



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CONSTITUTIONAL PETITION NO. 1 OF 2017**

**ETHICS AND ANTI-CORRUPTION COMMISSION.....1<sup>ST</sup> APPLICANT/2<sup>ND</sup> RESPONDENT**

**OSCAR ONYANGO OTIENO.....2<sup>ND</sup> APPLICANT/5<sup>TH</sup> RESPONDENT**

**VERSUS**

**HON. WILLIAM BARAKA MTENGO.....RESPONDENT/PETITIONER**

**AND**

**ATTORNEY GENERAL.....1<sup>ST</sup> INTERESTED PARTY/1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> INTERESTED PARTY/3<sup>RD</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE.....3<sup>RD</sup> INTERESTED PARTY/4<sup>TH</sup> RESPONDENT**

**CHIEF MAGISTRATE'S COURT, MILIMANI.....4<sup>TH</sup> INTERESTED PARTY/6<sup>TH</sup>  
RESPONDENT**

**RULING**

**(Notice of Motion application dated 27<sup>th</sup> April, 2017)**

1. The 2<sup>nd</sup> Respondent, the Ethics and Anti-Corruption Commission (EACC) and the 5<sup>th</sup> Respondent, Oscar Onyango Otieno have brought the application dated 27<sup>th</sup> April, 2017 under sections 1A, 1B, 3, 3A (2) and 63 (e) of the Civil Procedure Act, Cap 21; Order 1 Rule 10 of the Civil Procedure Rules, 2010; Section 11(1)(j) of the Ethics and Anti-Corruption Commission Act, 2011; and all other enabling provisions of the law seeking orders:

**“1. THAT this Honourable Court be pleased to transfer this Petition to the Anti-Corruption and Economic Crimes Division established in the High Court of Kenya pursuant to the Chief Justice Practice Directions dated 9<sup>th</sup> December, 2016 for purposes of taking directions of the hearing of 2<sup>nd</sup> and 3<sup>rd</sup> Respondents’ Notice of Preliminary Objection dated 3<sup>rd</sup> March, 2016 and the Petitioner’s Petition dated 3<sup>rd</sup> February, 2017.**

