



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO. 485 OF 2016

CHARLES VETERO MWANZIA AND OTHERS..... PETITIONERS

VERSUS

TAVETA SENIOR RESIDENT MAGISTRATE’S COURT.....1ST RESPONDENT

ATTORNEY GENERAL2ND RESPONDENT

INSPECTOR GENERAL OF POLICE3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....4TH RESPONDENT

THE OCPD TAVETA.....5TH RESPONDENT

THE O.C.S TAVETA6TH RESPONDENT

AND

NATIONAL COALITION OF HUMAN

RIGHTS DEFENDERS KENYA (NCHRD-K)INTERESTED PARTY

RULING

[1] This is a ruling on a request by the DPP that the Petition, which challenges prosecution mounted at Taveta Law Courts in SRM Court Criminal Cases nos. 380, 381 and 382 of 2016 against the Petitioners for various charges including attempted murder and unlawful assembly, be heard at Voi High Court.

[2] The Petitioners seek final orders as follows:

“PETITIONERS PRAYERS DATED 18TH NOVEMBER 2016 THAT

1. A declaration that Taveta SRMC Criminal Cases No 380, 381 and 382 of 2016 are illegal and instituted for an improper motive.

2. A declaration that the several fundamental rights canvassed have been violated.
3. A prohibition restraining the Magistrate court in Taveta or any other Court from hearing Taveta SRMC Criminal Cases No 380, 381 and 382 of 2016.
4. A permanent day in the proceedings in Taveta SRMC Criminal Cases No 380, 381 and 382 of 2016.
5. An order of mandamus do issue directing the Inspector General of police to investigate the conduct of the OCS and OCPD Taveta and their role in perpetrating illegality oppressive and prejudicial acts of abuse of office.
6. General damages.
7. Exemplary damages and costs of and incidental to this suit.”

[3] By a Motion dated 18th November 2016, the Petitioners sought interlocutory relief pending hearing of the Petition as follows:

“NOTICE OF MOTION DATED 18TH NOVEMBER 2016

1. This application be certified as urgent and service thereof be dispensed with in the first instance.
2. An order do forthwith issue staying the proceedings in Taveta SRMC criminal Cases No 380, 381 and 382 of 2016 pending the hearing and determination of this application.
3. A downward revision of the bail and bond terms for all the accused person in Taveta SRMC Criminal Cases No 380, 381 and 382 of 2016 pending the hearing and determination of the application and petition herein.
4. The petition be heard on a priority basis in the interest of justice.
5. Such further and /or other relief as this Honourable Court may deem fit to grant
6. Costs of this application be in the cause”

[4] The respondents have now filed a Replying Affidavit sworn by Chief Inspector Abdullahi Adan on 28th November 2016.

[5] When the matter came up for directions on 23rd November 2016, applied that the Petition be transferred to the High Court at Voi which is the nearest High Court near the place of trial at Taita taveta pointing out that the application which was in the nature of revision would under Article 165 (6) and (7) of the Constitution require the calling for the file from the trial court and therefore the Petition should have been filed at the Voi High Court which is the nearest High Court.

[6] It was objected that the Nairobi Petition No. 325 of 2011 upon which the Petitioners justified filing of the present petition in Nairobi only involved two of the present petitioners and as order had already been made by Lenaola J. (as he then was) the decision of the Court could be placed before the High Court sitting at Voi as had been pleaded in Voi HC Criminal Revision No. 3 of 2015. Urging that there was no good reason for the filing of the petition in Nairobi when there was already a High Court at Voi with the DPP having offices there and contending that Voi is about 1 ½ hours away from Taveta, dismissed any hostility alleged by the petitioners over the land dispute between the petitioners and other persons.

[7] The petitioners offered the reason of the pendency of proceedings by way of petition No. 325 of 2011, which related to a land dispute and asserted that there was a nexus between the land dispute and the criminal charges facing the Petitioners emphasising the Court’s subject matter jurisdiction as distinguished from geographical jurisdiction and urged that there was no prejudice to the DPP and in the circumstance so of the case, the convenience as to the place of filing must consider that it was the incarcerated person who facilitated the counsel who represented him on almost *pro bono* basis.

[8] Counsel for the Petitioners also raised the issue of convenience of the Petitioners' Counsel based at Nairobi and who were acting at near pro bono basis with meagre resources for travel to the High Court at Voi.

[9] The Counsel also objected on the ground of security for the petitioners urging that the charges related to a land dispute over a property at Taita Taveta and holding the Court at Voi, with its proximity to the disputed land at only 1 ½ hours away could facilitate easy access to the Court by persons opposed to the petitioners interest who had engineered arrests of the petitioners who were involved in land advocacy issues at Taita Taveta Scheme. The petitioners said that they had in previous proceeding before the Taveta Court secured by Anti-riot police and therefore sought an environment where they would feel safe to pursue their case without pressure being brought to bear on tem by person mobilized against the accused.

Principles on the place of suing

[10] While the civil process principles on the place of filing under section 15-18 of the Civil Procedure Act requires filing of a suit to the convenience of the defendant by filing at the place where the defendant resides or works for gain, the principle of access to justice and the right to Counsel in constitutional cases, criminal and related cases may dictate a forum of filing of charges different from where the defendant/accused resides or works.

[11] Considerations as to availability of witnesses for the parties may also dictate the filing of the case where the offence is alleged to have occurred, and related constitutional petition or application near the said area for ease of bring-up of the trial court files.

[12] In the present case, the Petition relates to the criminal charges pending before the law courts at Taveta and the geographical proximity facilitates the calling of the record pursuant to Article 165(7) of the Constitution. The existence of orders of the High Court at Nairobi in an earlier proceedings is not sufficiently material to affect the placement of the Petition as these may be certified for use at the appropriate High Court as happened in the Voi High Court Criminal Revision No. 3 of 2015.

[13] Convenience of *pro bono* Counsel for the accused is outweighed by the need to maintain the supervisory jurisdiction of the Voi High Court. It has not been shown that the petitioners may not secure pro bono lawyers at Voi and the Kenya National Commission on Human Rights which sues as the 12th Petitioner is a constitutionally funded body with capacity for nation-wide operations.

[14] While the Court understands the filing of the constitutional petition no. 325 of 2011 when there was no High Court station in the region, there has since been established a fully operational High Court station with a resident Judge since September 2015. There, initially was established a High Court Registry with circuit judges from High Court at Mombasa and from September 2015 a High Court station at Voi with administrative and judicial supervisory jurisdiction over the law courts at Taita Taveta.

[15] The High Court at Voi is able to make such directions as may be necessary for the protection of the accused and witnesses in the matter. The security concerns of the petitioner are appropriately addressed by the Police as stated by Counsel for the 12th Petitioner by presence of anti-riot police, who will continue to deploy as necessary officers for crowd control.

Orders

[16] This Petition will be transferred, for hearing and disposal, to the High Court at Voi which has the supervisory jurisdiction over the Magistrate's Court at Taveta, where the criminal cases the subject of the Petition are filed.

[17] For consideration of the revision of bail terms for the Petitioners, the Petition will be placed before the Presiding Judge of the High Court at Voi on Thursday 1st December 2016.

[18] Costs in the cause.

DATED AND DELIVERED THIS 29TH DAY OF NOVEMBER 2016.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Lempaa for 1-11 Petitioners

Mr. Kamau for the 12th petitioner

Mr. Achimosi for the 4th Respondent