REPUBLIC OF KENYA

IN THE HIGH COURT OF KIENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.553 OF 2015

BETWEEN

MAJOR LABAN A. NYAMBOK ……..…. PETITIONER/APPLICANT

AND

COURT MARTIAL NO.7 OF 2015 ……... 1ST RESPONDENT

THE CABINET SECRETARY FOR DEFENCE ……..….. 2ND RESPONDENT

PRINCIPAL SECRETARY FOR DEFENCE …….……..... 3RD RESPONDENT

CHIEF OF THE DEFENCE FORCES ……...…….. 4TH RESPONDENT

DIRECTOR OF MILITARY PROSECUTIONS ……..…..….. 5TH RESPONDENT

THE HON. ATTORNEY GENERAL ……..... 6TH RESPONDENT

RULING

Introduction

1. This Ruling relates to an Application filed by the Petitioner/Applicant praying for orders *inter alia* that a stay of his intended prosecution before the Court Martial be issued, pending the hearing and determination of his Petition which was filed together with the said Application.

2. In his Application dated 11th December, 2015, the Applicant specifically prays for the following orders:

   - ***...***
   - ***That the intended prosecution of the Petitioner before the Court Martial be stayed pending the hearing and determination of this Petition.***
   - ***That pending the hearing and determination of this Petition the Petitioner be admitted to reasonable bail or bond terms.***
   - ***That costs of this Application be provided for***.

3. The Application was premised on the grounds that:

- ***The fundamental rights of the Applicant have been infringed.***
- ***Justice cannot be administered by the Court Martial considering the circumstances of this Case and the jurisdiction of the Court Martial.***
- ***That the Court Martial is not the best suited Court to hear the alleged offences herein (sic).***
- ***That it is risky staying under the care and attention of the superiors whose names appear in some of the documents contained in the abstract of evidence considering the nature of this case (sic).***
- ***That this Court has jurisdiction to admit the Petitioner to reasonable bail.***
- ***That limitation of certain rights does not mean denying the Petitioner such right.***
- ***That the Petitioner is still presumed innocent.***
- ***That there is need to comply with the law in the interest of justice.***

The Applicant's Case

4. In his Affidavit in support, the Applicant deponed that he is employed by the Kenya Defence Forces as a Commissioned Officer and has served the military for about 24 years with dedication and diligence and has received various medals in regard to his good service.

5. He also stated that he was arrested sometime in April, 2015 and has been in confinement since then, without his case being disposed of by way of summary trial and that the reasons for his continued confinement have never been communicated to him as required both by the **Constitution** and the **Kenya Defence Forces Act**, yet the **Code of Regulations** also stipulate that disciplinary issues in the military should be dispose of within six months.

6. The Applicant in his Affidavit further addressed the contents and the evidence to be used in the intended charges against him before the Court Martial and argued that he is being sacrificed as the junior most Commissioned Officer amongst others mentioned in the evidence to be used therein. Furthermore, that if one, Dr. Guyo, is to offer evidence before the Judge/Advocate presiding over the Court Martial, that action may result in an order for the arrest and prosecution of the said Dr. Guyo, which prosecution cannot be undertaken in a Court Martial since the said doctor is not subject to the **Kenya Defence Forces Act** and as such, there is need for the making of a declaration that the best Court suited to hear the intended matter is not the Court Martial because of its limited scope of jurisdiction.

7. Accordingly, that the Court Martial, as constituted, may not have the mandate of summoning various persons who are signatories to certain cheques to be used as evidence in the intended prosecution and that fact, he alleged, would prejudice his case since there is a chain of command in the Armed Forces and the Judge/Advocate may be intimidated and as a result, if this Court is of the opinion that the prosecution must proceed, then the same should be ordered to be conducted in a neutral Court with jurisdiction to try non-military officers whose names have featured adversely in the statements and other documents to be used in the prosecution aforesaid.

8. He further contended that, from an examination of the abstract evidence to be used in the prosecution, he has not seen any evidence that any investigation was conducted in relation to moneys he sent to his superiors and yet he gave out information in that regard to the investigating officer. That the statements involving certain M-pesa transactions ought to include his superiors' phone numbers in order for the ends of justice to be met and that in their absence, it was his allegation that the investigating officer had been compromised thereby undermining his independence and therefore he cannot be trusted be trusted to reach objective conclusions.

