



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. CIVIL APPLICATION NO. JR. 424 OF 2014**

**IN THE MATTER OF AN APPLICATION BY SENATOR JOHNSON NDUYA MUTHAMA FOR  
LEAVE TO APPLY FOR JUDICIAL REVIEW AND ORDERS OF CERTIORARI AND  
PROHIBITION**

**AND**

**IN THE MATTER OF ARTICLES 10, 47, 50, 73 AND 157 OF THE CONSTITUTION OF THE  
REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF SECTIONS 6(a) & (b), 16(1), (2) & (3), 29(1), (2) 3, 301 2 and 34(1)(a), (b)  
& (c) OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT, 2013**

**AND**

**IN THE MATTER OF THE SPECIAL ISSUE OF THE KENYA GAZETTE VOL. CXVI-NO, 102  
OF 27<sup>TH</sup> AUGUST 2014**

**AND**

**IN THE MATTER OF NAIROBI CHIEF MAGISTRATE'S COURT ANTI-CORRUPTION CASE  
NO. 19 OF 2014**

**BETWEEN**

**SENATOR JOHNSON NDUYA MUTHAMA.....APPLICANT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup>  
RESPONDENT**

**HON. PAUL KIBUGI MUTE SC.....2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS.....3<sup>RD</sup>  
RESPONDENT**

**NATIONAL POLICE SERVICE.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion dated 17<sup>th</sup> November, 2014, the applicant herein **Senator Johnson Nduya Muthama**, seeks the following orders:

**1. Certiorari to remove into the High Court and quash the decision of the 1<sup>st</sup> Respondent contained in the Special Issue of the Kenya Gazette Vol. CXVI-No. 102 of 27<sup>th</sup> August 2014 Gazette Notice No. 5959 appointing Paul Kibugi Muite S.C to be a public prosecutor for purposes of criminal cases and all legal proceedings arising or connected with the following inquiry files:**

- 1. CCIO Nairobi Area Inquiry File No. 20/2013;**
- 2. Police Case File No. Cr. 121/761/2009;**
- 3. CID HQs Inquiry File No. 96/2008; and**
- 4. KACC/Fl.INQ/96/2010**

**2. An order of certiorari to remove into the High Court and quash the decision of the 1<sup>st</sup> Respondent made on or about 26<sup>th</sup> April 2014 or on any date between March 2014 and 27<sup>th</sup> August 2014 identifying, instructing and appointing Paul Kibugi Muite S.C to review, advise and/or in any manner handle the file(s) relating to or connected with investigations into matters touching on Malili Ranch Limited or any investigations into allegations of offences connected with the sale and/or purchase of land between Malili Ranch Limited and the Government of Kenya.**

**3. An order of Certiorari to remove into the High Court and quash the decision of the 2<sup>nd</sup> Respondent made on or between 27<sup>th</sup> August 2014 and 29<sup>th</sup> August 2014 to commence proceedings, prosecute, summon and/or cause the Applicant to be summoned and charged for the purpose of prosecution in Nairobi Chief Magistrate's Court Anti-Corruption Case No. 19 of 2014 – *Republic v Julius Maweu Kilonzo & 8 Others*.**

**5. An order of certiorari to remove into the High Court and quash the decision(s) of the 3<sup>rd</sup> Respondent contained in the charge sheet dated 27<sup>th</sup> August 2014 Police Case No. 121/272/2014 charging the Applicant alongside others with offences and counts contained in the said Charge Sheet.**

**6. An order of prohibition directed to the 1<sup>st</sup> Respondent prohibiting him from carrying out and/or proceeding with Nairobi Chief Magistrate's Court Anti-corruption Case No. 19 of 2014 – *Republic v Julius Maweu Kilonzo & 8 Other* whether by himself or through any other public or private prosecutor.**

**7. An order of Prohibition directed to the 5<sup>th</sup> Respondent prohibiting the 5<sup>th</sup> Respondent from carrying out and/or proceeding with Nairobi Chief Magistrate's Court Anti-Corruption Case No. 19 of 2014 – *Republic v Julius Maweu Kilonzo & 8 Others* and/or any further proceedings arising from or connected with the following inquiry files:**

- 1. CCIO Nairobi Area Inquiry File No. 20/2013:**
- 2. Police Case File No. Cr. 121/761/2009;**

