**REPUBLIC OF KENYA**

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

**PETITION NO. 25 OF 2015**

1. **IRENE WANJIRU KAMAU**
2. **ECKOMAS MWENGI MUTUSE**
3. **FRANCIS KIIO MWAKA**
4. **JOHN MWIRICHIA MUTWIRI**
5. **JOSHUA KIPKEMBOI SITIENEI …… PETITIONERS**

***VERSUS***

**THE HON. THE ATTORNEY GENERAL ……..… RESPONDENT**

**RULING**

1. The Petitioners/Applicants herein are **Public Officers** in the employment of the National Government and County Government of Machakos respectively. They were charged with various offences in Anti-Corruption Case No. **1 of 2015.** On the 23rd June, 2015, they filed a Constitutional Petition herein challenging the constitutionality of Section 62(1) of the Anti-Corruption and Economic Crimes Act, 2003 (ACECA).

2. The applicants also took out a Notice of Motion seeking issuance of conservatory orders staying their suspension from Employment at half pay, notwithstanding that they have been charged with offences under the ACECA.

3. The application is premised on grounds that:- the Petitioners/Applicants are public officers within the meaning of Article 260 of the Constitution of Kenya, 2010 (the Constitution) and Section 2 of the ACECA; on the 15th of June 2015 they were charged in Criminal Case No. 1 of 2015, pleaded not guilty to the offences and were admitted to bail; by dint of Section 62(1) of the ACECA they stand suspended from the date of the charge and are on half pay pending hearing and determination of the criminal charges; under Article 50(2) of the Constitution they are presumed innocent until the contrary is proven in a fair trial; it is inimical and unethical for the applicants to be punished by way of suspension from their employment before hearing and determination of the criminal charges against them; hearing and determination of Anti-Corruption in Kenyan courts takes not less than three (3) years, subjecting them to suspension is holding them in servitude in violation of Article 30(1) of the Constitution.

4. Further, that: to subject the applicants to suspension is an extra-judicial punishment and premature confirmation of guilt of allegations made against them, an act that subjects them to indignity and is an affront to their constitutional right to human dignity enshrined in Article 28 of the Constitution; the power to punish offenders is exclusively vested in the Judiciary by virtue of Article 159(1) of the Constitution; the legislature has no power or authority to mete out extra-judicial and or extra-crucial punishment; there exists other public officers as well as state officers who are not subject to suspension upon being charged under the ACECA which is discriminatory

and unequal treatment and it offends the Petitioners' rights to freedom from discrimination as enshrined under Article 27 of the Constitution.

5. Further, that: during the period of suspension the Applicants will not be working yet continue to receive taxpayers money disbursed to them as Public Officers; the act of suspension of the Applicants inflicts upon them extreme psychological and mental torture which is contrary to the constitutional provisions against the freedom from psychological torture as well as cruel, inhuman and degrading treatment as enshrined in Article 29(d) and (f) of the Constitution.

6. The applicants swore an affidavit in support of the application where they deponed that they were questioning the constitutionality of the provisions of Section 62(1) of the ACECA and basically reiterated the grounds on the body of the application.

7. The Petition and the Notice of Motion were served upon the Hon. Attorney General of Kenya who failed and/or neglected to respond thereto. The application therefore stands unopposed.

8. In his oral submissions, Counsel for the Petitioners, Mr. Kilukumi argued that the presumption of innocence is an absolute right that cannot be abrogated, limited or qualified, therefore suspending a public officer is eroding the right to be considered. Citing the case of **International Centre for Policy and Conflict and Others vs. The Hon. Attorney General and 5 others; (2013)eKLR,** he submitted that the judges stated that to do so would be violating their rights. Calling upon this court to adopt the reasoning in that case, he stated that investigations having been completed and a decision having been made to charge the applicants, asking a public officer to stay away from work is a punishment before conviction. That it is only the judiciary that can mete out punishment but not parliament. He cited the case of **Marete vs Attorney General (1987)KLR 620** where **Shields J.** stated that subjecting a person to two and half (2½) years without pay, without work and without freedom to seek work is a mental torture, inhuman and degrading treatment. He called upon the court to question the constitutionality of the statute as was done by **Odunga J.** in the case of **Coalition for Reform and Democracy (CORD) & Another VS Republic of Kenya & Another (2015) eKLR** where the constitutionality of security laws was challenged and some clauses suspended.

9. He concluded his submissions by asking the court to find that the question raised went beyond the applicants. Therefore he sought an order referring the matter to the Chief Justice to expand a bench of more than one judge to hear the matter pursuant to Article 165(4) of the Constitution.

