



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

ACEC CASE NO. 28 OF 2019

(PREVIOUSLY MOMBASA PETITION NO. 155 OF 2019)

IN THE MATTER OF : ARTICLES 2(1) & (5), 22, 23, 165(3), 159

AND 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF

**FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2(1) AND (5), 3, 10, 25(C), 27, 29, 47(1), 50, 79, 157(11), 159
AND 245 (4) OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF: SECTIONS 53, 55 AND 57 THE ADVOCATES

ACT – CAP 16 LAWS OF KENYA

BETWEEN

GEORGE MUGOYE MBEYA.....APPLICANT

V E R S U S

ETHICS & ANTI-CORRUPTION COMMISSION..... 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

THE CHIEF MAGISTRATE’S COURT, MSA..... 3RD RESPONDENT

RULING

1. George Mugoye Mbeya (hereinafter “the Petitioner/Applicant”) moved this Court vide a Petition dated 30th September 2019 and filed the same day seeking orders as follows;

(a) A declaration be and is hereby issued that the arrest and consequential preferment of charges by the 1st and 2nd Respondents against the Petitioner on complaints in respect of the Petitioners’ instructions to act for Christopher Odhiambo Karani, in his professional capacity as an Advocate is unconstitutional.

(b) An order of certiorari be and is hereby issued to bring into the High Court and quash the charge sheet dated 25th July 2019 together with the entire proceedings in Mombasa ACC No. 7 of 2019 Republic v. Christopher Odhiambo Karani, George Oguna, Mohamud Adan Mohamed and George Mugoye Mbeya in so far as they relate to the Petitioner.

(c) An order of injunction and/or prohibition be and is hereby issued restraining the Respondents from continuing with the

criminal prosecution of the Petitioner in Mombasa ACC No. 7 of 2019 Republic v Christopher Odhiambo Karani, George Owino Oguna, Mohamud Adan Mohamed and George Mugoye Mbeya in respect of any offences related to the dispute in Siaya Election Petition No. 1 of 2017, the affairs of Christopher Odhiambo Karani.

(d) An order be and is hereby issued prohibiting any criminal proceedings against the Petitioner in Mombasa ACC No. 7 of 2019 Republic v Christopher Odhiambo Karani, George Owino Oguna, Mohamud Adan Mohamed and George Mugoye Mbeya in respect of any offences related to the dispute in Siaya Election Petition No. 1 of 2017 the affairs of Christopher Odhiambo Karani.

(e) The costs of this Petition be borne by the Respondents.

(f) Any other orders that this Honourable court may deem fit to grant.

2. Contemporaneously filed with the Petition is a Notice of Motion seeking conservatory orders pending hearing and determination of the Petition. The said application was heard before J. Ogola Presiding Judge Mombasa who granted the same and stayed criminal proceedings against the Petitioner/Applicant in **Mombasa chief Magistrate's Anti-Corruption Case No. 7 of 2019.**

3. On 26th February 2020, the Petitioner's counsel Mr. Makhanu then holding brief for Havi alerted the court that the criminal proceedings against the Petitioner/applicant then pending before Mombasa Chief Magistrate's Court had been withdrawn. The criminal proceedings having been the central reason why the Petition was filed, the court advised parties to consider the status of the Petition now that there were no criminal proceedings in force to be prohibited or quashed. The Petitioner was given time to consider whether he was still interested in pursuing the Petition.

4. On 20th May, 2020 the Petitioner insisted on proceeding with the prosecution of the Petition. Counsel for the Petitioner sought leave to amend the Petition to include a claim for damages. Mr. Adere Advocate who had filed an application dated 26th November 2019 seeking joinder of Law Society of Kenya as an Interested Party withdrew their application.

5. Mr. Mwenda for the DPP indicated that they had no objection to grant of leave to amend the Petition. However, the court directed the Petitioner to file a formal application seeking leave to amend the Petition.

6. Subsequently, the Petitioner filed his application dated 27th May 2020 seeking leave to amend the Petition so as to include a claim for damages. The application is supported by an affidavit sworn on 27th May 2020 by the Petitioner/Applicant. It is accompanied by a draft amended Petition in which the Applicant claims that criminal charges against him in **Mombasa Anti-Corruption Case No. 7/2019** were withdrawn under Section 87(a) of the Criminal Procedure Code on 6th February 2020. That having undergone tribulations in the process of arrest and arraignment in court for malicious prosecution, he is entitled to compensation on account of injury caused to his person and profession and punitive damages on account of the Respondent's conduct.

