



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION- MILIMANI COURT

MISC. CRIMINAL APPLICATION NO.70 OF 2020

ANTHONY KIBANDI WATUKU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Anthony Kibandi Watuku, the Applicant herein approached the court through a Notice of Motion dated 15<sup>th</sup> February, 2021 seeking review and/or varying of Orders issued by this court presided over by Hon. L. Kimaru J. dated 16<sup>th</sup> December, 2020. Variance of the stated order would require the Complainant through the prosecution in MCCR/166/2019 to supply the Applicant with Exculpatory Documents specifically requested in letters dated 28<sup>th</sup> October, 2019 and 5<sup>th</sup> December, 2019 respectively.
2. The application is premised on grounds that the Applicant is legally in possession of new and important matter and/or evidence that has come into his possession by virtue of the ongoing Employment and Labour Relations Court matter in Nairobi ***ELRC Petition No. 128 Of 2018, Antony Kibandi Watuku Vs. ICDC*** and a complaint lodged which is pending investigations at the Director of Criminal Investigation Headquarters where Senior officers at ICDC have been adversely mentioned and are being investigated on a myriad of criminal issues ranging from corruption, nepotism and economic crimes.
3. That the refusal of the complainant to furnish the Applicant with the exculpatory documents should be viewed in the context of vengeance and vindictiveness harboured by the top leadership of the complainant company and in particular Ms. Faith Nene, a Human Resource and Administration Manager and enemy of the Applicant, who falsifies documents to incriminate him as seen in Nairobi ***ELRC No. 18 of 2018*** where a replying affidavit dated 12<sup>th</sup> February, 2020 was served at the end of the year as the court's determination that was delivered on the 16<sup>th</sup> December, 2020 was awaited.
4. That exculpatory evidential documents include letters dated 28<sup>th</sup> October, 2019 and 5<sup>th</sup> December, 2019, respectively, that are in possession of the Applicant have been inferred, deduced and/or implied from the charge sheet and witness statement furnished upon the Applicant, falsified/doctored minutes by ICDC officials, purposely designed to advance their personal vendetta, vengeance and selfish interests; and a failed assumption in the Ruling of Kimaru J. stating that the stated letters were obtained unlawfully.
5. That the learned Judge failed to look at every document sought independently hence failed to satisfy himself that most of the documents would reasonably put the Applicant in a position of a whistle blower in the matter before the Director of Criminal Investigation; the ruling failed to appreciate the distinction between **Article 50(2)(c)** and **Article 50(2)(j)** of the Constitution hence failing to provide him adequate facility and time to prepare the defence and that the Applicant who is presumed innocent until proven guilty and having not been given audience by the court offended the rule of Natural Justice. The application is supported by an affidavit sworn by the Applicant who avers as to his designation while in the employment of the complainant, his duties then and basically reiterates what is stated in the grounds of the body of the application.
6. The Respondent did not file a response to the application.
7. The application was canvassed by way of written submissions. Mr. Orlando learned counsel for the Applicant urged the court to order the Complainant to supply the Applicant with documents as outlined in letters aforementioned. That they were compelled to move the court because in the Ruling of Hon. Justice Kimaru, he stated that the stated documents may have been obtained unlawfully but they had a letter from the Human Resource Manager of the complainant dated 12<sup>th</sup> February, 2020 and through the document it was revealed that senior officers of the complainant were being investigated by Director of Criminal Investigation on corruption and economic crimes a fact that made him to deduce that the documents existed.
8. That the case before the lower court is of witch hunt, vindictiveness and vengefulness specifically from the human resource officer who is

malicious and has spite against him. That at the inception of the case the prosecution indicated that they had supplied him with statements which they did in piecemeals and have deliberately refused to supply him with all documents. That failure to supply him with the CCTV footage of 9/6/2018 of Uchumi House and ICDC offices which is located on the 17<sup>th</sup> and 18<sup>th</sup> Floor, which captured the Applicant per the allegation that he moved to the complainant's offices between 2.00-2.30pm will make him suffer damage. He also seeks the security vehicle's register at the entry and exit point on ground floor where vehicles were parked at a time when computer misuse and cybercrime **Act, 2018** had just come into existence.

9. He faulted the trial court for wanting to proceed with the case expeditiously not minding issues raised. That the charge sheet presented is defective and unconstitutional intended to victimize the Applicant into submission to withdraw the complaint filed at Director of Criminal Investigation. He sought to draw the distinction between **Article 50(2)(c)** and **50(2)(j)** of the Constitution. That where **Article 50(2)(j)** seeks to direct the prosecution to furnish the applicant with documents they seek to rely upon, **Article 50(2)(c)** requires the complainant to furnish the accused person with all documents they seek to rely upon during the prosecution's case.

10. In response thereto the Respondent opposed the application arguing that the court lacks jurisdiction to entertain the application because it was heard and determined by Justice Kimaru and a Ruling delivered on 6<sup>th</sup> December, 2020, therefore the court cannot vary orders of a Judge of concurrent jurisdiction. Ms. Akunja learned State Counsel urged that the present application raises issues of supply of documents allegedly in custody of the prosecution that was the issue determined before Hon. Justice Kimaru. That disclosure being a continuous process throughout trial, the prosecution could only provide what was in their possession. That it was a waste of judicial time to ask several courts to ventilate the same matter.

11. In a rejoinder thereto, the Applicant acknowledging that a decision was made by Hon. Justice Kimaru, he stated that they read the ruling and noticed particular concerns that they brought before this court in a form of review.

12. I have considered rival submissions by both parties. The Applicant herein being aggrieved by the ruling of Kimaru J. seeks review of the decision. This court being of concurrent jurisdiction with the court presided over by Kimaru J. can only review the decision if it is vitiated by mistake, error on the face of the record. It is argued by the Applicant that a new and important matter and/or evidence arose after the decision/Ruling of Kimaru J. that necessitated the application. This information arose as a result of an on-going matter before another Court.

13. Before Kimaru J. the Applicant sought an order for revision of the lower court's order which he deemed prejudicial to him as it had not ordered the complainant to provide him with all documents it intended to rely on. His argument was that he reasonably believed that the documents were important but the prosecution had not supplied him with the same. That the Ruling violated his rights as enshrined under **Article 50(2) (c)** of the Constitution. The contention of the prosecution was that they had supplied the Applicants with all documents they intended to rely on.

14. The learned Judge addressed the issue of the complaint raised by the Applicant of not being furnished with all documentary evidence that was in possession of the prosecution that it intended to rely on during trial. The court was in agreement with the prosecution that the prosecution could not be compelled to supply the Applicant with evidence that did not constitute evidence to be relied on.

15. The issue raised having been dealt with exhaustively, if the applicant is aggrieved as expressed, there was an avenue of appeal. Issues raised having been determined by Kimaru J. who presided over a court of concurrent jurisdiction with this court, his order finally determined the matter, therefore, this court is functus officio.

16. The Supreme Court expounding on the doctrine of functus officio in **Election Petitions Nos. 3, 4 & 5 Raila Odinga & Others vs. IEBC & Others [2013] eKLR** citing with approval an excerpt from an article by Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832 stated thus: -

*"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."*

17. The upshot of the above is that this court being functus officio is not seized of jurisdiction to determine the matter. In the result, the application fails and is dismissed.

18. It is so ordered

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF JUNE, 2021.**

**L. N. MUTENDE**

**JUDGE**