



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION
PETITION NO. 15 OF 2017

**IN THE MATTER OF: THE CONSTITUTION OF KENYA ENFORCEMENT AND
 INTERPRETATION OF THE CONSTITUTION RULES, 2013**

-AND-

IN THE MATTER OF: ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS

**IN THE MATTER OF ARTICLES 1, 10, 22, 23, 47, 49, 73, 157 AND 265 OF THE
 CONSTITUTION OF KENYA, 2010**

-AND-

IN THE MATTER OF: ADMINISTRATION ACT NO 4 OF 2015

-AND-

**IN THE MATTER OF THE HIGH COURT (ORGANIZATION AND ADMINISTRATION) ACT
 NO 27 LAWS OF KENYA**

-AND-

**IN THE MATTER OF: SECTIONS 58, 59, 60 AND 66 OF THE NATIONAL POLICE SERVICE
 ACT NO. 11 OF 2011**

-AND-

IN THE MATTER OF: BRIBERY ACT NO 47 OF 2016

-BETWEEN-

KEFAH MOMANYI TENDERE.....PETITIONER

VERSUS

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

REGIONAL DOG MASTER – COAST REGION.....2ND RESPONDENT

OCPD, KISAUNI - MOMBASA.....3RD RESPONDENT

OCS NYALI POLICE STATION.....4TH RESPONDENT

THE CHIEF MAGISTRATE'S COURT MOMBASA.....5TH RESPONDENT

AND

GEORGE MUMBO ONONO.....1ST INTERESTED PARTY

ETHICS & ANTI-CORRUPTION COMMISSION.....2ND INTERESTED PARTY

RULING

1. The Application before this Court was first filed at the High Court in Mombasa on 21st March, 2017 and was later transferred to the Anti Corruption and Economic Crimes Division at the High Court in Nairobi on 31st May, 2017. The Petitioner herein is a police officer of the rank of Police Constable attached to the Regional Police Dog Unit Head Quarters at Kisauni-Bamburi in Mombasa. He has moved the court under **Article 23(1)(2) and (3) and Article 159 of the Constitution of Kenya, 2010** by way of a Notice of Motion, seeking orders:

i. THAT pending the hearing of this application the Honorable Court be pleased to issue temporary conservatory orders against the Respondents and the interested parties either by themselves, their servants, agents, representatives or any other person or agency claiming under them from arresting, detaining, arraigning and charging the petitioner/applicant in the Chief Magistrates Court in Mombasa and from any other prosecutions on account of issues relating to: the Lawful execution of an Order by which the Petitioner/Applicant together with his two (2) other colleagues apprehended the 1st Interested Party and found him being in possession of substances suspected to be narcotic drugs; and recovery of a motor cycle Registration No. KMDY 629X make HAODJIN black and red in color which the 1st Interested Party abandoned when he escaped pending Inter-partes hearing of this Application.

ii. THAT upon inter-partes hearing the Orders prayed for in the prayer above be confirmed pending the hearing and determination of the Petition filed herein.

2. The grounds upon which the Application is based are that the intended arrest and prosecution of the Petitioner is instigated and made *malafides* and is calculated to benefit the 1st and 2nd Interested Parties in an act or attempted act of covering up the crime committed by the 1st Interested Party.

3. The Application is supported by the Affidavit of the Petitioner who avers that on the 8th of March, 2017 the petitioner and two police officers booked out for a normal police patrol exercise on foot. During this patrol the three policemen happened upon and apprehended the 1st Interested Party who was found to be in possession of twenty (20) small rolls suspected of being narcotic drugs. The 1st Interested Party managed to escape, however, the Petitioner and the two police officers confiscated the motorcycle Registration number **KMDY 629X** left behind by the 1st Interested party together with the 20 rolls of bhang and booked them at the Police Dog Unit Station vide OB.NO.14/8/3/2017 where the said exhibits are currently kept.

4. The Petitioner deponed that he was later approached by the 1st Interested Party and persons who had not identified themselves as police officers from the 2nd Interested Party's office who attempted to arrest him. The officers of the 2nd Interested Party produced 3 photostat copy notes of Kshs. 1,000/= which they alleged were in the possession of the Petitioner having been given to him by the 1st Interested Party as a bribe.

5. The Petitioner argues that he was never given a fair hearing by the Respondents, neither were proper investigations carried out before the decision to arrest and charge him were made. He avers that the decision to make an Application in the Chief Magistrates Court to obtain a warrant of arrest and thereafter charge him for the alleged offence of requesting for an advantage, was actuated by malice and driven by vested interests and is therefore unconstitutional and violates the legislative expectation to fair administrative action.

6. It is the Petitioner's argument that he, together with his colleagues acted within the powers of **Sections 58, 60, 63** of the **National Police Service Act No. 11A of 2011** when they recovered substances believed and or suspected to be narcotic drugs together with the motorcycle Registration number **KMDY 629X** left behind by the 1st Interested Party when he. The Petitioner argues that circumstances under which the 1st Interested Party was entertained and condoned by the 2nd Interested Party after he had committed a crime and escaped from the custody of police officers were questionable, and urges the Court under **Article 23(3)** and **165(3)(b)** of the **Constitution of Kenya, 2010** to allow this petition and grant the Orders sought in the interest of justice.

