



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION NUMBER 16 OF 2017

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 12, 19, 20, 21, 22, 23, 27, 38, 50, 73, 75, 76, 80, 21, 201, 258, AND 260 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE LEADERSHIP AND INTEGRITY ACT, ACT NO 19 OF 2012

AND

IN THE MATTER OF THE ELECTIONS ACT, ACT NO. 24 OF 2011

AND

IN THE MATTER OF THE ELECTION OFFENCES ACT, NO. 11 OF 2011

AND

**IN THE MATTER OF GOVERNOR PETER GATIRAU MUNYA USING PUBLIC RESOURCES
IN HIS POLITICAL ACTIVITIES**

BETWEEN

FRANCIS CURUKIAPETITIONER

VERSUS

HON. PETER GATIRAU MUNYA.....1ST RESPONDENT

COUNTY GOVERNMENT OF MERU.....2ND RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....3RD RESPONDENT

COMMISSION ON ADMINISTRATIVE JUSTICE.....INTERESTED PARTY

RULING

Preliminary Objection: court has no jurisdiction

[1] A Notice of Preliminary Objection was given by the 1st and 2nd Respondent on 24th July 2017 against the Petitioner's Notice of Motion application and Petition dated 21st July 2017. The Objection entails:

1. THAT this Honourable Court lacks jurisdiction and capacity to investigate any issue to establish whether or not allegations of corruption and/or misappropriation of funds against the 1st and 2nd Respondents have been made out.

2. THAT this petition is fundamentally and incurably defective in form and in substance and the same is premature and malicious since there is an established procedure under the Constitution, the Leadership and Integrity Act, 2012 and the Ethics and Anti-Corruption Commission Act, 2011 [No. 22 of 2011] for dealing with the allegations in the nature of those complained of in this petition.

3. THAT the Petitioner has relied on inadmissible documents with no probative value.

4. THAT the petition is incompetent, bad in law, misconceived and an abuse of the Honourable Court's process.

[2] The grounds on which the Petitioner has based his application is that the 1st Respondent is using public resources in his political activities. He alleges that the 1st Respondent organized for the launch of his re – election manifesto disguised as ‘YOUTH BUSINESS CHALLENGE AND SPORTS DAY’ at Kinoru Stadium on Sunday 23rd July 2017 where the budget of Kshs. 19 Million was drawn from public resources from Meru County Department of Culture, Gender, Sports, Youth & Social Service. That by the 1st Respondent having access to public resources by virtue of his office, he has gone ahead to place advertisements in the media to his personal benefit in contravention of section 14 (2) Election Offences Act, which prohibits publication of any advertisements of the respective government either in the print media, electronic media, or by way of banners or hoarding in public places during the election period. The 1st Respondent having access to public resources by virtue of his office has gone ahead to use county vehicles and other facilities at his disposal to initiate projects under the guise of development. That his actions of misusing public resources are not only unconstitutional but are a breach of the national values and principles of Leadership under Chapter Six and the principles of Public Finance under Article 201 of the Constitution.

[3] In light of the above is the preliminary objection by the 1st and 2nd Respondent merited? I will not re-invent the wheel. It is now abundantly clear that a “preliminary objection” consist in a point of law which must not be blurred with factual details that require probing of evidence; it must be straight-forward point which upon determination will dispose of the entire case. On this see the opinion by **Law JA** in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696* when he rendered himself thus:

“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Similarly **Sir Charles Newbold** in the same case stated that:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.”

See also the case of *Oraro vs. Mbaja [2005] 1 KLR 1410* **jwang, J** (as he then was).

[4] Applying the test of law, the court confined the objection to matters of jurisdiction only. Needless to state that the question of admissibility of documents is a matter for trial and I will not consider it here. I will, therefore, examine only the objection on jurisdiction. The sweetest canticle to ever be composed on jurisdiction was by Nyarangi JA in the case of Lilian "S" that "**Jurisdiction is everything**". If, therefore, I come to the conclusion that this court does not have jurisdiction to hear this matter, it will mean that I will strike out the Petition as well as the application which invariably saddles upon the Petition. See the Supreme Court decision in the **Hassan Nyanje Charo v Khatib Mwashetani & 3 others [2014] eKLR** where it was stated that:

"A preliminary objection founded on an allegation of lack of jurisdiction, like the present one, has the potential of striking out a party's matter, if allowed."

