



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CONSTITUTIONAL PETITION NO. 227 OF 2018**

**IN THE MATTER OF: ARTICLES 1, 2, (4), 10, 21, 22, 23, 27, 28, 35, 47, 48, 49, 50, 157, 159, 258 & 259 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: THE 1<sup>ST</sup> TO 3<sup>RD</sup> RESPONDENTS DECISION TO CHARGE THE PETITIONERS IN MOMBASA CHIEF MAGISTRATE'S COURT CRIMINAL CASE NO. 1631 OF 2018**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 29, 48 & 50 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: THE PENAL CODE CHAPTER 63 LAWS OF KENYA\AND**

**IN THE MATTER OF: THE POLICE ACT, NATIONAL POLICE ACT & THE DIRECTOR OF PUBLIC PROSECUTION ACT**

**BETWEEN**

- 1. HASSAN S. ABDALLA**
- 2. ZAFFER EBRAHIM TAYABALI KARIMJEE**
- 3. MUSTAFA FAZALABBAS MOHAMMEDALI**
- 4. HASHIM GOTSAT.....PETITIONERS**

**VERSUS**

- 1. DIRECTOR OF PUBLIC PROSECUTIONS**
- 2. THE INSPECTOR GENERAL OF POLICE**
- 3. DIRECTOR OF CRIMINAL INVESTIGATIONS**
- 4. CHIEF MAGISTRATE COURT, MOMBASA**
- 5. IBRAHIM SHEIKH ABDULLA.....RESPONDENTS**

**RULING**

**The Application**

1. By a Notice of Motion application dated 22/10/2020, the Petitioners herein pray for the following orders:

a) Spent

b) That there be a stay of any further proceedings pending the hearing of this application *inter partes*.

c) That pending the hearing of the appeal filed herein that there be a stay of any further proceedings in the matter.

d) That in the alternative to prayer 3 above, that the court do review the order that was made on 7/09/2020, so that the petition is listed for hearing on a *viva voce* basis.

e) That costs of this application be provided for.

2. The application is premised on the grounds set out therein, and is supported by Affidavits sworn by **Mr. Gikandi** Learned Counsel for the Petitioners on 22/10/2020 and 9/03/2021.

3. The Application is based mainly on the allegation that there are rival affidavits filed by parties making it difficult to establish the truth without subjecting the deponents to cross-examination.

### **The Response**

4. The 1<sup>st</sup> Respondent opposed the Application vide Grounds of Opposition as follows:

a) That the Application is grounded on facts that disclose bad faith, illegality and frown upon Article 159,169 of the Constitution, the “**Mutungu rules**” and Sections 210 and 215 of the Criminal Procedure Code.

b) That this Court having pronounced itself vide ruling dated 7/09/2020, it lacks jurisdiction to hear this Application.

c) That the Application be dismissed.

### **Submissions**

5. Parties did file submissions pursuant to the Court’s directions. The Petitioners submissions are dated and filed on 9/03/2021, while the 5<sup>th</sup> Respondent’s submission are dated and filed on 23/03/2021.

6. **Mr. Gikandi** learned counsel for the Petitioners identified the sole issue for determination as being, whether the orders issued on 7/09/2020 should be reviewed. Counsel argues that there exist sufficient reasons to warrant a review of the orders, which directed that the Petition herein be heard by way of Affidavit evidence, because the Affidavit sworn by the 5<sup>th</sup> Respondent on 15/02/2019, contrasted with the contents of the Affidavit in support of the Petition filed by the 1<sup>st</sup> Respondent sworn on 26/09/2018 on matters of fact. Therefore, counsel argued that when facts in issue are contested, it is sufficient for the Court to allow for *viva voce* evidence.

7. **Mr. Aboubakar** learned counsel for the 5<sup>th</sup> Respondent submitted that hearing the Petition vide oral evidence would be tantamount to hearing the criminal case itself, when the Petition is only intend to deal with the issue of whether the initiation of the criminal case violates provisions of Article 157(11) of the Constitution.

### **The Determination**

8. I have considered all the material canvassed in respect of the Motion. In my view, the sole issue for determination is whether the Petitioner should be allowed to prosecute the petition via *viva voce* evidence.

9. Counsel for the petitioner argues that there are sufficient reasons to warrant a review of this court’s orders issued on 7/09/2020. In my view, a Court may review its decision where there is evidence of sufficient cause as seen in **Nuh Nassir Abdi v Ali Wario & 2 Others [2013] E KLR EP NO. 6 of 2013**, G.V Odunga J. stated that: -

**“A decision whether or not to vary, set aside or review earlier orders was an exercise of judicial discretion and the Court could only exercise such discretion if so to do would serve useful purpose....”**

10. It is imperative, in a bid for clarity, for this court to reproduce the Orders in the Ruling dated 7/09/2020.

**“ I am not convinced that this petition may only be canvassed by way of *viva voce* evidence by cross-examining the respondents. If it is the court file, the same be called up by this court if it is the documents from lands office, same may also be called by the court. This is possible even without the witnesses being subjected to cross-examination at this stage.**

**It is also my considered position that this matter being of 2018, ought to be concluded expeditiously. It would be subject to inordinate delay were the court to allow the application by the petitioner made today. I dismiss this application and order that this petition shall be canvassed by way of affidavit and written submissions”.**

11. The mode for hearing constitutional petitions is stipulated under **Rule 20 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**. It is either by affidavits, written submissions or oral evidence. However, the Court may upon application or on its own motion direct that the petition or part thereof be heard by oral evidence. In my view, the Court's choice on the *modus operandi* in hearing is purely a discretionary issue, and the reasons for adopting the hearing by way of Affidavit were elucidated as captured earlier in this ruling.

12. In **National Bank of Kenya Ltd v Ndungu Njau [1996] KLR 469 (CAK)** at Page 381

**“In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue? In my opinion the proper way to correct a judge’s alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose.”(Emphasis added).**

13. Applying the principles laid down in the above precedents, I decline the invitation to set–aside and/or review the Court’s order issued on 7/09/2020. The application dated 22/10/2020 is unmerited and misconceived. Accordingly, I dismiss it with costs in the cause.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JUNE, 2021.**

**E. K. OGOLA**

**JUDGE**

Ruing delivered via MS Teams in the presence of:

Ms. Randa for Petitioners

Ms. Wanjohi for DPP

Ms. Peris Court Assistant