3. **CID HQs Inquiry File No. 96/2009; and**

4. **KACC/FI/INQ/96/2010**

**10. The costs of this application be in the cause**

2. The hearing of the Motion commenced on 27<sup>th</sup> July, 2015 when the applicant's case was heard and the same was adjourned to today for the hearing of the respondents' case. However, **Mr Njoroge**, learned counsel for the Attorney General appeared and informed the Court that the Attorney General got notice of these proceedings through the cause list. Having considered the issues the subject of the application the Attorney General formed the opinion that the matter raises weighty matters including Article 157 of the Constitution. However, as the AG did not have the proceedings, it was unable to reply to the application though it is the defender of public interest and as such is mandated to uphold the rule of law in Kenya.
3. It was submitted that the AG wishes to reply to the application and file such documents as would be necessary and submissions. He therefore prayed that the Court do adjourn the hearing to a specific date on which the AG would be extensively heard since extensive proceedings had taken place herein so as to enable the AG acquaint himself with the proceedings. According to **Mr Njoroge**, the AG wished to bring case law with respect to his position hence the request for the indulgence.
4. In his view since the hearing of the criminal proceedings the subject of these proceedings is due for mention in October, there is no danger to such indulgence being granted.
5. The position of the AG was supported by the Respondents. In his submissions **Mr Ashimosi**, learned counsel for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents, submitted that during the hearing the appearance of the The Chief Magistrate's Court, the 5<sup>th</sup> Respondent herein was not addressed yet that party ought to have been represented by the AG. He supported that position that the AG be given time to participate as his submissions are important. He however suggested that in so doing the Court ought not to nullify the proceedings which have taken place so far.
6. On his part **Mr Esmail**, learned counsel for the 2<sup>nd</sup> Respondent while supporting the AG's position submitted that the AG being a constitutional office, his input in the matter is crucial especially with respect to the agreement alluded to in the submissions which in his view was not even part of the applicant's case. The AG'S position it was submitted may even affect his client's case and that of the DPP. Since there was no evidence of service on The Chief Magistrate's Court, it was contended that the Court is likely to be faced with an application for review. In his view, the accommodation that has been given to the applicant cannot go unnoticed hence the Respondent also ought to be accommodated if justice is to be seen to have been done.
7. On behalf of the Applicants, it was submitted by **Dr Khaminwa** and **Mr Ndubi** that to acceded to the request of the AG would mean re-opening of the proceedings yet the proper parties to these proceedings are the Director of Public Prosecutions, the Director of Criminal Investigations, the National Police Service and The Chief Magistrate's Court. It was submitted that apart from The Chief Magistrate's Court the other parties ably represented. According to **Dr Khaminwa**, this matter has been in the public limelight for a long time hence the AG cannot feign ignorance of these proceedings. The Chief Magistrate having been duly served it was submitted that the applicants had fulfilled the obligation on them
8. With respect to the submission that the AG is under a duty to uphold the rule of law, it was submitted that that is a duty placed on all lawyers and judges and not just the AG. It was the applicant's view that in the absence of clear proof of non-service the matter cannot be reopened at all.
9. According to **Mr Ndubi**, since The Chief Magistrate's Court had decided not to participate in these proceedings there was no need to serve the hearing notice on it as it had shown no interest in the matter. While not opposing the participation of the AG in these proceedings, it was submitted that the hearing ought t proceed in order to avoid any further delay.
10. In his rejoinder, **Mr Njoroge** submitted that even if The Chief Magistrate's Court was served, that does not mean that the AG was served yet the AG ought to have been served as mandated under section 12 of the **Government Proceedings Act**. However, it was his view that there was no evidence of service on the Magistrate. Being the Chief Legal Adviser to the Government, it was

submitted it behoves the AG whenever it comes to his attention that there is a matter pending to approach the Court in order to make necessary representations.