7. The Applicant sought to include additional prayers or reliefs as follows;

(aa)A declaration be and is hereby issued that the arrest and incarceration of the Petitioner for a period of over 24 hours by the 1st and 2nd Respondent violated the Petitioner's right to be arraigned in court within 24 hours, as guaranteed by Article 49(1) (f) of the Constitution of Kenya.

(ab)The Petitioner be and is hereby awarded compensatory and punitive damages as against the Respondents, for the unlawful arrest, defamation, incarceration and the unlawful deprivation of the Petitioner's freedom of movement and liberty.

8. During the hearing, Mr. Havi for the Petitioner urged the court to grant leave to the Petitioner pursuant to Rule 18 of the Constitution of Kenya Practice Directions of 2013 by the Chief Justice commonly referred to as the Mutunga Rules. Learned counsel contended that the intended amendment is not prejudicial to the Respondent. That the Respondent will be prejudiced by having some of the facts and particulars of his Petition shut out.

9. In response by the 1st Respondent, Mr. Makori counsel appearing for the EACC filed Grounds of Opposition dated 16th June 2020 stating that: the application is an utter abuse of the court process; that the inclusion of new reliefs in the Petition marked as "aa" and "ab" does constitute a new cause of action that is distinct and separate from the Petition dated 28th September 2019; the application is an afterthought following the prosecution's withdrawal of criminal proceedings in **Anti-Corruption Case No. 7/2019**; the Applicant does not espouse further particulars of how and when the Petitioner's constitutional rights were contravened by the 1st Respondent; application is bad in law as it does not meet the requisite legal threshold for grant of the leave sought and, that the Petitioner has not demonstrated the prejudice likely to be suffered if leave is not granted.

10. During the hearing, Mr. Makori adopted his Grounds of Opposition aforementioned. He contended that the prayer for damages is purely a separate suit which has nothing to do with violation of the Petitioner's rights. Lastly, Mr. Makori expressed the view that the amendment and inclusion of new reliefs will further delay the disposition of the Petition.

11. On their part, the 2nd Respondent filed Grounds of Opposition too dated 8th June 2020 stating that; the Petitioner has not adduced any evidence to show that criminal proceedings against the Petitioner were mounted with ulterior purpose and that the DPP acted in excess of powers conferred upon him or even abused court process; the Petitioner has not demonstrated that he has suffered substantial loss by withdrawal of criminal proceedings by the 2nd Respondent; that it is in public interest that complaints regarding crime once reported must be

investigated and charges filed in court and, that the Petition is without merit and amounts to abuse of the court process.

12. In his oral submissions, Mr. Mwenda reiterated the Grounds of Opposition aforesaid hence urged the court to dismiss the application.

13. In his rejoinder, Mr. Havi contended that the withdrawal of criminal charges against the Petitioner / Applicant is a confirmation that indeed the Petitioner's rights were violated. That to institute a separate suit will amount to litigation by instalments.

Determination

14. I have considered the application herein and draft amended Petition attached thereof. I have also considered the Grounds of Opposition filed by both Respondents and counsel's oral submissions. The only issue for determination is whether the Petitioner/Applicant has satisfied the requirements for amendment of pleadings in this case the Petition.

15. The Applicant/petitioner is seeking to amend the petition so as to include the remedy of damages which was omitted in the original Petition. Although admitted that the amendment may have been accelerated by the 2nd Respondent's withdrawal of criminal charges against the Applicant, the Applicant's argument is that there is no harm in amending the pleadings so as to determine all issues together to avoid litigation in instalments.

16. The real objective of amendment of pleadings is to facilitate a litigant to plead all necessary issues of the claim to which as a party seeking an amendment is entitled to make in his cause of action and that a party should always where such amendments are justified be allowed to apply for amendment for proper determination of real issues in controversy to avoid a multiplicity of suits. See Central Kenya Ltd v. Trust Bank Ltd (2002)EA 365.

17. In Petition No. 177/2015 Mombasa Cement Limited v. Speaker of the National Assembly and 2 Others (2016)eKLR the court had this to say:-

“The general rule when it comes to amendments of pleadings is that amendments ought to be freely allowed so long as they do not occasion any prejudice to the party facing them.”

18. Similar position was held in the case of Kooba Kenya Limited v. County Government of Mombasa (2018)eKLR where the court stated that:-

“It is now a tradition of law and practice that amendments to pleadings should not be unduly denied unless the proposed amendment is so frivolous and would not help the court to arrive at a proper determination of the suit. It is also trite law now that to avoid a multiplicity of suits, applications to amend pleadings should be granted so that all the issues pertaining to similar transactions may be resolved in one suit.”

