



Kabundu v Mombasa Government of Kenya; Office of Director of Public Prosecution & 5 others (Interested Parties) (Criminal Application 14 of 2020) [2021] KEHC 12542 (KLR) (25 February 2021) (Ruling)

Patrick Kabundu v Mombasa Government of Kenya; Office of Director of Public Prosecution & 5 others (Interested parties)

Neutral citation: [2021] KEHC 12542 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPLICATION 14 OF 2020
A. ONG'INJO, J
FEBRUARY 25, 2021**

BETWEEN

PATRICK KABUNDU ACCUSED

AND

MOMBASA GOVERNMENT OF KENYA RESPONDENT

AND

THE OFFICE OF DIRECTOR OF PUBLIC PROSECUTION INTERESTED PARTY

THE CHIEF MAGISTRATE MOMBASA INTERESTED PARTY

PETER GICHAMBA INTERESTED PARTY

THE ATTORNEY GENERAL OFFICE INTERESTED PARTY

THE JUDICIAL SERVICE COMMISSION INTERESTED PARTY

THE NATIONAL POLICE SERVICE INTERESTED PARTY

RULING

The Application

1. By an Amended Notice of Motion Application dated 27th February, 2020, Patrick Kabundu (the Accused/Applicant) prays for the following orders:-
 1. This Application be certified as urgent and be heard ex parte in the first instance.



2. That there be a stay of proceedings in Mombasa County prosecution case No. 3867 of 2018 including the proceedings and orders, rulings dated 23rd January, 2020 and any orders or rulings based on the subject proceedings pending inter party hearing.
 3. That there be a stay of proceedings in Mombasa County Court prosecution No. 3867 of 2018 including the proceedings and orders, rulings dated 23rd January, 2020 and any orders or rulings based on the subject proceedings pending final determination of this application.
 4. That this Honorable court be pleased to issue or direct the Mombasa County Government Court prosecution case No. 3867 of 2018 through Mombasa County Court registry accept the 1st accused written submissions and authorities dated 23rd January, 2020 and be included in the ruling of the court to be delivered on 27th February, 2020.
 5. That this Honorable Court be pleased to set aside all Mombasa county proceedings including orders and rulings based on proceedings dated 23rd January, 2020 and list the subject matter for hearing after admitting the accused documents.
 6. Without prejudice to the above, the honorable Court orders the 2nd respondent and its agents be ordered to comply with the directives and memo of the Chief Registrar of Judiciary dated 26th May, 2015.
 7. Without prejudice to the above, the honorable court to direct the chief magistrate to comply with the directives and memo of the chief registrar of judiciary dated 26th May, 2015.
 8. Without prejudice to the above the accused applicant criminal case NO. 3867 of 2018 Mombasa County Government versus Patrick Kabundu is terminated for being a non-starter or unconstitutional in breach of Article 50 (2) (d) and Article 160 of the constitution.
 9. Without Prejudice to the above the honorable courts do direct that county prosecutors who are not gazette and unconstitutional in law.
 10. Without Prejudice to the above the Honorable court do direct that the county Government field marshals or county government Askaris are not enforcement officers as per the National Police service.
 11. Without prejudice to the above the Honorable court do direct the county government Attorney cannot purport to act or represent the director of public prosecution in County government criminal cases.
 12. The costs of this Application be granted to Accused/Applicant.
2. The application is premised on the grounds set out therein however the same is not accompanied by a supporting affidavit and an undated and unsigned supplementary affidavit by Patrick Kabundu.
 3. Prayers 1, 2 and 3 were granted ex parte pending the hearing and determination of the main application and were thus spent.
 4. The Applicant's case is that the Mombasa County Court has denied him his right or fundamental freedom. That he has also been denied access to justice as the court shall ensure access to justice for all persons and if any fee is required it shall be reasonable and shall not impede access to justice
 5. The Applicant avers that he has been having problems filing his documents in defence of his case at County Courts of Mombasa since the procedure of filing documents is different from the laid down procedure of the judiciary and also in breach of the Magistrate and Kadhi's court Registry manual.