Therefore I should ask:-

- 1. Whether this Honourable Court lacks jurisdiction and capacity to investigate allegations of corruption and/or misappropriation of funds against the 1st and 2nd Respondents.**
- 2. Whether there is an established procedure under the Constitution, the Leadership and Integrity Act, 2012 and the Ethics and Anti-Corruption Commission Act, 2011 [No. 22 of 2011] for dealing with the allegations in the nature of those complained of in this petition.**
- 3. Whether this petition is incompetent, bad in law, misconceived and an abuse of the Honourable Court's process.**

[5] It has been argued that ground 5 of the Petitioner's application states that the 1st Respondent's actions of misusing public resources are in breach of the principles of Leadership under Chapter Six. As such are matters of corruption, financial impropriety and breach of integrity qualities should be referred to the Ethics and Anti-corruption Commission and other relevant institutions established for that purpose but not the court. Mr Kiogora argued that this court has jurisdiction under article 165 of the Constitution. He stated that these improprieties are being committed by a person with access to public resources to fund his personal campaigns. These improprieties according to Kiogora impinge on free and fair elections guaranteed under article 83 of the Constitution. He did not stop there; he argued that the issues raised in this petition are quite nascent and have not been litigated before. These arguments bring me to the point where I must place the cause of action herein in its proper perspective, I should state that Chapter Six of the Constitution was given practical application when Parliament established implementing institutions thereto. Thus, Ethics and Anti-Corruption Commission (EACC) is one of the independent commissions established by virtue of Article 79 as read together with Article 252 of the Constitution for the purpose of ensuring that public officers conduct themselves in line with the tenets and qualities of integrity for leadership enshrined in Chapter Six of the Constitution. Article 79 states:

"Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter."

The Ethics and Anti-corruption Commission (EACC) was accordingly established through the Ethics and Anti-Corruption Commission Act, No. 22 of 2011 (hereafter EACC Act). Some of the functions of the EACC are specific in Section 11 of the EACC Act. Section 11 (1) (c), (d) and (e) to be:

"(1) In addition to the functions of the Commission under Article 252 and Chapter Six of the Constitution, the Commission shall—

(a) ...

(b) ...

(c) receive complaints on the breach of the code of ethics by public officers;

(d) investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or violation of codes of ethics or other matter prescribed under this Act or any other law enacted pursuant to Chapter Six of the Constitution;

(e) recommend appropriate action to be taken against State officers or public officers alleged to have engaged in unethical conduct.”

It is important to also state the general functions and powers of an independent commission provided in Article 252 of the Constitution, to wit:

“(1) Each commission, and each holder of an independent office—

(a) may conduct investigations on its own initiative or on a complaint made by a member of the public;

(b) has the powers necessary for conciliation, mediation and negotiation;

(c) shall recruit its own staff; and

(d) may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution.

(2) A complaint to a commission or the holder of an independent office may be made by any person entitled to institute court proceedings under Article 22 (1) and (2).

(3) The following commissions and independent offices have the power to issue a summons to a witness to assist for the purposes of its investigations—

(a) the Kenya National Human Rights and Equality Commission;

(b) the Judicial Service Commission;

(c) the National Land Commission; and

(d) the Auditor-General. “

I should add that the foregoing are not the only laws which EACC is or is one of the implementing institution. There are other, most notable being the Anti-corruption and Economic Crimes Act and Leadership and Integrity Act.

[6] And in accordance with the law I have stated above, allegations of corruption, financial impropriety, and breach of tenets of integrity against a state or public officer should be reported to and be investigated at first instance by the EACC. The relevant law provides for steps to be taken by EACC on such complaints and action to be taken upon completion of investigation. Depending on the result of investigation EACC is required to forward the file to the DPP with specific recommendations and may recommend the file to be closed or charges be levelled or surcharge the person or make any other recommendation provided in law. The DPP is the authority with the power to institute and undertake criminal proceedings against any person before the court as per article 157 of the Constitution and Section 5 of the Office of the Director of Public Prosecutions Act, 2013 [No. 2 of 2013].