10. Despite the fact that the application is unopposed, as a court I am duty bound to interrogate the case as presented and come up with cogent reasons requiring grant or conservatory orders as prayed. It has been held that a party seeking a conservatory order is required to establish a prima facie case with a probability of success and that unless the court grants a conservatory order, there is a real danger that the applicant will suffer prejudice as a result of the violation or threatened violation of the Constitution (See **Nairobi HC Petition No. 427 of 2014 Hon. Kanini Kega vs Okoa Kenya Movement & 6 others (2014)eKLR; Nairobi H.C. Petition No. 16 of 2011; Centre for Rights Education and Awareness (CREAW) & 7 others versus Attorney General; Muranga HC Petition No. 7 of 2014).**

11. In the case of **Gatirau Peter Munya versus Dickson Mwenda Kithinji & 2 others Petition No. 2 of 2014**, the Supreme Court of Kenya considering what conservatory orders entail had this to say:

> ***"..... 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".***

12. From the foregoing it is apparent that issuance of conservatory orders is not automatic. I have to consider whether:-

- ***The applicants have demonstrated existence of a prima facie case in their cause with a probability of success.***
- ***There is a real danger of the applicants suffering prejudice as a result of the violation /threatened violation of the constitutional provisions cited.***

13. First and foremost I wish to point out that the order sought by the applicants will have wide ramifications as very many people have been charged with anti-corruption and economic crimes in this country.

14. In determining the issue of whether a prima facie case has been demonstrated, it is imperative to consider the provision of the law being faulted. Section 62(1-4) of ACECA Provides:

> ***" (1) A public officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge.***
>
> ***(2) A suspended public officer who is on half pay shall continue to receive the full amount of any allowances.***
>
> ***(3) The public officer ceases to be suspended if the proceedings against him are discontinued or if he is acquitted.***
>
> ***(4) This section does not derogate from any power or requirement under any law under which the public officer may be suspended without pay or dismissed."***

It is not in dispute that the applicants are public officers as envisaged by the statute and Article 260 of the constitution. This would therefore bring in the question: what was the purpose of the legislation?

Looking at the preamble to the ACECA it provides:

> ***"An act of parliament to provide for the <u>prevention</u>, investigation and punishment of corruption, economic crime and related offences and for matters incidental thereto and connected there with (Emphasis mine).***

15. It is reasonable to think that parliament intended to address the issue of prevention of corruption by coming up with such a provision of the law.

The statute must have intended to remedy the issue of an accused person being allowed to continue holding the same office where the offence was alleged to have been committed. Granting such a person an opportunity of remaining in office could therefore defeat the spirit of prevention of corruption.

16. Would this, however, be prejudicial to the applicants? Looking at the provision of the law, following the suspension, the applicants are entitled to half pay and allowances they are eligible to. In the Marete case (supra) the applicant was held for two and half years without pay, without work, without freedom to seek work to support his family which was tantamount to being held in servitude. The case is distinguishable from the instant one.

17.Majanja J. was confronted with such an application in the case of **Thuita Mwangi and 2 others vs Ethics & anticorruption commission & 3 others (2013) eKLR** where he had this to say;

***"The section 62 must be read in context of its purpose, the overall purpose of the Act and the spirit enshrined in Chapter 6 of the constitution. Suspension does not amount to a penalty but merely suspends certain rights pending determination of the trial. In the event the person is acquitted the full benefits are restored. If the person is convicted, then the suspension merges into a penalty."***

What was stated by the learned judge is persuasive. The suspension in issue cannot therefore be viewed as a punishment imposed by parliament.

18. The statute provides for hearing of the case on a day to day basis until completion. (See section 4(4) of ACECA). Therefore the applicants need not be apprehensive that the trial will take long.

19. In the premises, I find the applicants having not demonstrated why the order sought should issue. Consequently I decline to issue the conservatory order sought.

20. I have been asked to refer the matter to the Chief Justice for the constitution of a bench of an uneven number of judges to hear it, as the question being raised in the petition go beyond the five (5) applicants.

21. Article 165 (4) of the constitution provides:-

***"(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice."***

22.The issue to be determined is therefore whether the petition raises a substantial question of law? To determine whether a substantial question of law exists would depend on the merit of the case but must be based on some substantive legal argument. It should be a case of general public importance or affect the rights of parties substantially.

I do note what was stated in the case of **Stanely Waweru Kariuki vs Attorney General, Petition No. 13761 of 2003** Mutunga CJ. Stated:

***"I am not satisfied that the matter certified as raising a substantial question of law.... was based on any substantive legal arguments made before the court ..... and subsequently considered by the court as satisfying the provisions of this article ....."***

Consequently he returned the matter to the court for re-consideration.

With this Practice Note in mind – I do note that ACECA was enacted prior to the promulgation of the Constitution. The Constitution provides for myriad of human rights, freedoms, equality and freedom from discrimination is provided for by Article 27. According to section 62(6) of ACECA only public officers charged with corruption and economic crimes offences are suspended from office. A person whose removal from office has been provided for by the Constitution, if charged with such an offence, cannot be suspended. This falls short of equality before the law. The law may be discriminatory.

23. It is a question that must be addressed. In the premises pursuant to the provisions of Article 165(4) of the Constitution, I do certify that the petition herein raises a substantial question of law under clause 3(b) and (d) that should be determined. Therefore I direct that the file shall be placed before the Chief Justice for purposes of empanelling a Bench of an uneven number of judges, being not less than three to hear and determine the petition.

**DATED, SIGNED** and **DELIVERED** at **MACHAKOS** this **26TH** day of **AUGUST, 2015.**

**L.N. MUTENDE**

**JUDGE**