6. He further avers that while the head of station is the Chief Magistrate and the county courts head of station is the county attorney who is not a judicial staff. That at the time of filing his Notice of Preliminary objection, the County Prosecutor directed him to go to the 6th floor Bima Towers to get permission to file the documents before she could receive it which is in breach of Articles 47, 48, 49 and 50 of the Kenyan Constitution.
7. The Applicant stated that sometime in 2019 when he was filing his Notice of Preliminary Objection, the Magistrate Court No. 5 was holding brief for the Magistrate for the county court who was on leave at the time, directed the County Prosecutor to receive his Notice of Preliminary Objection which was received and stamped by the Mombasa County Courts registry and no payment was ever made.
8. The Applicant further avers that the Presiding Magistrate stated that he does not understand how the County Courts operate and declined to give any directions. The Applicant contends that on 23rd January, 2020 the County Prosecutor refused to receive or access his documents and when he raised the issue in Court, the Court ignored it. That he thereafter went to raise the issue with the Principal Magistrate who directed him to file his documents in the criminal registry after assessment, however the criminal registry declined to accept his documents since they were reading Mombasa County Government County Court Prosecution No. 3867 of 2018 which they stated was not part of their judicial registry.
9. The Applicant states that he was then advised by one of county staff to proceed to the office of the Country Attorney who manages the court and staff and his documents were received on 23rd January, 2020. He further states that after the promulgation of the 2010 Constitution, Article 262 (22) dealt with the issue of judicial proceedings and pending matters, and the Chief Registrar of Judiciary on 26th May, 2015 issued an internal memo where she gave directions on how pending matters at municipal and city courts should proceed and how new violation of county legislation of county legislation should be managed.
10. The Applicant contends that the Respondent, the 1st, 2nd, 4th, 5th and 6th interested parties have failed to comply with the directives and memo of the Chief Registrar of Judiciary dated 26th May, 2015. He further contends that the citizen budget estimate fiscal year for 2018/2019-2020/2021 medium term from the county treasurer June, 2018 demonstrate cash illegally collected by Mombasa County governments as cash fine and cash bond. Further he referred to the National Assembly official report dated 21st June, 2016 where Mrs. Margaret Kiiru a member of the Nakuru County Assembly made a petition to the National Assembly regarding alleged unlawful establishment of courts /County inspectorate and enforcement units by various county government.

The Response.

11. The application is opposed by the Respondent vide a Replying Affidavit sworn on 30th October, 2020 by one Carol Masai, an employee of the County Government of Mombasa. In its replying affidavit, the Respondent averred that the applicant is a businessman who is the accused in Criminal Case No. 3867 of 2018 where he has been charged with advertising by way of displaying a signboard without the requisite permit from the County Government of Mombasa, placing illegal structures on a public walkway thereby causing obstruction and endangering safe and free passage of road users, among other charges.
12. The Respondent avers that after pleading not guilty to the charges, on 19th July, 2018 the Applicant filed a Notice of Preliminary Objection citing among other grounds that the Magistrate's Court handling the case had no jurisdiction to handle the case. It is further averred that at the same time,



the applicant filed Petition No.195 of 2018 seeking among other orders the stay of proceedings in the Criminal Case, however those orders were denied.

13. The Respondent states that on 21st November, 2019, the prosecution was granted 14 days to file a response to the Applicant's Notice of Preliminary Objection and the matter was listed for mention on 5th December, 2020 where the Applicant sought time to respond to the submissions file by the prosecution and he was granted 14 days.
14. The Respondent avers that on 15th January, 2020 when the matter came up for mention for further direction, the Applicant failed to attend court and through his representative, sought for a further seven days to file his submissions which were granted by court and the matter was given another mention date for 23rd January, 2020. The Respondent further avers that the Applicant was yet to file his submissions come the 23rd January, 2020 and the court ruled that the Preliminary Objection shall be determined based on the documents in the court record and submissions already filed as of 23rd January, 2020.
15. The Respondent contends that in the application before court, the Respondent deviated from the issue at hand which was the decision of the court to proceed to determine the Notice of Preliminary Objection without the Applicant's submissions.
16. The Respondent further contend that the County Inspectorate is now arresting individuals who violate county laws and handing them to the police for processing and presentation before the Magistrate Court stationed at the Mombasa County premises which court people refer to as "county court" and that County Officers who used to prosecute cases on behalf of the now defunct Municipal Council and partly after the formation of the County Government of Mombasa are no longer prosecuting the cases as that function has been taken over by the Office of the Director of Public Prosecutions.
17. The Respondent avers that Petition 195 of 2018 raises issues which are similar to the ones raised in this application and therefore this suit is a duplication of Petition 195 of 2018 save for the issue of the Applicant's submissions not having been accepted by the court.