9. He argued further that the failure to investigate his superiors' bank accounts and M-pesa accounts is a clear manifestation of favouritism and discrimination on the part of the prosecution which makes him apprehensive that justice cannot be meted out to him as justice cannot be seen to have been done in circumstances where no reason has been given as to why the investigation officer did not even make an attempt to look for information which would have led him to the truth of the matters leading to the Applicant's prosecution.

10. Furthermore, that the Court Martial is not the best suited Court to try him and cannot deliver any justice considering that the Convener of the said Court is working under the Director of Military Prosecution in the Legal Department of the Department of Defence and as such takes instructions and directives from the Director of Military Prosecution. That, his (the Applicant's) interest main interest is to see justice being done in a Court which cannot feel intimidated by the appearance of senior personalities who may include the Chief of Defence Forces and also to see to it that the documents and other evidence presented before the Court Martial are not tampered with.

11. Finally, the Applicant deponed that, the rules of natural justice cannot be complied with when one party, the prosecution, cannot be reprimanded by this Court yet prolonged confinement has become too common in Court Martial cases and in any event, the said prosecution cannot be fair when the prosecutor is also charged with proof reading of proceedings of the Court, giving legal advice to the Chief of Defence Forces, Keeping exhibits and proceedings of the Court as well as convening the Court.

12. The Applicant's case was further presented by Learned Counsel, Mr. Were, who submitted that **Section 56** of the **Kenya Defence Forces Act** grants civilian courts the jurisdiction to hear and determine matters such as alleged offences touching on fraud and that it is therefore not prudent for the Respondents to try suspects in both the Court Martial and civilian courts while the charges emanate from the same transaction. That the risk of both courts reaching conflicting decisions is real and yet such a situation can be averted.

    It was his other submission that the investigations conducted in relation to the Applicant were selective and discriminative thereby resulting in violation of **Article 27** of the **Constitution** and S**ection 43 (3) (c)** of the **Kenya Defence Forces Act** as no reason has been given as to why the Chief of Defence Forces was never interrogated during the investigations and yet he was privy to some of the issues leading to the Applicants' prosecution. Additionally, that the Applicant was not given an option to either choose a summary trial or a full trial at the Court Martial yet it is a cardinal principle of law that a case should be commenced in the lowest unit with the jurisdiction to try it. In that regard, under the **Kenya Defence Forces Act**, the Commanding Officer is the lowest unit to deal with cases in the Military and therefore, he has the jurisdiction to deal with the alleged offences and that the Applicant cannot see any justice from a process which had been predetermined even before the investigations and that is why he is urging this Court to stay the intended prosecution pending the determination of the present Petition.

13. Counsel added that it would also be prudent to know the outcome and recommendations of the Director of Public Prosecutions on the Applicant's prosecution since he has powers to prosecute him under **Section 56** of the **Kenya Defence Forces Act** and furthermore, where the offence can be tried by both the Court Martial and a civilian Court, it is required that there should be consultations between the Director of Public Prosecutions and the Military as to the right Court to try charges relating to military personnel.

14. As for the Applicant's prayer to be granted bail pending trial, he submitted that **Section 54** of the **Kenya Defence Forces Act** does not limit the right to bail as contemplated under **Article 49 (1) (h)** of the **Constitution** and for all the above reasons, the Applicant is entitled to bail on reasonable terms.

15. Lastly, Counsel relied on the decisions in **George Joshua Okungu and Another vs The Chief Magistrate's Court and Others, Petition No. 227 and 230 of 2009, Joseph Karobia Kinyua vs Commander of Kenya Army and Another, Criminal Petition No. 6 of 2012, Peter M. Kariuki vs Attorney General, Civil Appeal No. 79 of 2012** and **Ronald Leposo Musengi vs Director of Public Prosecutions and Others, Petition No. 436 of 2014** in support of the present Application.

The Respondents' Case

16. In opposing the present Application, the Respondents filed a Replying Affidavit sworn on their

behalf by Lt. Col. Gedion Mwamjeni Bebora on 24th December, 2015.

17. Col. Mwamjeni deponed largely to substantive issues in the Petition but of relevance to the Application before me, he stated that even if the Applicant and civilians were joint suspects in the commission of crimes, there exist other legally prescribed avenues for charging and prosecuting the civilians while the Applicant would face his charges at the Court Martial.