**2. THAT the cost of this application be provided for.”**

2. The application is based on the grounds on its face and the supporting affidavit sworn on 27<sup>th</sup> April, 2017 by Taabu Lwangu an investigator with the 2<sup>nd</sup> Respondent.
3. Hon. William Baraka Mtengo the Respondent/Petitioner opposed the application through grounds of opposition dated 16<sup>th</sup> June, 2017 and a replying affidavit he swore on 28<sup>th</sup> June, 2017.
4. The 1<sup>st</sup> Interested Party/1<sup>st</sup> Respondent, the Attorney General, the 2<sup>nd</sup> Interested Party/3<sup>rd</sup> Respondent, the Director of Public Prosecutions (DPP), the 3<sup>rd</sup> Interested Party/4<sup>th</sup> Respondent, the Inspector General of Police and the 4<sup>th</sup> Interested Party/6<sup>th</sup> Respondent, the Chief Magistrate's Court did not file any response to the application. However, during the hearing Mr Fedha who appeared for the DPP indicated that the DPP and the Attorney General supported the positions of the applicants.
5. The applicants' case is that the Chief Justice made the Practice Directions for the Anti-Corruption and Economic Crimes Division of the High Court published in the Kenya Gazette, Special Issue, Vol. CXVIII on 9<sup>th</sup> December, 2016 (the Practice Directions) pursuant to Section 5 of the Judicial Service Act, 2011 and Section 16 of the High Court (Organization and Administration) Act, 2015. They assert that on several occasions they have made concerted efforts for the transfer of this matter to the Anti-Corruption and Economic Crimes Division (the Division) pursuant to the Practice Directions. It is their statement that this court directed them to file a formal application hence the filing of the instant application.
6. It is the applicants' case that this court has previously transferred Petition No. 26 of 2016, Petition No. 23 of 2016 and Miscellaneous Civil Application Judicial Review No. 1 of 2016 to the Division. It is the applicants' case that it is in the interest of justice and consistency that the Practice Directions be complied with.
7. The Respondent opposed the application through Grounds of Opposition as reproduced hereunder:
  - “1. The High Court at Malindi is a competent court which has jurisdiction to try and determine the question of infringement, threat or violation of fundamental freedom and rights as mandated by the Constitution of Kenya 2010 under Article 165(3) (b) & (d).**
  - 2. The Constitution is the Supreme Law and therefore the Chief Justice cannot via a Gazette Notice limit the power conferred to the High Court under Article 165 of the Constitution of Kenya 2010. Thus, the Practice Notice contained in Gazette Notice No.102623 dated 09.12.2016 violates the express provisions of the Judicial Service Commission Act Section 3 which reads “.... the Judiciary shall facilitate accessibility of judicial services to all Kenyans...” and is therefore null and void.”**
8. It is the Respondent's position that the Practice Directions are a violation of the Constitution and a claw back of the gains made so far in bringing justice closer to the people.
9. On the applicants' case that this court has previously transferred similar cases to the Division, the Respondent contends that each case should be determined on its own merits and further that he has not been charged for any corruption or economic crimes and the Practice Directions are therefore not applicable to his situation. Also that he is not privy to the causes of action of the matters allegedly transferred by this court to the Division and he is thus not in a position to comment further on those matters.
10. It is the Respondent's case that his matter is before a competent court with the jurisdiction to handle the claim of the violation, infringement and threat to his constitutional rights by the 2<sup>nd</sup> to 6<sup>th</sup> respondents.
11. Further, that taking his matter to Nairobi will lead to his incurring expenses on transport and accommodation for himself and his counsel. He accuses the Chief Justice of publishing the Practice Directions without involving the members of the public thus denying them legitimacy for want of public

participation and the need for fair administrative action.

12. Finally, the Respondent asserts that he is being unfairly targeted by the Jubilee administration using state agencies like the 2<sup>nd</sup> Respondent for winning the 2016 Malindi Constituency by-election on the ODM ticket against Jubilee's candidate.

13. The advocates for the parties agreed to dispose of the matter through written submissions.

14. In their submissions dated 20<sup>th</sup> June, 2017 the applicants assert that the Practice Directions are constitutional as they were issued under Section 5 of the Judicial Service Act, 2011 and Section 16 of the High Court (Organization and Administration) Act, 2015. It is the applicants' case that the Chief Justice as the head of the Judiciary has constitutional and statutory mandate and authority to create the Division and to issue directions for all the divisions of the High Court. Their position is that in doing so, the Chief Justice exercises powers granted to him by Article 161(2)(a) of the Constitution, Section 5 of the Judicial Service Act, 2011 and sections 11, 16 and 27 of the High Court (Organization and Administration) Act, 2015.

15. The applicants assert that transfer of similar matters to the Division has previously been effected by this court. Cited as evidence are Petition No. 26 of 2016, Petition No. 23 of 2016 and Miscellaneous Civil Application Judicial Review No. 1 of 2016. According to the applicants, it is in the interest of justice and consistency in the administration of justice that the Practice Directions be complied with. Further, that the Practice Directions are meant to facilitate the administration of justice without delay as required under Article 159(2)(b) of the Constitution.