Submissions.

18. The application was canvassed through written submissions. The Applicant filed submissions on 19th November, 2020 and a response to the Respondent's submissions on 10th December, 2020. In his submissions, the Applicant submitted that the High Court criminal division is empowered under the Constitution 2010 with supervisory jurisdiction over any person, body or authority exercising a judicial function.
19. The Applicant submitted that there exist no such courts as the municipal, county and/or city courts other than those courts created under articles 162 and 169 of the Constitution of Kenya 2010. He further submitted that municipalities were previously created by Section 12 of the Local Government Act, Cap 265 Laws of Kenya which was repealed when the County Government Act No. 17 of 2012 came into force. He relied on the provision of Section 134 of the County Government Act.
20. The Applicant submitted that when the Local Government act was repealed, all bodies created by that statute ceased to exist. Reliance was placed in the case of John Michael Wanjau v Municipal Council of Eldoret (2013) eKLR where the court held that the Local Government Act was repealed when the County Government Act came into force. The Applicant in his submissions submitted that there are no courts existing as County courts or otherwise specially for the enforcement of the by-laws promulgated by the County Government.



21. It was further submitted by the Applicant that in the internal memo dated 26th May, 2015, under Article 262 (22) of the transition which are Constitutional direction of Judicial proceeding and pending matters as a first step towards transitioning the function of defunct city and municipal court to dispersed by Magistrate Courts and ensure that all revenues accruing from such cases is collected by the Judiciary and applied to the consolidate fund and no revenue to County Government. He therefore urged the court to stamp its authority by allowing prayer 6 and 7 of the amended notice of motion.
22. The Applicant submitted that the Mombasa County Inspectorate purported to use the Mombasa County Inspectorate bill 2016 in breach of Article 199 (1) County legislation does not take effect unless published in the gazette. He further submitted that the Magistrate Court in Mombasa held that it is unlawful for County Inspectorate to arrest citizens only police officers have the mandate to arrest law breakers and proceeded to urge the court to grant prayer No. 10.
23. It was further submitted by the Applicant that the charge sheet date 31st May, 2018 deals with 3 counts and the 3 counts are founded on several County Legislation. It was his submission that Article 199 91) of the Constitution 2010 is clear that County Legislation does not take effect unless in gazette he relied in the case of Tyson Ng'etich & Another V Government Bomet County Government & 5 others No. 415 of 2014 (2015) eKLR and proceeded to request the Court to grant prayer No. 8.
24. The Applicant submitted that the County Prosecutors, Kennedy O. Oruku and Caroline Masai are gazette based on the Local Government Act, he referred the court to the provisions of Article 160 (1) of the Constitution of Kenya 2010 which deals with the Independence of the Judiciary and submitted that by enforcing the Chief Registrar Judiciary Memo dated 26th May, 2020 the registry will be in line with the 2010 Constitution and Article 262 (22) of the Constitution.
25. The Applicant further submitted that the subject Notice of Preliminaries objection raised in County Case No. 3867 of 2018 is now being raised before this court, that these are points of law and the courts has jurisdiction to deal with the subject matter under article 165(6) and (7) of the Constitution. He argued that the court proceedings which have been annexed as CM 1 shows the County Court operating under the old Constitution with the Magistrate from the judiciary but county prosecutors and county Court clerks from the Respondent and Court files kept as the County Court registry in breach of Article 50 (2) (d),160(1). 161 (1) and 262 (22) of the Constitution.
26. He submitted that Miss Carol Masai in her sworn affidavit admits to be employed by the Respondent and that the memo of the Chief Registrar of the Judiciary is an administrative direction hence requesting this Court to give a judicial order to enforce the administrative direction from the Judiciary arm.
27. The Respondent filed its submissions on 7th December, 2020. The Respondents in their brief submissions submitted that it is not in dispute that the Applicant had been granted three chances to file his submissions but he failed to do so without any justifiable reasons, thus prompting the Magistrate's Court to make a determination that it will base its ruling considering what was already in the Court record.
28. The Respondent submitted that the Magistrate's Court acted in the interest of justice in coming to that decision since the Applicant had shown a tendency of wasting the Court's time by failing to adhere to the strict timelines given regarding the filing of the submissions in question. The Applicant urged the Court not to entertain the application since by doing so it will amount to showing the greater public that Court timelines are of no consequence and can be ignored.
29. The Respondent further submitted that the Applicant was busy pursuing Mombasa High Court Petition 195/2018 when he was taking the Magistrates Court round in circles regarding filing of