18. According to him, the Applicant, being a Commissioned Officer and a member of the regular forces of the Kenya Defence Forces is subject to the **Kenya Defence Forces Act** by virtue of the provisions of **Section 4 (a)** of the **Kenya Defence Forces Act** and he is therefore properly before the Court Martial for trial. Further, that the Court Martial has jurisdiction to try all the charges for which he has been charged and that the jurisdiction of the said Court Martial cannot be substituted with that of any other Court. Additionally, that the issue of the jurisdiction of the Court Martial was raised before the said Court by the Applicant and the same is awaiting Ruling. That any complaints in that regard before this Court are therefore premature and misplaced.

19. On the composition of the Court Martial, it was the Respondents' contention that the Applicant was granted an opportunity to object to any of the members therein but he did not raise any such objection and the members were then duly sworn. That, the Court Martial as constituted as well as the proceedings before it are legal, constitutional, independent and beyond reproach contrary to the Applicant's allegations and fears. That the Court Martial just like any other Court, also has the powers to summon any person to provide relevant evidence and that no application has been placed before the Court Martial and denied on the grounds of the seniority of any person sought to be summoned.

20. Learned Counsel, Mr. Kamunya presented the Respondents' case and in Written Submissions dated 19th January, 2016, he relied on the decisions in **Muslims for Human Rights (MUHURI) and Others vs Inspector General of Police and Others, [2014] eKLR, Helmuth Rame vs Republic, [2015] eKLR, and Attorney General vs Gabriel Kirigha Chawana, Civil Application No. 9 of 2014** for the proposition that the Applicant has not demonstrated that he has an arguable case to warrant grant of the Orders sought.

21. He submitted further that a substantial part of the Applicant's case is based on issues which qualify as grounds of appeal or review, as opposed to issues affecting his rights and freedoms *per se*. Further, that while the Applicant alleges that he is now aggrieved by the composition of members of the Court Martial and challenges the Court Martial's jurisdiction as well as the independence of the prosecutor, he had indeed raised the foregoing objections at the Court Martial and a Ruling was delivered on the same and he cannot now appeal that decision by way of this Petition.

22. Further, in the Respondents' view, the Applicant has, under **Section 186** of the **Kenya Defence Forces Act**, a right of appeal against that decision of the Court Martial yet he has not claimed that his entitlements under **Articles 48** and **159 (2)** of the **Constitution** are in any way threatened so as to be an impediment to his right of appeal. That the Applicant has also raised questions of the constitutionality of the convening and constitution of a Court Martial as prescribed by law, which matter was addressed by the Court in **Samuel Sabuni and Others vs Court Martial and Others, Petition No. 235 of 2014**, and hence the same is *res judicata*. As a result, it was their argument that the Applicant's case is not arguable and also has very little chances of success.

23. The Respondents also submitted that the Petitioner will not suffer irreparable harm if the Court Martial proceedings continue since, in addition to him reserving his right of appeal/review, he can be compensated by way of damages if this Court finds that he has suffered harm or violations of his fundamental rights and freedoms. At the conclusion of his Petition.

24. Their other submission was that an order for stay of the proceedings at the Court Martial could incurably distort its administration and that if orders are granted, chances are that the Judge/Advocate and members of that Court will be reassigned and resume other duties and that

would result to the membership of the Court falling below the five-member threshold expected of it thereby delaying justice and hence contrary to **Article 159 (2)** of the **Constitution** and to the public interest.

25. Furthermore, that it is in the public interest that a high standard of order is maintained in the disciplined force in which the Applicant serves and the granting of conservatory orders in the absence of a serious demonstrable breach of the **Constitution** in the Court Martial proceedings would undermine the guiding principles of the **Kenya Defence Forces Act** under **Section 3 (a)** and **(b)** thereof. In that regard, they sought relied on the decision in **Samuel Sabuni and Others vs Court Martial (supra)** in support of their submission aforesaid.

26. Additionally that, it cannot be gainsaid that the gravity of the offences believed to have been committed by the Applicant cannot be ignored in considering whether public interest applies to the present case and that it would amount to disregarding the provisions of **Articles 10, 159 (2) (a),** and **Chapter Six** of the **Constitution** and the aforesaid **Section 3** of the **Kenya Defence Forces Act** if the Orders sought are granted.

27. In respect to the prayer for bail/bond, their submission was that the Petitioner having not made the application for bail/bond to the Court Martial, then there is no appeal/review pending before this Court to warrant the grant of the said order.

