



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A.C. Mrima J.)

CONSTITUTIONAL PETITION NO. 40 OF 2020

-BETWEEN-

ERIC KYALO MUTUA.....PETITIONER

-VERSUS-

- 1. THE INSPECTOR GENERAL OF POLICE**
- 2. THE DIRECTOR OF CRIMINAL INVESTIGATIONS**
- 3. THE DIRECTOR OF PUBLIC PROSECUTIONS**

-AND-

- 1. LAW SOCIETY OF KENYA**
- 2. ETHICS AND ANTI CORRUPTION COMMISSION...INTERESTED PARTIES**

RULING NO. 1

Introduction and Background:

1. This Ruling is in respect of whether this matter ought to be heard before the Anti-Corruption and Economic Crimes Division of the High Court or the Constitutional and Human Rights Division.
2. The brief background to this matter is that the Ministry of Information and Communication sought to buy land in the year 2009. It advertised for its supply and eventually, *Malili Ranch Limited*, was awarded the tender.
3. The Petitioner herein, *Eric Kyalo Mutua*, through his Law firm Messrs. E.K. Mutua & Co. Advocates, was instructed by Malili Ranch Limited to conduct the transaction on its behalf. To that end, the firm received the Board of Directors' resolution to sell the parcel of land known as L.R No. 9918/3.
4. Subsequent upon finalizing the transfer, some shareholders of Malili Ranch Limited, instituted *High Court Civil Case No. 2 of 2010* at Machakos Law Courts. They sought to nullify and to stop the payment of the purchase price. Interim orders were issued in the case but later discharged for having been overtaken by events.
5. Sometimes in December, 2010, an individual by the name *Stephen King'oo Mbuti* lodged a complaint at the Director of Criminal Investigations, the 2nd Respondent herein. He claimed that the sale of L.R No. 9918/3 was fraudulent in that the Petitioner's law firm had irregularly made payments to some members and Directors of Malili Ranch Limited.
6. Following the complaint, Milimani Chief Magistrates Criminal Case No. 2141 of 2009 was commenced against two Directors of Malili

Ranch Limited. In the case, the Petitioner was a witness for the prosecution. At the close of the prosecution's case, the Court found that the accused persons had no case to answer. The Directors were accordingly acquitted.

7. In the year 2014, a fresh complaint was lodged against the sale of L.R No. 9918/3. The Director of Public Prosecutions, the 3rd Respondent herein, charged certain persons including the Directors of the Malili Ranch Company in *Milimani Anti-Corruption Case No. 19 of 2014*. In the case, the Petitioner herein was made a prosecution witness. The case is ongoing.

8. On 10th February, 2020, the Petitioner was taken to the Director of Criminal Investigations (hereinafter referred to as '*the DCI*') headquarters where he was informed that there were instructions from the 3rd Respondent to charge him with the offences of theft of the purchase price paid in respect to the sale of L.R No. 9918/3 and making a false document, to wit, minutes of Malili Ranch Limited.

9. At the DCI the Petitioner's fingerprints were taken. He was thereafter released with the instruction to appear in Court on 12th February, 2020.

10. On the foregoing, the Petitioner lodged an undated Petition seeking the following reliefs: -

a. A conservatory Order/perpetual order of injunction restraining the respondent by themselves, or agents and or employees from arresting detaining, charging and or prosecuting the Petitioner in relation to the above stated matters.

b. A restraining order against the respondents whether by themselves agents and servants and whomsoever acting under their authority or instruction from charging, prosecuting arrest continued harassment questioning or intimidation of the petitioner in the above stated matter.

c. An order of certiorari do issue to bring into this court to quashing the charges in Nairobi Criminal Case No. Of 2020 Republic -vs- Eric Kyalo Mutua.

d. An Order of Stay of Nairobi C.M Criminal Case No.....of 2020 Republic -vs- Eric Kyalo Mutua.

e. A declaration that the arrest charging prosecution of the Petitioner is unconstitutional and therefore null and void ab initio.

f. A declaration that the arrest continued harassment questioning and intimidation of the Petitioner amounts to violation of Articles 27,28,29,35, 39, 47 and 50 of the Constitution.

g. General Damages including aggravated and exemplary damages.

h. Costs of this Petition and interests thereon on (g) above at court rates from the date of judgment until payment in full and final satisfaction of the decree herein.

i. Any other further relief that this honourable Court may deem fit and just to grant.