submissions, that the Applicant was holding out for favorable ruling since he had amended his application for conservatory orders in that Petition to include and order seeking to have the proceedings in Criminal case No. 3867 of 2018 and that the Applicant is using the present suit as a chance to redeem his failed application for conservatory orders.

30. It was submitted that it is not in contention that matters before the “County Court” are being handled by prosecutors seconded by the ODPP, and that the suit is now stale as the wrong complained about has since been remedied. The Respondent further submitted that it is trite law that Courts are to handle live and active cases, the present application has been overtaken by events. The Respondent urged the court to dismiss the application with costs to the Respondent.

Determination.

31. I have considered the issues raised on the Amended Notice of Motion, replying affidavit by the Respondent and submission of parties. In my view, the issues which arise for my determination are as follows:-
- I. Whether this suit is a duplication of Mombasa High Court Petition No. 195 of 2018.
 - II . Whether the Magistrate Court ought to have admitted the applicant’s submissions and list of authorities.

Whether this suit is a duplication of Mombasa High Court Petition No. 195 of 2018.

32. I have perused the record and I have also had the opportunity of reading the ruling in Mombasa High Court Petition No. 195 of 2018 and it is not in dispute that, subsequent to the filing of the Notice of Preliminary Objection in Criminal Case No. 3867 of 2018, the Petitioners filed Petition No. 195 of 2018 seeking for an order of temporary injunction against some of the parties in the suit herein.
33. The Applicant has heavily relied on the letter dated 26th May, 2015 from the Chief Registrar of the Judiciary concerning revenue collection from County Courts. The Applicant in his supplementary affidavit stated that the Mombasa County Government illegally collected cash fine and cash bonds which is not in line with the directives contained in the Memo by the Chief Registrar of the Judiciary dated 26th May, 2018. The Applicant however did not adduce and/or annex any evidence to actually support his claim and confirm that monies collected as fine and bond was not deposited in the consolidated fund account.
34. I have looked at the Chief Registrar of the Judiciary response to the Applicant’s letters dated 4th June, 2018, 27th June, 2018 and 25th September, 2018 and I note that the Chief Registrar of the Judiciary informed the Applicant that she was not aware of any court flouting the directives in the memo dated 26th May, 2015.
35. I find that some of the issues raised in the application herein have already been dealt with by the court in Petition No. 195 of 2018 in rulings dated 9th May, 2019 and 6th May, 2020. I also find that Petition No. 195 of 2018 is still pending determination on the issue of revenue and other fines/fees collected are deposited in consolidated fund account.
36. At this juncture I am constrained to distance myself from the issues explained above herein as they are currently subject to determination in Petition 195 of 2018 before a court of competent jurisdiction.
37. I find that the orders sought against the County Government Askaris/Marshals are incapable of being granted since they are not parties in these proceedings.



Whether the Magistrate Court ought to have admitted the applicant’s submissions and list of authorities.