7. This Application is opposed by the by the 2nd Interested Party on grounds that the petitioner has failed to set out with reasonable precision that of which he complains and the manner in which his constitutional rights, expectations and fair administrative action have and/or will be infringed.

8. That 2nd Interested Party avers that it has constitutional and legal mandate under **Article 252(1)(a)** of the **Constitution of Kenya** to conduct investigations on its own initiative or on a complaint made by any members of the public and make the necessary recommendations to the Director of Public Prosecutions under **Section 35** of the **Anti Corruption and Economic Crimes Act**.

9. The 2nd Interested Party contends that it acted on a formal complaint which was made by the 1st Interested Party and followed due process in the course of its investigations. The Application before the court is therefore an abuse of the court process and an attempt to subvert the course of justice since investigations against the petitioner were initiated when a formal complaint was made against the Petitioner.

10. In the Replying Affidavit dated 3rd April, 2017 sworn by Rashid Kibet, an officer with the 2nd Interested Party, Mr. Kibet deponed that contrary to the Petitioners averment that he arrested the 1st Interested Party at 8am, the said person was at the offices of the 2nd Interested Party recording his formal complaint against the Petitioner for demanding a bribe of Kshs. 3,000/= so as to release his motorcycle Registration Number **KMDY 629X**.

11. Mr. Kibet deponed that upon receipt of the complaint, the 2nd Interested Party prepared for an operation and when the Petitioner made a demand for a bribe and received it, the officers from the 2nd Interested Party moved in to apprehend him. The Petitioner drew a pistol against the said officers and threatened to shoot them despite the officers having fully identified themselves as officers of the 2nd Interested Party. The Petitioner was asked to sign an inventory of the notes recovered, he proceeded to eat and swallow the notes and also declined to hand over the Ceska pistol for ballistic analysis.

12. The deponent stated that although the other two officers present during the incident reported to the office of the 2nd Interested Party to record statements, the Petitioner declined to do so, thus prompting the 2nd Interested Party to seek a warrant of arrest and present him before the court.

13. The deponent averred that the 2nd Interested Party is still in the process of conducting investigations on the circumstances surrounding the demand for bribes, engagement in corruption and economic crimes and the subsequent arrest of the 1st Interested Party. This has been conducted in a manner that has been above board and as required by the provisions of the Constitution of Kenya, 2010. The deponent prays that the court do decline to issue the orders sought by the petitioner as none of his constitutional rights have been violated as alleged.

14. The Petitioner filed a Supplementary Affidavit on 22nd May, 2017 wherein he denies that he went underground or absconded as alleged. He denied being presented with an inventory as alleged and denied eating and/or swallowing the notes allegedly recovered from.

15. At the hearing of this application, learned counsel for the Applicant, Mr. Omwanja argued that there was no evidence adduced by the 2nd Interested Party to the effect that the Petitioner had eaten and swallowed the Kshs. 3,000 as is alleged by the 2nd Interested Party. Learned Counsel stated that while it is not disputed that the 1st Interested Party was arrested and later escaped or that illegal items were recovered from him, the 2nd Interested Party colluded with the 1st Interested Party to frustrate the Petitioner.

16. Learned Counsel for the 1st and 2nd Interested Party, Mr. Bii, at the hearing relied on the grounds of the opposition and the Replying Affidavit of Rashid Kibet both dated 3rd April, 2017 and argued that the 2nd Interested Party carried out investigations as mandated by the law. Counsel averred that the 2nd Interested Party received a formal complaint from the 1st Interested Party that the petitioner herein had demanded a financial benefit from him and that the Petitioner was caught on tape demanding the same from the 1st Interested Party. He indicated that the tape was not brought before this court because it was intended for the trial court.

17. Mr. Bii stated that the Director of Public Prosecutions made an independent decision to charge the Petitioner herein, however, charges were yet to be brought against the petitioner because of orders issued from the superior court. Mr. Bii argued that the 2nd Interested Party had no malice against the Petitioner and efforts had been made to have the Petitioner give the 2nd Interested Party his side of the story, however, the Petitioner declined. He submitted that the Petitioner is not entitled to the orders sought and the court should not allow his application.

18. Mr. Bii relied on the two cases: **Samuel Kanja & 2 others v Ethics and Anti-Corruption Commission & another [2016] eKLR** and **Constitutional Petition No. 7 of 2015, Stanley Kiplangat Cheruiyot & 13 Others v the Director of Public Prosecutions & Ethics and Anti-Corruption Commission**, wherein the court dismissed the petitioner and directed that the matters they were hearing were best dealt with by the trial court as the Ethics and Anti Corruption Commission had worked within its mandate.

19. Mr. Ashimosi, Learned Counsel for the 2nd Respondent, submitted that the recommendation by the 2nd Interested Party was given as per **Section 35** of the **Anti Corruption and Economic Crimes Act** and the 2nd Respondent made an independent decision to charge the Petitioner. Counsel noted that the charge sheet had already been filed in **case no 445/2017**, a decision not challenged before the court since the petitioner did not challenge the charges filed against him.

