



**IN THE REPUBLIC OF KENYA**

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

**PETITION NO. 38 OF 2014.**

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 27,**

**28, 47, 48, 49, 73, 159, 165 (3) (d) 258 AND 259 OF THE**

**CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE CONSTITUTION**

**AND IN THE MATTER OF VIOLATION OF THE RIGHT TO HUMAN DIGNITY, FAIR ADMINISTRATIVE ACTION AND PROTECTION OF FREEDOM AND SECURITY OF PERSON AND LIBERTY AND**

**IN THE MATTER OF ABUSE OF OFFICE BY THE 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS**

**BETWEEN**

**KIMUNAI OLE KIMEIWA.....1<sup>st</sup> PETITIONER**

**DAN ASHITIVA DAUDI .....2<sup>nd</sup> PETITIONER**

**SYLVESTER KIBET TOTONA.....3<sup>rd</sup> PETITIONER**

**MUSA CHEMITEI KIPKAMBA.....4<sup>th</sup> PETITIONER**

**AMOS KIBET KONYAEL.....5<sup>th</sup> PETITIONER**

**FRANCIS MUNGAI THUO .....6<sup>th</sup> PETITIONER**

**AND**

**JOSEPH MOTARI MOSIGISI**

**(THE THEN DISTRICT COMMISSIONER,**

**RONGAI DISTRICT) .....1<sup>ST</sup> RESPONDENT**

**DISTRICT CRIMINAL INVESTIGATION**

**OFFICER NAKURU DISTRICT.....2<sup>ND</sup> RESPONDENT**

**PRINCIPAL SECRETARY, MINISTRY OF**

**INTERIOR COORDINATION OF NATIONAL GOVERNMENT.....3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

## RULING

1. In a judgment dated 16/01/2018, this Court found for the Petitioners in the present case holding that the Respondents in the case were liable for the constitutional violations suffered by the Petitioners. The Court awarded each of the Petitioners compensation of Kshs. 800,000/- per person for the violations.

2. The Petition had been drawn as against four Respondents. The first Respondent, named by name in the Petition, was Joseph Motari Mosigisi. He is the Applicant in the present Application. The Applicant was the District Commissioner of Rongai District when the alleged constitutional violations against the Petitioners (Respondents herein) happened.

3. The Petition particularized specific allegations against the Applicant and sought to establish liability against him in his personal capacity. This became a substantive issue taken up in the Petition. The Applicant and the Honourable Attorney General raised the objection in their defence. Parties submitted on the issue. The Court made a specific finding on the issue. The Court ruled as follows:

*20) The Respondents argue that the 1st Respondent is a public officer and he should not have been sued in his individual capacity.*

*21) The Respondents are correct that when sued as a result of discharging one's duties or functions, the proper course is to sue the Attorney General or the office and not the individual officer in their personal capacity. However, there are times when a particular Petitioner may feel that a public officer conducted himself so flagrantly that they were acting on their own; on their own frolic so to speak. In such circumstances, the Petitioner is at liberty to sue the public officer on their own in addition to suing the Government.*

4. Then, regarding the factual findings of what the Applicant was accused of doing, the Court made the following findings:

*The Petitioners say that they were being used as "sacrificial lambs"; that the real target was Hon. Luka Kigen who had differences with the 1st Respondent. They claim that the act of disinternment was actually done by the office of the 1st Respondent and that their arrests were baseless. They claim that the 1st Respondent wanted them to falsely confess that it was Hon. Kigen who had disinterred the body and that they were only charged when they refused to do so.*

*The Petitioners say that the "entire trial was shambolic and abusive of process as the complainants were never disclosed in any real sense nor was there any remote connection between the crime and the Petitioners. It was a classic case of abuse of power of the people of Kenya and the security apparatus of the country" against the Petitioners. They believe that the criminal process was used to harass them and settle political scores in a ploy stage-managed by government officials.*

*All these factual allegations are not responded to or disputed by the Respondents. They are, therefore, taken to be established. In my view, if one gleans at the proceedings, the ruling by the Learned Magistrate, one will be justified to believe the theory advanced by the Petitioners that this was nothing but malicious use of the criminal justice system.*

5. With their judgment in hand, the Petitioners have sought to enforce it. Their first port of call has been execution against the Applicant. Their reasoning is clear enough: they sued him in his personal capacity jointly with the Government; the Court ruled that this was proper; and that, therefore, he was liable to pay the Petitioners.

