE DCIO TAKABA POLICE STATION 7TH RESPONDENT

THE KENYA DEFENCE FORCES 8TH RESPONDENT

AND

THE NATIONAL POLICE COMMISSION INTERESTED PARTY

**THE KENYA HUMAN RIGHTS AND EQUALITY
COMMISSION INTERESTED PARTY**

**THE INDEPENDENT POLING OVERSIGHT AUTHORITY INTERESTED
PARTY**

RULING

1. The applicants herein moved to this court vide a Petition dated November 15, 2022 seeking various reliefs and declaration of violation of their constitutional rights by the respondents. Subsequently, they



filed A Notice of Motion dated January 30, 2023, brought pursuant to Articles 165 (3) (b) and 165 (4) of the *Constitution*, Rules 18, 19, 23 and 24 of the *Constitution of Kenya (Protection and Fundamental Freedoms, Practice and Procedures rules 2013)*, seeking orders as hereunder;

- a. This application be certified as urgent and be heard ex-parte in the first instance.
 - b. That pending the hearing and determination of the Application and the Petition, an Injunction be issued against the 1st to 8th Respondent and the 9th Intended Respondent jointly and severally from prosecuting the 1st petitioner and arresting and/or prosecuting the 2nd Petitioner in relation to Criminal Case Number MCCR E004 of 2023 and the charge relating to Motor-vehicle Registration number KBS 548N.
 - c. That pending the hearing and determination of this Application and Petition, interim orders to issue staying the proceedings in respect to Criminal Case No. E004 of 2023 at Mandera Law Courts in which the impugned criminal charges are coming up for hearing on February 15, 2023.
 - d. That pending the hearing and determination of this Application and Petition, the 1st Respondent be restrained from arresting, detaining and charging the 2nd Petitioner in the respect to Motor-vehicle Registration number KBS 548N.
 - e. That the Office of the Director of Public Prosecution be enjoined to the petition as the 9th Respondent.
 - f. That the petitioners/applicants be granted leave to amend the Petition filed herewith and dated August 5, 2022.
 - g. That in the alternative to prayer (f) above, and in the interest of time and expediency, the amended petition annexed herewith be deemed to be amended with the leave of court and be admitted as duly amended and duly filed upon payment of the requisite court fees.
 - h. That cost of the application be provided for.
 - i. Any other relief that this Honourable court deem just and fit.
2. The application is anchored on grounds set out on the face of it and averments contained in the supporting affidavit of Hassanur Abdi Abbey (hereafter the 1st applicant) sworn on January 30, 2023 and Hawa Ibrahim Shabura (hereafter the 2nd applicant) sworn on the same date.
 3. It is the 1st applicant's case that having filed and served the petition herein upon the respondents, he was promptly confronted by officers of the 3rd - 7th respondents who directed him to withdraw the petition herein lest he be dealt with. He averred that he was summoned at Elwak Police Station where he was detained until 16-1-2023 when he was charged with Criminal Case no E004/ 2023 facing 3 counts, Interalia; being in possession of unaccustomed goods; obtaining registration by false pretences, and giving false information to persons employed in the Public service.
 4. That the charges levelled against him were malicious as the motor-vehicle registration number KBS 548N claimed to be un-custommed goods belongs to the second applicant who has since acknowledged by recording a statement with the police confirming that she had bought it from one Ibrahim Allow Maalim who has also recorded a statement confirming that he too had bought it from Ahmed Allio Mahat. He deposed that he was a mere witness to the 2nd Applicant when she bought the motor-vehicle hence malice in arresting him and the 2nd applicant for no wrong committed hence malicious prosecution.