[7] Section 42 of the Leadership and Integrity Act, No. 19 of 2012 is also of specific importance in these proceedings. It states that any person who alleges that a state officer has committed a breach of code may lodge a complaint with the relevant public entity and then the public entity shall register and inquire into the complaint. Section 43 states the action to be taken upon completion of the investigations. Section 43

(1) states that:

“If upon investigation under this Part, the public entity is of the opinion that civil or criminal proceedings ought to be preferred against the respective State Officer, the public entity shall refer the matter to –

- a. the Commission or the Attorney – General, with respect to civil matters;**
- b. the Director of Public Prosecutions, with respect to criminal matters; or**
- c. any other appropriate authority.”**

[8] I will now juxtapose these laws with the cause of action filed in this court to establish whether this court is the right forum to deal with it. Case law is useful companion here. There is ample judicial decisions on this subject but I will not multiply them. Except, I am content to cite the case of **Benjamin Ndolo Wambua & Another vs. The County Secretary Nairobi City Council Government, Petition No. 25 of 2015** in which Mumbi Japtly summed up the position of the law in the following manner:

“There is thus clearly stipulated procedure for dealing with complaints alleging abuse of office and breach of various codes of ethics by State Officers such as Governors. It is not the Court which is vested with the mandate to investigate these breaches, but various bodies as stipulated in the sections set out above. Clearly, therefore, the allegations made against the Governor in this petition are outside the jurisdiction of this Court.”

[9] The above view taken by the courts is in deference to the Constitution which has donated power to Parliament to enact legislation and to clothe institutions with such powers as permitted by the Constitution. Secondly, it is in deference to those institutions and their respective jurisdictions as set out in law as a matter of adjudication of disputes and administration of justice. I should add that matter complained of bear criminal charge against the Respondents and the court may not be the correct launching pad of criminal investigations and prosecution. Other relevant institutions including EACC should be the ones to investigate these claims. And depending on the result of their investigations, make appropriate recommendation to the appropriate authority including but not limited to the DPP or AG for appropriate action. In particular, the Petitioner has premised his application on Section 14 of the Election Offences Act and Article 201 of the Constitution. And has alleged that the 1st Respondent has violated the various provisions thereto. Financial improprieties arising out of breach of the principles of finance in article 201 of the Constitution amount to corruption and should be investigated by inter alia, the Auditor General, County Assembly, Parliament and EACC. On Section 21 of the Election Offences Act, I note it provides that:

“The Director of Public Prosecutions shall have the power to order investigations and to prosecute offences under this Act.”

On this I will refer to the opinion by Lord Viscount Dilhorne stated in DPP vs. Humphrys [1976] 2 ALL ELR:

“A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred.

Lord Salmon further states in the same case:

“...a judge has not and should not appear to have any responsibility for the institution of prosecutions;...”

[10] In conclusion, I find that

1. The matters complained of are not really nascent; they relate to allegations of financial improprieties, corruption and breach of the integrity chapter of the Constitution. The allegations are, however, serious issues of governance in devolved system of government. I wish they were referred to the right authorities.

2. There are established procedure and institutions under the Constitution, the Leadership and Integrity Act, 2012 and the Ethics and Anti-Corruption Commission Act, 2011 [No. 22 of 2011] for dealing with the allegations in the nature of those complained of in this petition.

3. This Honourable Court, therefore, lacks jurisdiction, power, mandate, mechanism and capacity to investigate allegations of corruption and/or misappropriation of funds against the 1st and 2nd Respondents.

4. Accordingly, this petition has been filed in the wrong forum.

The upshot therefor is that the preliminary objection is upheld and I dismiss the petition. The application which saddled upon it also falls by the way side. I will not, however, condemn the Petitioners to costs as such litigation has an aura of public litigation. It is so ordered.

Dated, signed and delivered in open court at Meru this 26th day of July 2017

F. GIKONYO

JUDGE

In the presence of:

Kiogora advocate for Petitioner

Ojiambo advocate for Prof. Ojienda for 1st and 2nd respondents

F. GIKONYO

JUDGE