Determination

28. From the foregoing, two key issues emerge for determination namely:

- ***Whether the Applicant has made out a case for the staying of his prosecution by the Court Martial; and***
- ***Whether this Court should admit the Petitioner to bail or bond on reasonable terms.***
- ***Whether the Applicant has made out a case for the staying of the intended prosecutions by the Court Martial***

29. As I understand it, orders for stay for proceedings are in the nature of conservatory orders and in that context, the principles in regard to the grant of conservatory orders were outlined in the case of **Martin Nyaga Wambora vs Speaker of The County Assembly of Embu and 3 Others, Petition No. 7 of 2014, where the Court stated that:**

[59] ***In determining whether or not to grant conservancy orders, several principles have been established by the courts. The first is that: "… [an applicant] must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution"***
[60] ***To those erudite words I would only highlight the importance of demonstration of "real danger". The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention.***
[61] ***The second principle, which naturally follows the first, is whether if a conservancy order is not granted, the matter will be rendered nugatory.***
[62] ***The third principle is one recently enunciated by the Supreme Court in the election petition case of Gatirau Peter Munya v Dickson Mwenda Githinji and 2 Others, SCK Petition No 2 of 2013. The principle is that the public interest must be considered before grant of a conservatory order. Ojwang and Wanjala JJSC stated that: "*** **[86]** ***'conservancy orders' bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within the 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"

[63] ***Thus, where a conservancy order is sought against a public agency like a legislative assembly that is mandated to carry out certain functions in the normal course of its business, it is only to be granted with due caution. The interruption of the lawful functions of the legislative body should take into account the need to allow for their ordered functioning in the public interest***."

25. Further, in the case of **Judicial Service Commission vs Speaker of the National Assembly and Another, Petition No.518 of 2013**, the Court noted thus: ***"Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."***

30. I shall adopt the above findings as if they were mine and it would therefore mean that the key purpose of orders of stay such as the ones now sought, is the preservation of the subject matter of a suit pending the hearing and determination of the hearing of the main suit.

31. Based on the matters placed before me therefore, I must firstly caution that it is not for this Court to evaluate the evidence to be used in the intended prosecution as that falls within the mandate of the Court Martial. This Court does not also have the jurisdiction to evaluate the veracity or otherwise of the evidence to be used and as such, I must out rightly decline the Applicant's invitation to that effect. I say so because it is in the Court Martial that the Petitioner shall present his challenge in regard to any evidence that may be tendered against him.

32. With that background, from the Applicant's allegations, it is quite evident that he is apprehensive of the intended prosecution he is supposed to undergo at the Court Martial and he has taken issue with the composition of the Court Martial among other issues. In that regard, **Section 163** of the **Kenya Defence Forces Act** provides that:

"(1) A court-martial may be convened by the Defence Court-martial Administrator or Service Court-martial Administrator in respect of each service, as the case may be.
(2) An order convening a court-martial shall be signed either by the Defence Court-martial Administrator or by the Service Court-martial Administrator in respect of each Service.
(3) For purposes of this section, the Defence Court-martial Administrator and Service Court-martial Administrators shall be legal officers who qualify to be appointed as Registrars of the Court of Appeal and High Court respectively, and shall be appointed by the Defence Council.

33. **Section 164** thereof further provides that:

(1) The convening officer shall not be a member of a court-martial which that officer convenes.
(2) An officer who, at any time between the date on which the accused was charged with the offence and the date of the trial, has been the accused's commanding officer, and any officer who has investigated the charge against the accused, or who under service law has held or been one of the persons holding an inquiry into matters relating to the subject-matter of the charge, shall not be a member of the court-martial which tries that accused, nor shall that person be Judge Advocate at the court-martial.

34. Based on the foregoing provisions, it is my view that the grounds for the disqualification of a member of the Court Martial are clearly stipulated and as such, the mere fact that a convener of a Court Martial is working directly under the Director of Military Prosecution in the legal

department, does not take away the jurisdiction of the Court Martial. As a result therefore, I am inclined to disagree with the Applicant's contentions that the Court Martial lacks jurisdiction to entertain his intended prosecution. In any event, it has not been disputed that the Applicant was given a chance to object to the members of the Court Martial to sit in his case but he never did so.