- 38. From the record it is clear that the Applicant sought for time to file his written submissions twice before the Magistrate’s Court that is on 5th December, 2019 and on 15th January, 2020, but he failed to do so. That from the copies of proceedings annexed to the Respondent’s replying affidavit I note that on 23rd January, 2020, when the matter came up for mention before the Magistrate Court to confirm whether the Applicant has filed his submissions, the Applicant indicated that he was to file and serve his documents within 7 days, however he has the documents but they are not filed. The Court proceeded and made a ruling that it shall deliver its ruling on the Notice of Preliminary Objection based on the documents and submissions already filed as at today.
- 39. It is clear from the above that the Applicant did not inform court of his predicaments and/or difficulties if any that he faced in his attempt to file his written submissions and list of authorities at that moment when the matter was mentioned so as to give the Magistrate Court an opportunity to deal with the issue. The Applicant chose to wait until the Magistrate Court had given its decision then rushed to complain of his predicaments to the Principal Magistrate.
- 40. It is not in dispute that as of 23rd January, 2020, the Applicant had neither paid filing fees for his written submissions and list of authorities nor served them upon the Prosecutor. It is trite law that for pleadings to be admitted as part of the court record, a litigant ought to first have them assessed at the requisite Court registry, pay the assessed filing fees and finally have them stamped with the stamp bearing the date of when the documents were received to signify receipt by the relevant court registry.
- 41. The Applicant had not done any of the above when he appeared before the Magistrate Court on 23rd January, 2020 and therefore the Magistrate Court had no obligation to accept and admit documents that had not been properly filed so to speak. I therefore find that the Magistrate Court was not at fault in its ruling of 23rd January, 2020, directing that it shall decide on the Notice of Preliminary Objection based on the documents and submissions already filed as at 23rd January, 2020.

Conclusion.

- 42. The Applicant urged this court to give an order terminating Criminal Case No. 3867 of 2018 for being in breach of Article 50 (2) (d) and Article 160 of the Constitution of Kenya 2010. Article 50 (2) (d) provides as follows:

“ Every accused person has the right to a fair trial, which includes the right to:-

- a.
- b.
- c.
- d. To a public trial before court established under the Constitution.”

- 43. Whereas Article 160 of the Constitution of Kenya 2010 provides for the independence of the Judiciary, the allegation that cases before the Court being hosted by the County at the County premises, are being handled by County Prosecutors and, whether this Court should issue an order terminating Criminal Case No. 3867 of 2018, these are issues that can only be dealt with substantively by parties adducing oral evidence and witnesses and not through a miscellaneous criminal application



44. I have also noted that the Amended Notice of Motion dated 27th February, 2020 is not accompanied by a supporting affidavit and also the supplementary affidavit filed on 14th October, 2020 has neither been signed and/or dated.

45. The court in *Mwala Land Disputes Tribunal & another v Kiilu Mathuva & 3 others Ex-Parte Kyengo Mathuva* [2006] eKLR observed as follows;

“The question which arises then is whether filing such Notice of Motion without specifically supporting it with any independent affidavit was proper. In my view, a Notice of Motion is not a Notice of Motion unless it complies with Order 50 Rule 3 which states:

“Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.”

A notice of motion then, as is shown by the side note next to the above rule, which states “contents of notice”, is only a notice of motion, if it is properly supported by an independent affidavit.”

46. In the present case before us, the application was not supported by an affidavit therefore not compliant with the provisions of Order 50 Rule 3. as has been held by many courts a motion without a supporting affidavit, is incurably defective.

47. With regards the undated and unsigned supplementary affidavit filed on 14th October, 2020, the Supreme Court in *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR held that:

“The making of affidavits is governed by the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya. Section 5 of the Act provides, thus:

“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

Further, Section 8 states:

“A magistrate or commissioner for oaths may take the declaration of any person voluntarily making and subscribing it before him in the form in the Schedule.”

Hence, an affidavit must clearly state the place and date where it was made and it must be made before a Magistrate or a Commissioner for oaths.

We have no hesitation in finding that the purported Replying Affidavit filed by the 1st Respondent is fatally defective as the same contravenes all the legal requirements for the making of an affidavit. Hence it has no legal value in the matter before us.”

48. For the reasons explained herein above, the application before me is incurably defective, however in the interest of justice and in light of the provision of Article 159 (2) (d) of the Constitution of Kenya, 2010 which provides that justice shall be administered without undue regard to procedural technicalities. I allow the application dated 27th February, 2020 only to the extent that the Applicant be allowed to file his submissions and list of authorities in the lower Court upon payment of requisite fees.

49. The other prayers in the amended notice of motion dated 27th February, 2020 fail therefore struck out with no orders as to costs.



It is so ordered.

DATED, SIGNED AT MOMBASA THIS 25TH DAY OF FEBRUARY, 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