16. It is the applicants' submission that it is in the public interest that the purpose of the establishment of the Division should not be defeated. On this point, reliance is placed on the decision of Mumbi Ngugi, J in **Ondiek Nyairo v Paul Chepkwony & 2 others [2017] eKLR** in which she stated that:

**“As is evident from the Practice Directions issued by the Chief Justice regarding the mandate of the Anti-Corruption and Economic Crimes Division, 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. In my view, the petition before me is one such matter. It would defeat the purpose of the establishment of the Division if we were to engage in a splitting of hairs and argue that the matter does not fall within its mandate because it does not involve a prosecution for corruption, yet it seeks the orders and sanctions that are within the mandate of the court when dealing with cases initiated under the Acts enumerated in the Practice Direction.”**

17. The applicants therefore urge this court to allow their application.

18. The Respondent filed submissions dated 7<sup>th</sup> July, 2017. The Respondent's position is that Article 165 (3) of the Constitution grants this Court, subject to clause (5), unlimited original jurisdiction in criminal and civil matters. The court is also granted jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. This Court, the Respondent contends, is therefore competent and has jurisdiction to try and determine the question of infringement or violation of his fundamental rights and freedoms. It is the Respondent's position that the Chief Justice cannot through a Gazette Notice oust this Court's constitutional jurisdiction by allegedly exercising powers under the Judicial Service Act, 2011 and the High Court (Organization and Administration) Act, 2015. It is the Respondent's assertion that the two Acts of Parliament are purely for administrative functions and not to oust the jurisdiction of the High Court as provided by the Constitution.

19. It is the Respondent's case that section 5 of the Judicial Service Act only empowers the Chief Justice to assign duties, create divisions and transfer judicial officers within those divisions but he cannot confer jurisdiction upon any officer of the Judiciary neither can he take away the jurisdiction conferred on a judicial officer. The Respondent cited the decision of the Court of Appeal in **Karisa Chengo & 2 others v Republic [2015] eKLR** in support of his position.

20. The Respondent asserts that the Practice Directions violates one of the objectives of the Judicial Service Act which, according to Section 3 (i), is to facilitate accessibility of judicial services to all Kenyans. According to the Respondent, transferring this matter to Nairobi will deny him easy access to court and will make justice very expensive for him as he will have to fund his travels and that of his counsel to Nairobi. Further, that courts in Nairobi and older stations are already suffering from case backlog as was appreciated by the Chief Justice on 20<sup>th</sup> February, 2015 when launching the National Case Audit and Institutional Capacity Survey at Milimani Law Courts.

21. The Respondent contends that his complaint is about violation of the right to a fair hearing. He relies on the decision in **Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics & Anti-Corruption Commission & 5 others [2016] eKLR** to demonstrate that the court can grant orders to quash warrants issued in violation of constitutional rights.

22. On the files which the applicants claimed had been transferred to the Division by this Court, the Respondent asserts that the information is irrelevant to his case as each case should always be determined on its own merits. Further, that he was not privy to the particulars of the files transferred to Nairobi.

23. On the decision in **Ondiek Nyairo** (supra), the Respondent submits that his case, unlike the cited case, is about breach of fundamental rights. He therefore contends that the said decision is irrelevant.

24. The instance application is made on the strength of the Practice Directions. Rule 2 requires that:

**“All new cases relating to corruption and economic crimes shall be filed in the Principal Registry of the Division at Nairobi for hearing and determination.”**

25. Rule 5 provides the scope of the mandate of the Division, *inter alia*:

**“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) ...”**

26. A perusal of the Respondent’s Petition dated 2<sup>nd</sup> February, 2017 shows that the same challenges an investigation conducted by the 2<sup>nd</sup> Respondent against him. He alleges that the said investigation has violated or threatens to violate his constitutional rights. This is therefore a matter that falls within the jurisdiction of the Division as per the Practice Directions. It is also noted that by the time this matter was filed in February, 2017, the Practice Directions were already in force as they had been promulgated in December, 2016. This matter was therefore filed before this Court in clear contravention of the Practice Directions.