5. On her part, the 2nd applicant basically supported the applicant's case thus confirming that she is the rightful owner to the subject motor-vehicle having bought the same at Kshs 670,000/= from one Ibrahim Allow Maalim. She deponed that she had recorded a statement with the police affirming the same. That Ibrahim Allow has equally recorded a statement with the police confirming that he too bought the motor vehicle from Ahmed Alio Mahat. She expressed fear that she is under threat of arrest if she does not withdraw this petition. Despite being served with the application, the respondents did not file any response. The matter therefore proceeded ex parte. Mr Kinaro for the applicant urged the court to allow the application as it was not opposed.
6. Learned counsel basically reiterated the content of the averments contained in their affidavits in support of the application.
7. I have considered the application herein, affidavits in support together with the annexures thereof. The issue for determination is whether the applicants have met the threshold for grant of conservatory orders. It is trite that before a conservatory order can issue, the applicant/ petitioner must prove that he has established a prima facie case with a likelihood of success.
8. In the case of; *Centre for rights Education and Awareness (CREAW) & 7 others v Attorney General* (2011) eKLR, it was held that:

“It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the petitioner's application and not the petition. I will not therefore delve into detailed analysis of facts and law. At this stage, a party seeking conservatory order only requires to demonstrate that he has a prima facie case with likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of violation or threatened violation of the Constitution.”
9. It therefore follows that a frivolous application cannot attract grant of conservatory orders. See *Adriano Kamotho Njenga v Selection Panel for the appointment of commissioners of the Independent Electoral and Boundaries Commission (2021) & 2 Others; Independent Electoral and Boundaries Commission* (2021) eKLR.
10. Although the application is not opposed, the burden to prove that there is a prima facie case worth consideration lie with the applicant. An application which is not opposed does not automatically succeed simply because it is not opposed. See: *Gideon Sitelu Konchellab v Julius Lekakeny Ole Sunkuli & 2 Others* (2018) eKLR where the Supreme Court held that;

“... It is not automatic that for any unopposed application, the court will as a matter of course grant the sought orders. It behooves the court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted...”
11. The issue at hand in this case is that the 1st applicant has been charged maliciously for an offence he did not commit. He is facing three (3) counts all of which stem from the alleged possession of uncustomed goods in this case a motor-vehicle the subject of the said Criminal Proceedings pending before Mandera magistrate's court.
12. The 1st applicant averred that the motor-vehicle belongs to the 2nd applicant who bought it from one Ibrahim. The 2nd applicant has since recorded a statement with the police confirming that the motor-vehicle is hers which she bought from Ibrahim who also bought it from one Allow.



13. Prima facie, the 1st applicant has advanced an arguable case which is not frivolous. There is nothing on record to show that the 1st applicant did own or was in actual possession of the subject motor-vehicle whose custom duty had not been cleared or authorized by the relevant clearing authority. In a nutshell, the application herein is meritorious and deserving orders for stay of the criminal proceedings in Mandera Criminal Case No E004/2023 pending the hearing and determination of the petition herein.
14. Regarding the second applicant's prayer that an order does issue against the respondents not to prefer charges against her, that will amount to interfering with the role of other constitutional and statutory bodies or mandate. I will however, direct that should there be need to prefer any charges against her, she should not be detained until produced in court for processing in the normal way.
15. As regards the joinder of the ODPP's office, the same is allowed and the ODPP be served with the Petition so as to file a response. Concerning amendment of the Petition, the same is not Prejudicial hence allowed. The amended Petition to be served upon all parties within 14 days from the date of delivery of this ruling.
16. Having held as above, it is hereby ordered that;
 - a. An order staying proceedings in Mandera Magistrate's court Criminal Case No E004/2023 be and is hereby issued pending hearing and determination of the petition herein.
 - b. That the 2nd applicant shall at all times avail herself to the police whenever required, in relation to any investigation connected with this case but shall not be detained until presented before a court of law for processing as may be appropriate.
 - c. The ODPP be and is hereby enjoined as a party in these proceedings.
 - d. The ODPP to file their response within 21 days
 - e. Leave to amend the petition herein is granted and the amended petition be served upon all parties within 14 days of delivery of this ruling.
 - f. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF MAY, 2023.

J. N. ONYIEGO
JUDGE