20. Mr. Ashimosi argued that the Petitioner had concentrated on matters of evidence yet the application before the court is a Constitutional Petition over the violation or threatened violation of the Constitution, which ought to be demonstrated so as to warrant the orders sought. He urged the court to dismiss the application and discharge the orders that are on record.

21. In response, Mr. Omwanja, Learned Counsel for the Petitioner indicated that the threatened arrest of the Petitioner is indeed a violation of his constitutional rights because, in apprehending the 1st Interested Party, the Petitioner acted in accordance with the Police Standing Orders, the National Police Act and the Constitution. He submitted that the intention is for the Petitioner to be interdicted and lose his job and urged the court to find that the manner in which the 1st and 2nd Interested Party conducted themselves is not proper and allow the application as the parties await the hearing of the petition.

22. I have considered the application, the responses thereto as well as the arguments put forth by the counsel at the hearing of this matter. The issue for determination herein is whether this court should

interfere with the constitutional mandate of the 1st Respondent and the 2nd Interested Party and grant the conservatory orders sought by the Petitioner. For such orders to be granted, the Petitioner must, to the satisfaction of this court, demonstrate that there exists a potential violation of his constitutional rights.

23. The conservatory orders sought seek to stop the arrest and prosecution of the Petitioner for any alleged offence related to the circumstances under which the 1st Interested Party was arrested and his motorcycle confiscated by the Petitioner. The implication of these orders is that the 1st Respondent will be prevented from exercising the powers conferred to its office under **Article 157 (6) of the Constitution** which states:

“The Director of Public Prosecution shall exercise State powers of prosecution and may-

(a) Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.”

24. The Supreme Court in Gatirau Peter Munya -v- Dickson Mwenda Kithiji & 2 Others (2014) eKLR, considered the principles for grant of conservatory orders and stated:

“[86] Conservatory orders bear a more decided public- law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

25. When considering the issuance of conservatory orders, as a principle, the court should always be reluctant to interfere with the powers and mandate enshrined in the Constitution and donated to constitutional bodies. The cases of **Meixner & Another v Attorney General [2005] 2 KLR 189** and **Paul Nganga & 2 Others v Attorney General & 3 Others [2013]eKLR**, both indicate that the court ought to interfere with the discretion to prosecute only in exceptional circumstances and where the institution of a criminal prosecution is divorced from the goals of justice. In criminal prosecutions instituted upon no foundational basis whatsoever, the court has a duty to interfere with the discretion, in the interest of justice. See **Kuria -v- Attorney General [2002]2 KLR 69, R -v- Attorney General Ex p Kipngeno Arap Ngeny HCMisc Appl No. 406.**

26. In the instant application, the Petitioner contends that the 2nd Interested Party and the 1st Respondent have conducted irregular investigations and abused the power to prosecute respectively. Counsel for the petitioner during the hearing of this petition argued that the Petitioner’s constitutional rights to fair administrative action have been violated and the intention for the investigations, charges and prosecution is for the Petitioner to be interdicted and lose his job.

27. It is not contested that the 2nd Interested Party has statutory mandate to investigate crimes which have an economic and unethical underpinnings. The 2nd Interested Party has a mandate under **Section 11 of the Ethics and Anti-Corruption Act** to investigate and recommend to the 1st Respondent the prosecution of any person for any acts of corruption or violation of ethics. Upon receipt of a complaint, the 2nd Interested Party is under obligation to act impartially and independently to carry out thorough investigations. Ordinarily, such investigations involve taking into account the versions presented by both the complainant and the suspect.

28. Evidenced by the Replying Affidavit of Mr. Rashid Kibet, the 2nd Interested Party, acted in accordance with procedure following the formal complaint it received from the 1st Interested Party. The Petitioner was further afforded the opportunity to record a statement by the 2nd Interested Party and

declined to do so.

29. It is my considered view that the mere fact that the version of the Petitioner was not accepted does not make the investigations and subsequent charges malicious. In the event the applicant is arrested and arraigned in court for trial, the trial court is competent to consider and evaluate any constitutional issues and any evidence raised. The Petitioner has not therefore, to the satisfaction of this court, demonstrated the manner in which his constitutional rights will be infringed in the event he is charged and arraigned in court.

30. The 2nd Interested Party satisfied its mandatory obligation under **Section 35** of the **Anti Corruption and Economic Crimes Act** and forwarded a recommendation to the 1st Respondent whose office exercises its functions without any external influence, control or any other persons consent. The Petitioner in this case has not pointed to any evidence, direct or circumstantial, of any interference with the 1st Respondent's independence. There is nothing, in short, upon which I can hold that the 1st Respondent has or is about to abrogate his duties and obligations.

31. In sum I find that there is no malice exhibited in the investigation process nor in the prosecution process. I therefore hold that the application dated 20th March, 2017 lacks merit and is consequently hereby dismissed.

It is so ordered.

SIGNED DATED and **DELIVERED** in open court this **23rd** day of **November, 2017**.

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L. A. ACHODE

JUDGE