35. Furthermore, it has similarly not been disputed that there is a pending Ruling yet to be made on the question of the jurisdiction of the Court Martial. As a result, I am unable to reach the conclusion that the Court Martial does not have the jurisdiction to try the Applicant herein. Additionally, since the Applicant is a Commissioned Officer, **Section 4 (a)** of the **Kenya Defence Forces Act** applies squarely and fairly to him and as such, the Court Martial is better placed preside over the matter.

36. From my reasoning above, It is obviousthat am not satisfied that the Applicant has made out a case to warrant the grant of orders of stay or stoppage of the prosecution against him before the Court Martial and all other matters raised by him are best determined by the Court Martial and not this Court.

- ***Whether this Court should admit the Petitioner to bail or bond on reasonable terms***

37. It is not in dispute that the Petitioner has not made an Application for the grant of bail before the Court Martial in regard to the intended prosecution. In that regard, in my view, it is not proper for this Court to entertain any such application while the same falls squarely within the jurisdiction of the Court Martial.

38. The above notwithstanding, in the context of the armed forces however, the rights under **Article 49** of the **Constitution** as regard *inter alia* the right to bail, can be limited in terms of the provisions of **Article 24** of the **Constitution**, as read with the provisions of the **Kenya Defence Forces Act** which provides at **Section 54** as follows:

1. ***The rights of an arrested person in Article 49 of the Constitution may be subject to limitation in respect of a person to whom this Act applies as set out in subsections (2) and (3).***

2. ***Nothing contained in or done under the authority of this Act shall be held to be inconsistent with or in contravention of the right of an arrested person in so far as the Act permits—***

- ***the holding of an arrested person jointly with the persons serving a sentence;***
- ***the holding of an arrested person without bail; or***
- ***the holding of an arrested person in custody notwithstanding that the offence is punishable by a fine only or imprisonment for a term not exceeding six months.***

3. ***An accused person shall not be held in custody for more than eight days before he or she is arraigned before a commanding officer or a court-martial unless the commanding officer, for reasons to be recorded in writing, is satisfied that the continued arrest of the accused person is necessary.***

4. ***The commanding officer shall review his or her decision in subsection (3) after the lapse of eight days until the accused person is brought before a commanding officer or a court-martial."***

39. In my view, each case in regard to an Application of bail or bond must be determined on its own merits. In that regard, since the right to bail is not an absolute one, the denial of such bail or bond cannot in any way be said to be *prima facie* unconstitutional. I must therefore disagree with the Applicant's assertions that his right to bail has been infringed. If any advice is needed, let him apply for bail or bond in the Court Martial and only if it has been denied can he approach the Criminal Division of the High Court and seek a review of such an order.

Conclusion

40. As I conclude, I must remind the Parties that the proceedings before the Court Martial are to be conducted in line with the **Constitution** as required under **Section 161** of the **Kenya Defence Forces Act** which stipulates that:

In addition to other principles and values provided for in the Constitution, the court-martial shall, in the exercise of its powers and discharge of its functions, be guided by the principles provided for under Article 159(2) of the Constitution.

41. That is why in **Samuel Sabuni and Others vs Court Martial Case (supra)**, the Court made the observation that:

"***A Court Martial has inbuilt mechanisms for protecting the rights of those who appear before it. At this stage it would be prejudicial to the petition to state whether the applicants' case has high chances of success or not.***
One cannot say that this petition will be rendered nugatory if the applicants' trials are not stopped. In my view, there are three factors which make me reach the conclusion that the conservatory orders should not be granted.
Firstly, the public interest requires that discipline is maintained within the Forces and one of the methods of maintaining order and discipline is by court martialling those who breach military rules.
Secondly, the petitioners have recourse to appeal if their cases are heard and determined before this petition is concluded.
Thirdly, if it is later found that the petitioners' constitutional rights have been violated, they can always be compensated.
Although the most appropriate action is to forestall a threatened breach of constitutional rights, at times the public interest outweighs the perceived fears held by the individual citizens that their rights are about to be breached."

42. I completely agree with the above sentiments and it is my finding that the Applicant has not made out a case to warrant the grant of orders of stay of the proceedings at the Court Martial. Neither do I find reason to admit him to bail or bond as prayed.

Disposition

43. For the above reasons, the Application dated 11th December, 2015 is hereby dismissed.

44. Let each Party bear its own costs.

45. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF MARCH 2016

ISAAC LENAOLA

JUDGE

DELIVERED THIS 24TH DAY OF MARCH, 2016

JOSEPH L. ONGUTO

JUDGE