6. The Applicant, with the support of the Honourable Attorney General, resists that approach. He has filed the present Application seeking the following substantive prayers:

*c. That there be a stay of execution and stay of the Warrant of Attachment and Sale of Moveable property, Judgment and it's entirely Decree entered on 16th January, 2018 as against the 1st Respondent pending the hearing and determination of this Application inter-parties.*

*d. That this Honourable Court be pleased to issue a declaration that the Judgment can only be satisfied by the 3rd and 4th Respondent since this is a judgment which arose against Government officer pending the hearing and determination of this Application inter-parties.*

*e. That there be a stay of execution and stay of the Warrant of Attachment and Sale of Moveable property, Judgment and it's entirely Decree entered on 16th January, 2018 as against the 1st Respondent and any other consequential orders in this suit.*

*f. That the Honourable Court be pleased to issue any other order as may seem just.*

*g. That the cost of this Application be provided for.*

7. The Application is opposed. The Application was argued by way of Written Submissions.

8. The Applicant's submissions were filed by the Honourable Attorney General. The Honourable Attorney General frames the singular issue as: whether execution of judgment against the Applicant in his personal capacity is lawful and justified.

9. The Honourable Attorney General argues that personal liability should not attach to State Officers sued in their official capacity. He argues that the pleadings show that the Petitioners had sued the Applicant in his personal capacity and that they should not be allowed to execute against him now. The Honourable Attorney General argues that there is nothing in the judgment of the Court that says that the Applicant was found to have "acted on his own frolic or any circumstances justifying personal liability."

10. Further, the Honourable Attorney General argues that the paragraph in the Court’s judgment cited above was obiter dictum and not the *ratio decidendi* of the case. As such the paragraph should not be used to execute against the Applicant in his personal capacity. The Honourable Attorney General insists that the intended execution, warrant of attachment and sale of Applicant’s property in satisfaction of the Court’s judgment and decree is “premature, unwarranted, illegal and unlawful” and that it is a “classic case of abuse of the court process” “intended to intimidate a former state officer who has since retired from the public service.”

11. With respect, the Honourable Attorney General attempts to re-litigate an issue that was squarely before the Court; and issue which, as pointed out above, was submitted on and the Court pronounced itself on. As clearly pointed out above, the holding of the Court respecting the propriety of suing the Applicant in his personal capacity was an issue before the Court. The Court made a finding of law and fact. The Court held that as a matter of law it was proper, in the circumstances of this case, to sue the Applicant in his personal capacity. The Court further held that as a matter of fact the Applicant was liable for his actions against the Respondents.

12. Those findings may have been unpalatable and unsatisfactory to the Applicant and the Honourable Attorney General. If so, the appropriate step for them to take would have been to file an appeal.

It is, with respect, too late in the day to seize the same arguments dismissed during trial and weaponize them in resistance to the execution of the unchallenged judgment.

13. This Court is, by constitutional definition and design, potentially fallible. However, the constitutionally mandated path to discovering and demonstrating its fallibility and reversing the effects of such fallibility is not to invite the self-same holder of its office to “change his mind” on an issue he has already determined through a stealth review application like the one before the Court. The path divined by the Constitution and statutory law is *vide* an appeal to the Court of Appeal. This is the reason the review jurisdiction of the Court is radically circumscribed. There are fundamentally good reasons for such circumscription – including the fact that litigation at a given rung of the Court system must come to an end. An aggrieved party is entitled to seek an appeal – but to the higher Court; not to vex his adversaries in the same Court.

14. In the case at bar, the Court considered the facts of the case and the law and announced a rule of law that a public servant who travels outside the remit of his office and acts maliciously towards his fellow citizens and thereby inflicts actual injury or emotional distress to such citizens loses the personal protection and immunity afforded to him by virtue of his public office. Such an official is, in the famous Torts-speak, on a frolic of his own. On such a frolic, he should expect consequences of his actions; consequences which are not inoculated by either the Constitution or statutory law.

15. In announcing and applying this rule of law to the case at bar, the Court was reminding all public servants that their offices are clothed with public power to be exercised in accordance with the Constitution, the law and their oath of office. Public Officers should not excitedly and maliciously exercise power at the behest of the politically powerful to harm those perceived to be on the wrong side of the political divide at the given political moment. The rule of law this Court announced and applied was to remind public servants that political power and public office are transient. They pass. But the Rule of Law is, by our Constitution, enduring. The arc of history might be long; but it unfailingly arcs towards justice.

16. If this Court was wrong in discovering this eternal rule of law in the subtext of our Constitution, statutory and decisional law, let the higher Court say so. And the only way to bring the question within the purview of the higher Court is through an appeal.

**17. For these reasons, this Application is dismissed with costs.**

18. Orders accordingly.

**Dated and delivered at Nakuru this 12<sup>th</sup> day of November, 2020**

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**JOEL NGUGI**

**JUDGE**