11. The Petitioner also filed an application by way of a Notice of Motion. The application was dated 12th February, 2020. It was supported by the affidavit sworn by the Petitioner. The application sought conservatory orders restraining the Respondents from arresting, detaining, charging and prosecuting the Petitioner pending hearing and determination of both the application and the main Petition.

12. The application was heard on 18th February, 2020 by *Korir J.* where the Court issued conservatory orders as sought.

13. The matter was then transferred to this Court for hearing and determination.

14. This Court, *suo moto*, asked the parties to submit on the appropriate Division of the High Court for the hearing and determination of the Petition hence this ruling.

The Petitioner's position:

15. The Petitioner filed written submissions dated 9th April 2021. He took the position that the appropriate forum is the Constitutional and Human Rights Division of the High Court.

16. The Petitioner referred to *Samuel Kamau Macharia & Another -vs- Kenya Commercial Bank Ltd & Another* where the Supreme Court held that a Court must only exercise jurisdiction conferred upon it by either the Constitution, the law or both.

17. In stating that this Division of the High Court is vested with jurisdiction to determine the suit, the Petitioner referred to Article 165(3) of the Constitution and submitted that his prosecution was a violation of his rights under Article 27, 28, 29, 35, 39, 47 and 50 of the Constitution.

18. On the foregoing, the Petitioner submitted that the main issues before this Court were whether the criminal proceedings against him constitute an abuse of process of legal process and whether the discretion given to the 3rd Respondent under Article 157 of the Constitution is being abused and as such ought to be interfered with.

19. It was the Petitioner's further submission that all the issues fell within the jurisdiction of this Division. While referring to the Court of Appeal in Civil Appeal No. 62 of 2016 *Christopher Orina Kenyariri t/a Kenyariri Associates Advocates -vs- Salama Beach Hotel Limited & 3 Others*, he submitted that the High Court of Kenya has jurisdiction to hear all matters in which the High Court has been granted authority by the Constitution. In the case, it was observed that '... the High Court of Kenya remains one and the same Court, only that it sits at different locations of the country and where it sits cannot therefore affect its jurisdiction.'

20. Reference was further made to *Ondieki Nyairo -vs- Paul Chepkwony & 2 Others* (2017) eKLR where it was stated that the Practice Directions regarding the mandate of the Anti - Corruption and Economic Crimes Division of the High Court for all matters relating to corruption and economic crimes filed under any of the statutes enumerated in Rule 5 fell within the mandate of that Division.

21. The Petitioner also submitted that the Court in Malindi High Court Constitutional Petition No. 1 of 2017, *Ethics and Anti-Corruption Commission & Another -vs- William Baraka Mtengo & Another*, also dealt with the Practice Directions. The Court stated that the Chief Justice's directions did not take away the constitutional mandate of the High Court, but are rather aimed at promoting efficient and timely disposal of matters touching on corruption and economic crimes. It was also held that the Practise Directions did not take away the jurisdiction of other Learned Judges of the High Court to hear the cases arising from the statutes listed in the Practice Directions.

22. On the foregoing, the Petitioner submitted that the instant dispute does not concern corruption or economic crimes and is, therefore, not a matter for the Anti-Corruption and Economic Division.

23. The Petitioner submitted that he was being charged with theft and making false statement all of which are offences under the Penal Code.

24. It was further his submission that the Charge Sheet originated and was signed at the Muthaiga Police Station as opposed to the Ethics and Anti-Corruption Crimes Commission and that according to Rule 5(d) of the Practice Directions, matters to be heard by the Anti-Corruption and Economic Crimes Division are cases related to corruption and economic crimes filed under the various statutes listed thereunder.

25. In the end, it was submitted that it would be inappropriate for this Court to make a determination that the Petition be instead heard by the Anti-Corruption and Economic Crimes Division.

26. As the 1st Interested Party herein, the Law Society of Kenya, supported the Petitioner's position, I will consider its submissions before the submissions in opposition.

The 1st Interested Party's position:

27. The 1st Interested Party, the Law Society of Kenya, submitted that the Petitioner herein had not been charged before any Anti-Corruption Court and that the Charge Sheet disclosed the charge of stealing and making a false document without authority under the Penal Code. It also reiterated the fact that the Charge Sheet originated from Muthaiga Police Station but not from Ethics and Anti-Corruption Commission.

28. It was its case that the Petition raised issues of violation of the Petitioner's rights in relation to the manner in which the Respondents dealt with his involvement in a conveyance transaction.