11. While not seeking for nullification of the proceedings, learned counsel submitted that the AG only needed time to prepare its representations and come back for the same on a date convenient to the Court.
12. I have considered the issues raised by the parties herein. It is important to consider the import and the impact of section 12 of the **Government Proceedings Act**. However, that issue is not new as it has been the subject of a decision by this Court. In **The Council of Governors and Others vs. The Senate Petition No. 413 of 2014** a three judge bench of this Court held:

**“The Constitution, 2010 allows the Attorney General the right to represent the National Government in Court proceedings but does not stipulate that the Attorney General should be sued in all instances where any organ of the National Government has been sued and to say otherwise would be absurd.”**

13. This position was cited with approval in the subsequent case of **Council of Governors & Others vs. The Senate & Others Petition No. 381 of 2014** in which the Court expressed itself as follows:

“The preamble to the Government Proceedings Act states that it is:

*An Act of Parliament to state the law relating to the civil liabilities and rights of the Government and to civil proceedings by and against the Government; to state the law relating to the civil liabilities of persons other than the Government in certain cases involving the affairs or property of the Government; and for purposes incidental to and connected with those matters.*

Section 12(1) of the Act, which is relevant for present purposes, provides as follows:

*Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be.*

It must be observed, first, that the present matter is not a civil matter relating to “*the affairs or property of government*” in the manner contemplated under the provisions of the Government Proceedings Act. The petition before us seeks the interpretation of the question whether an Act of Parliament is unconstitutional for violating the Constitution. It is brought under the provisions of Article 165 and 258 of the Constitution which grant the Court the jurisdiction to interpret whether an Act of Parliament is inconsistent with or otherwise in contravention of the Constitution. It cannot therefore be deemed to be “*civil proceedings*” as contemplated in the Government Proceedings Act. In our view, the provisions of section 12 of the said Act do not apply to petitions alleging violation of constitutional rights or contravention of the Constitution.”

14. These being judicial review proceedings, the said section does not apply.
15. It was further submitted that the AG has the obligation to uphold the rule of law hence the necessity to make that office a party to these proceedings. However Article 3(1) of the Constitution provides:

***Every person has an obligation to respect, uphold and defend this Constitution***

16. Therefore under the current Constitution it is not just the AG who is under a duty to uphold the law and the Constitution, but all persons are under a similar duty and it would be absurd in my view to argue that in all matters of public interest all persons ought to be joined. Where a public body is a party to the proceedings, the AG is of course entitled to represent that body. Similarly even in cases where a public body is not a party but the matter concerns public interest the AG may appear for a party to those proceedings. In these proceedings the AG was properly entitled

and in my view was the proper office to appear for The Chief Magistrate's Court. That party has neither come to Court to seek any orders herein nor sought to set aside these proceedings. Instead the position taken by the AG is that it ought to be heard in its own rights. The AG however has not sought that the proceedings herein be set aside.

17. This Court undoubtedly has power under Order 53 rule 3(4) of the **Civil Procedure Rules**, on the hearing of the Motion to adjourn a hearing upon such terms as the court may direct. The terms to be imposed by the Court however depend on the circumstances and the justice of the case. In this case, the applicant does not oppose the AG's participation in these proceedings. Rather he is concerned about the delay which is likely to be occasioned by such adjournment especially if the proceedings were to be re-opened. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents are similarly concerned about the prospects of re-opening the case.
18. Having considered the issues the subject of these proceedings, which I agree are weighty matters of public and legal interest to this country I am satisfied that the AG ought to be given an opportunity to make his representations. However I am not satisfied that The Chief Magistrate's Court was not served since based on what has been placed before me there is *prima facie* evidence of service and The Chief Magistrate's Court has not sought any orders before this Court. Accordingly I will limit the participation of the AG in these proceedings to matters of law and the factual evidence already on record.
19. In my view however, there is no compelling reason to insist that this matter ought to proceed today in light of the fact that the AG may wish to file submissions in the matter. It would be prudent to have the said submissions on record first before proceeding further.
20. Accordingly I hereby adjourn the hearing of this matter. I direct the AG to file and serve his submissions within 7 days.
21. I further direct that at the adjourned hearing the applicant will be afforded not more than 30 minutes to deal with the issues raised by the AG and thereafter the Respondents will respond to the application within not more than two hours.

**Dated at Nairobi this 29<sup>th</sup> day of July, 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Dr Khaminwa, Mr Ndubi and Mr Oluoch for the Applicant**

**Mr Ashimosi for 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents**

**Mr Esmail for the 2<sup>nd</sup> Respondent**

**Mr Moimbo for Mr Njoroge for the Attorney General**

**Cc Patricia**