27. The Respondent has taken issue with the constitutionality of the Practice Directions. He is not the first person to do so. In **Nairobi High Court Constitutional Petition No. 534 of 2016 Peter Wanyama Manyonge v Chief Justice of the Republic of Kenya & 5 others**, the petitioner therein had challenged the Practice Directions for being unconstitutional. Consent was later entered as follows:

**“1. THAT the Practice Directions dated 9<sup>th</sup> December, 2016 vide Gazette Notice No.10263: Rule No. 2 of the said Practice Directions be amended to allow the Chief Justice to establish sub registries outside Nairobi.**

**2. THAT upon such amendment being effected, the Petition herein be marked as settled.**

**3. THAT there be no order as to costs.”**

28. I am not aware whether the said consent has been effected. The consent, however, confirms that there is need to relook at the Practice Directions with a view to ensuring that the right to access justice is not taken away from Kenyans who reside outside Nairobi and its environs.

29. The Respondent contends that the said Practice Directions have taken away the jurisdiction of this Court and that the Chief Justice has no power to take away jurisdiction from the High Court. I entirely agree with the Respondent that the Chief Justice has no authority whatsoever to take away jurisdiction from any court or to confer jurisdiction to any court. As was stated by the Supreme Court in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, a court's jurisdiction flows from the Constitution or legislation or both. On matters touching on infringement of rights, the Constitution has through Article 165 conferred that power on the High Court.

30. The question therefore is whether the Chief Justice has taken away the constitutional mandate of the High Court through the Practice Directions. In my view, he has not done so. 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. That is not to say that by establishing the Division, the Chief Justice took away the jurisdiction of the other judges of the High Court to hear the cases listed in the Practice Directions. All judges of the High Court are still at liberty to hear the matters listed in the Practice Directions.

31. In **Civil Appeal No. 62 of 2016 at Malindi, Christopher Orina Kenyariri t/a Kenyariri Associates Advocates v Salama Beach Hotel Limited & 3 others**, the Court of Appeal shed light on the jurisdiction of the High Court thus:

**“We must reiterate that the High Court of Kenya remains one and the same court, only that it sits at different locations of the country, such as Malindi and Nairobi. The location where it sits cannot therefore affect its jurisdiction. The practice and requirements that suits be filed in particular stations of the High Court are purely for administration and convenience in the hearing and determination of suits. That is not in any way to suggest that such requirements or practice is unreasonable or unnecessary, it is intended to reduce costs of transporting witnesses from one court of the country to another for hearing of cases and to expedite hearing and determination of suits, thus giving meaning to the overriding objective and the constitutional value in Article 159 which emphasize the need to reduce costs and delay in the hearing and determination of suits.”**

32. Whereas the Constitution at Articles 48 requires that justice be accessible, the same Constitution at Article 159(2)(b) demands that justice shall not be delayed. The right to access justice ought to be balanced with the need to ensure that justice should not be delayed. As already noted the Practice Directions, were among other things, intended to aid the efficient and timely disposal of the matters identified therein. A special Division was, in my view, therefore necessary in order to attain those goals. A judge engaged in hearing kinds of cases may not have room for prioritising the matters identified in the Practice Directions.

33. This matter is a good example as to why cases that ought to be heard and determined without unnecessary delay should be placed before judges dedicated to hearings such matters. This Petition was filed in early February, 2017 and interim orders were granted *ex-parte*. To date the matter has not been heard. Maybe if the matter had been filed at the Division, the same could have been finalized by now. This matter shows why it was necessary to have a number of judges specifically dedicated to deal with matters of this nature.

34. For the reasons stated in this ruling, I allow the application of the 2<sup>nd</sup> and 5<sup>th</sup> respondents and order this file transferred to the Anti-Corruption and Economic Crimes Division at the High Court in Nairobi.

35. The parties shall take a date in the Division's Registry within two weeks from the date of this ruling

so that the matter can be mentioned before the Presiding Judge or Duty Judge for taking directions on the hearing and disposal of the interlocutory applications and the Petition. The costs of this application shall abide the outcome of the Petition.

**Dated, signed and delivered at Malindi this 28<sup>th</sup> day of Sept., 2017.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**