29. On the place of the Practice Directions by the Chief Justice, reliance was placed on the Court of Appeal in Malindi Civil Appeal No. 2 of 2016 *Christopher Orina Kenyariri Associates Advocates -vs- Salama Beach Hotel Limited & 3 Others*, *Ondieki Nyairo -vs- Paul Chepkwony & 2 Others* (2017) eKLR and in *Ethics and Anti-Corruption Commission & Another -vs- William Baraka Mtengo & 4 Others* (2017) eKLR.

30. Based on the above, it was the 1st Interested Party's case that the dispute was rightly before this Division of the High Court.

The Respondents' position:

31. The Respondents filed joint submissions dated 9th April, 2021. It was its case that pursuant to Gazette Notice No. 9123 of 2015 all matters relating to corruption and economic crimes that may be filed under any law in the High Court must be lodged and heard by the Anti-Corruption and Economic Crimes Division.

32. It was further its case that under Gazette Notice 10263 of 9th December, 2016 and Gazette Notice No. 7262 of 26th June, 2018, being the Practice Directions for Anti-Corruption and Economic Crimes Division of the High Court, Rule 2 thereof require all cases relating to corruption and economic crimes be filed in the Principal Registry at Nairobi for hearing and determination.

33. It was further submitted that Rules 5 and 6 thereof provides that the Anti-Corruption and Economic Crimes Division of the High Court shall hear Petitions and Judicial Review applications on claims of infringement or threatened infringement of constitutional rights relating to corruption and economic crimes.

34. It was the Respondents' case that according to Rules 7 and 8 of the Practice Directions, all cases relating to corruption and economic crimes which have been filed before other stations or Divisions of the High Court in which hearing had not commenced ought to be transferred to the Anti-Corruption and Economic Crimes Division.

35. Butressing the position, the Respondents referred to *Tom Ojienda -vs- Ethics and Anti-Corruption Commission* (2020) eKLR where the Court referred to the case of *Christopher Kenyariri t/a Kenyariri Associates Advocates* where it was observed that: -

The Court of Appeal appreciates that the practice directions and requirement that suits be filed at a particular stations of the High

Courts are purely for administration and convenience in the hearing and determination of suits. Such mechanisms reduce costs and expedite hearing and determination of suits.

36. The decision in *Ethics and Anti-Corruption Commission & Another -vs- William Baraka Mtengo & 4 Others* (2017) eKLR was also referred where the Court stated that: -

The practice directions are aimed at promoting efficient and timely disposal of matters touching on corruption and economic crimes. There must have been reasons that informed the establishment of the Division.

37. Support was also found in *Ondieki Nyairo -vs- Paul Chepkwony & 2 Others* (2017) eKLR where the import of Rule 5 was referred to in the following manner: -

All matters relating to corruption and economic crimes filed under any of the Acts enumerated in rule 5 fall within the mandate of the Division. It would defeat the purpose of the establishment of the Division if we were to engage in splitting of hairs and argue that the matter does not fall within its mandate because it does not involve prosecution for corruption, yet it seeks orders and sanctions that are within the mandate of the Court when dealing with cases initiated under the Acts enumerated in the Practice Directions.

38. Based on the said observations and findings, the Respondents submitted that the Petition, having arisen from the arrest and subsequent arraignment of the Petitioner in the impugned criminal case, then the Petition fell squarely within the ambit of Rules 5 and 6 of Practice Directions and that the Anti-Corruption and Economic Crimes Division of the High Court is the appropriate forum and as such this matter ought to be accordingly transferred to that Division.

The 2nd Interested Party's position:

39. The 2nd Interested Party herein, the Ethics and Anti-Corruption Commission did not participate in the matter.

Analysis and Determination:

40. The jurisdiction of the High Court is donated by the Constitution under Article 165(3). That fact is not in contest.

41. This Court's request for address on the appropriate forum for determination of the dispute herein was informed by the circumstances of the suit and Section 11 of *High Court (Organisation and Administration) Act*.

42. The provision is on the Divisions of the High Court.

43. Pursuant to Section 11(1)(h) thereof, My Lord the Chief Justice Hon. David Kenani Maraga, (as he then was) through *Gazette Notice No 10263* of 9th December, 2016 issued Practice Directions titled *Practice Directions for the Anti-Corruption and Economic Crimes Division of the High Court*.