19. The Petitioner's/Applicant's original Petition is hinged on prayers for declaration that the recommendation by the 1st Respondent and the subsequent 2nd Respondent's preferment for his prosecution was illegal and malicious. That the same was decided in bad faith, with ulterior motive and without taking into account that being a Legal Practitioner he was being victimized for acts done in the course of discharging his professional duties as an Advocate.

20. Under Article 23, the High Court has jurisdiction to hear and determine the applications for redress of denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights. Article 22(1) also provides that every person has the right to institute civil proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or impugned, or is threatened.

21. Article 23(3) does provide remedies that a court may grant upon proof of the Rights or Fundamental Freedoms violated or threatened to be violated. Among such reliefs are; a declaration of rights, injunction, a conservatory order, a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; order for compensation and or order of Judicial Review.

22. The Petitioner/Applicant is seeking to amend the Petition to include a relief of compensation as provided under Article 23(3) of the Constitution. Under Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, amendment of pleadings in constitutional reference Petitions is provided as follows;

“A party who wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the court.”

23. When it comes to amendment of pleadings, the court is clothed with wide discretionary powers which must be exercised judiciously for the ends of justice to be met. A court seized of an application for leave to amend pleadings is duty bound to weigh carefully whether the application is frivolous, unfounded, baseless, vexatious or merely amounts to abuse of the court process and that the amendment is not likely to add any value to the petition and that it will be prejudicial to the Respondent.

24. In this case, the hearing of the Petition has not taken off. The Applicant is claiming that he is entitled to compensation for the tribulations he suffered upon arrest and arraignment in court based on malicious investigation and prosecution. On the other hand, the Respondents are claiming that the amendment is an afterthought coming up immediately after the 2nd Respondent had withdrawn criminal charges against the Applicant/Petitioner and that he should file a separate suit.

25. Compensation is one of the remedies provided under Article 23(3) of the Constitution subject to proof of violation of any constitutional rights or breach of fundamental freedom/s. It is incumbent upon the Applicant/petitioner to prove how his rights or fundamental freedoms were or have been violated so as to claim compensation.

26. The allegation and proof of such violation is a matter of evidence which cannot be canvassed at this stage. For the Respondents to allege that the Applicant/petitioner has not proved by way of evidence or demonstrated that his rights or fundamental freedoms have been violated is to demand premature submission of evidence even before the hearing commences. They should preserve that argument for the main hearing. The court cannot determine on the merits or demerits of the Petition at this stage.

27. Whereas the Applicant may lose out on compensation if the amendment is not allowed to enable him prove his case, the Respondents have not demonstrated that they are likely to suffer prejudice by the Applicant being given an opportunity to articulate their case after amending the petition. Access to justice under Article 48 is a constitutional right entitled to a litigant who has a dispute capable of litigation before an independent court or tribunal.

28. It will amount to a travesty of justice if litigants are to be prematurely shut or locked out of the legal process without justification. Unless a case is totally hopeless, frivolous and unfounded, each party should be allowed and facilitated to have his day in court and it is for the court to determine after considering all material or evidence submitted by parties before it. Therefore, it is my finding that the respondents have not demonstrated that they will suffer prejudice by the applicant amending his petition.

29. From the circumstance of this case, it will not be necessary for the Applicant to file a separate suit to claim compensation when the law allows consideration of the same cause of action in this petition. To avoid a multiplicity of suits arising out of the same transaction and to save on courts' time and unnecessary costs on parties by filing a separate suit, it is prudent that the claim for compensation be allowed to proceed to determination together with the other prayers.

30. In any event, Mr. Mwenda for the DPP had on 26th May 2020 indicated that he had no objection to the amendment of the Petition. For him to change thereafter and file Grounds of Opposition is a sign of not being sincere to the court .

31. Having considered the application and circumstances under which it has been filed and further having considered the applicable provisions of the law and relevant judicial precedents relating to amendment of pleadings, it is my finding that the application or amendment of the Petition is justified and the same is allowed as prayed with orders;

(a) That the amended draft Petition attached to the application for leave to amend petition be and is hereby deemed as duly filed.

(b) That the draft amended Petition be served upon the Respondents within 7 days from the date of delivery of this Ruling.

(c) That the Respondents to file their response if any within 14 days from the date of service.

(d) Regarding costs, the same should be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF AUGUST, 2020.

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J. N. ONYIEGO

JUDGE