44. Rule 5 of the said Practice Directions provides for the scope of the Anti-Corruption Court in the following manner: -

Scope of Mandate

5. The following matters shall be heard by the Anti-corruption and Economic Crimes Division of the High Court—

(a) petitions and Judicial Review applications on claims of infringement or the threatened infringement of constitutional rights relating to corruption and/or economic crimes related matters;

(b) all proceedings relating to corruption and economic crimes over which the Magistrates' Anti-Corruption Court has no jurisdiction;

(c) all criminal reviews, revisions, appeals and any other applications arising from decisions of the special Magistrates appointed under Section 3 of the Anti-Corruption and Economic Crimes Act, 2003;

(d) cases relating to corruption and economic crimes filed under the following Acts:

(i) Anti-Corruption and Economic Crimes Act, Cap. 65.

(ii) Proceeds of Crime and Anti-Money Laundering Act, Cap. 59B'.

(iii) Anti-Counterfeit Act, Cap. 130A

(iv) Leadership and Integrity Act, Cap. 182.

(v) Public Procurement and Asset Disposal Act, No. 33 of 2015.

- (vi) Public Officers Ethics Act, Cap. 183.
- (vii) Public Finance Management Act, No. 18 of 2012.
- (viii) Extradition (Contiguous and Foreign Countries) Act. Cap. 76.
- (ix) Extradition (Commonwealth Countries) Act, Cap. 77.
- (x) Prevention of Organized Crimes, Cap. 59.
- (xi) Mutual Legal Assistance Act, Cap. 75A.
- (xii) Regional and International Treaties and Conventions on Anti-Corruption.
- (xiii) Or filed under any other enabling provisions of law.

(e) Disputes touching on or related to—

- (i) offences or the recovery, or protection of public property, or
- (ii) the tracing of, freezing of, or confiscation of proceeds of corruption or related to corruption and money laundering, and,
- (iii) the payment of compensation of proceeds of corruption and economic crimes.

45. I have keenly interrogated the submissions by the parties and the factual background of the matter. I have also perused the Charge Sheet in the impugned criminal case.

46. Count I of the Charge Section reads as follows: -

Stealing contrary to Section 268(1) as read with Section 275 of the Penal Code.

47. The particulars of the charge read as follows: -

ERICK KYALO MUTUA: Between 25th June 2009 and 19th March 2010 at Nairobi/Machakos Counties within the Republic of Kenya, jointly with others before Court stole a sum of Kshs. 553,831,731.15 being the sale proceeds of 5000 acres of land L.R No. 9918/3 that was sold to the Government of Kenya (Ministry of Information and Communication) the property of Malili Ranch Limited.

48. Count II read are as follows: -

Making a false document without authority contrary to section 357 of the Penal Code

49. The particulars of the count are as follows: -

ERICK KYALO MUTUA: On 28th of November 2009, at Makueni/ Machakos/Nairobi Counties within the Republic of Kenya, jointly with others before court and with intent to defraud made an unlawful document to wit minutes of Directors of Malili Ranch Limited, purporting it to be a genuine resolution passed by the registered members of Malili Ranch Limited namely replacing Peter Kanyi and Kilonzo Maweu as Chairman and Secretary respectively a fact you knew to be false.

50. A careful look at the charges *vis-à-vis* the provisions of Rule 5 of the Practice Directions for the Anti-Corruption and Economic Crimes Division of the High Court seem not to align. The offences are not among those covered under the said rule. Instead, the offences are provided for under the Penal Code.

51. It, therefore, follows that if the Petition herein is unsuccessful, then the criminal case will revert to the mainstream Criminal Courts and not under the Anti-Corruption Court despite the fact that an earlier criminal case over the same subject was instituted before the Anti-Corruption Court.

52. With that finding, this Court is capable of disposing the issue.

53. In the end, this Court makes the following final orders: -

a. The Constitutional and Human Rights Division of the High Court is the appropriate forum for hearing and determining the Petition herein.

b. Parties shall comply with the directions made on 21st October, 2020 on the filing and service of written submissions, if not yet, within 30 days of today.

c. Highlighting of the submissions on a date to issue.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF DECEMBER, 2021

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Mr. Cecil Miller, Counsel for the Petitioner.

Mr. Momanyi, Counsel for the Respondents.

Messrs. Muchemi & Co., Advocates for the 1st Interested Party.

No appearance for the 2nd Interested Party.

Elizabeth Wanjohi – Court Assistant