REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

MISC. APPL. NO 354 OF 2004

KENNETH KIPKEMBOI SETTIM.............1ST APPLICANT

JOSSY MWIKALI KIOKO...................2ND APPLICANT

VERSUS

REPUBLIC..RESPONDENT

RULING

1. The present matter first appeared before the High Court on 21st September 2006, more than nine years ago today. It came by way of a reference to the High Court, on the application of the applicants who were then facing prosecution in Anti-corruption Case No. 6 of 2004.

2. It was listed for mention before Emukule J on 25th September 2006, when the Court directed that it should be placed for mention before Hon. Mr. Justice Nyamu on 3rd October 2006. On that date, as on the previous date, there was no appearance for the respondent as the applicants had not effected service.

3. Nonetheless, after noting the failure to serve the respondent, the Court directed the parties to file and serve written arguments with the usual lists (if any) within 30 days, and the matter was set for mention to confirm compliance on 8th November 2006. The Court also directed that its orders for that day be served on the respondent.

4. On 8th November 2006, there was no appearance by either the applicants or the respondents, and the matter was stood over generally, with an order that the applicant pay the court adjournment fee before the next listing.

5. No action was taken in the matter for the next eight years, until the matter was placed before Majanja J on the 12th of August 2013 in the absence of the parties. The Court referred the matter back to the Chief Magistrate's Court to hear and determine the case in accordance with the law. The Court also directed that there would be no order as to costs.

6. The applicants have now filed the present application in which they challenge the order of Majanja J of 12th August 2013 and seek orders to set it aside and for their reference to be referred to the Chief Justice. In the application dated 30th June 2015, the applicants seek the following orders:

1. ***This application be certified urgent and heard ex part in the first instance.***

2. ***Pending the hearing and determination of this application inter partes a conservatory order be issued staying the proceedings in Anti-corruption case no 6 of 2004 Republic v Kenneth Kipkemboi Settim & Another.***

3. ***Pending the hearing and determination of this application inter partes, an order be issued calling for the court file in the Chief Magistrates Court, Milimani Law Courts in Anti Corruption Case No 6 of 2004 Republic v Kenneth Kipkemboi Settim & Another.***

4. ***An order be issued setting aside the ex parte court order issued by this Hon court on 12th August 2013 remitting the court file in Anti corruption Case No 6 of 2004 Republic v Kenneth Kipkemboi Settim & Another to the subordinate court for hearing and disposal.***

5. ***An order be issued remitting the constitutional reference raised by the applicants in the proceedings in Anti- corruption Case no 6 of 2004 Republic v Kenneth Kipkemboi Settim & Another to the Hon Chief Justice for purposes of constituting a bench for hearing and disposal of the constitutional reference.***

6. ***Any other or further order this Hon. Court deems fit, proper and just to grant.***

7. ***Costs of this application be borne by the respondent in any event***

7. The application is based on the following grounds:

a. ***By an ex part order issued by the Hon Mr. Justice Majanja the court file in Anti corruption Case No 6 of 2004 was remitted to the anti-corruption court, Milimani Law Courts for hearing and disposal.***

b. ***Parties were neither invited to nor appeared before the learned Judge before the orders were issued.***

c. ***The learned Judge did not give any reasons for remitting the file back to the anti-corruption court despite pendency of the constitutional reference before this Hon court.***

d. ***On 20th May 2015 the anti-corruption court set down the Anti corruption Case No 6 of 2004 for hearing on 18th June 2015 stating that it was bound to proceed with the hearing of the case by virtue of this court's order issued on 12th August 2013.***

e. ***On 18th June 2015 despite attempts by the applicants to convince the trial magistrate in anti corruption Case No 6 of 2004 to temporarily adjourn the proceedings to enable the applicants have the file placed before the High court for determination of the constitutional reference on the merits, the learned trial magistrate rejected the applicants' request and proceeded with the hearing of the case.***

f. ***The applicants' trial proceeded in the absence of their advocate thus offending their constitutional right to legal representation.***

g. ***The further hearing of the trial has been fixed for 23rd July 2015.***

h. ***Unless this Hon Court stays the proceedings and calls for the subordinate court file and reinstates the reference, the applicants' right to have the reference heard and determined on the merits will be adversely affected and negatively and adversely affect the applicants' constitutional right of access of justice guaranteed under article 48 of the constitution of Kenya 2010***

i. ***Further and other grounds to be adduced at the hearing.***

8. In the affidavit in support of the application sworn on 30th June 2015 by the applicants' Counsel, Mr. Abbas Esmail, it is deposed, on the basis of information from Mr. Kioko Kilukumi Advocate, who had the personal conduct of Anti-Corruption Case No 6 of 2004 pending before the Chief Magistrate's Court, that this matter was referred to this Court by the trial court in its ruling delivered on or about 28th September 2004 pursuant to an application by the applicants.

9. In the said ruling, according to the applicants, the Learned Magistrate referred the court file to the Hon Chief Justice to constitute a bench for disposal of the constitutional issues raised by the applicants. Mr. Esmail avers that the Chief Justice is yet to give audience to the parties for purposes of creation of a bench to hear the reference, and that Mr. Kilukumi has never appeared before the Hon Chief Justice for directions.

10. Mr. Esmail further avers that unknown to the applicants or their lawyers, the court file was place before the Hon Mr. Justice Majanja. The Court then made an ex parte order in which he remitted the file back to the Chief Magistrate's court for hearing and disposal. Mr. Esmail states that no reasons were recorded for issuing the said order despite the applicants' reference not having been heard. Summons were then issued by the trial court to the applicants.

11. The matter proceeded for hearing before the Chief Magistrate's Court in the absence of Mr. Esmail who had sought an adjournment and indicated that he had not familiarized himself with the file to enable him adequately represent the accused persons.

12. In his submissions on behalf of the applicants, Mr. Esmail stated that he had noted that the applicants' reference had been unheard since 2004 when it was placed before the court. His submission was that it was incumbent on the Court to hear both parties on the merits before sending the matter back to the trial court.

13. According to Mr. Esmail, in a somewhat unclear averment, the reason why the matter has never been heard almost two years after the file was remitted back to the trial court is that the applicants informed him that they had been summoned back to the Magistrate's Court in the anti-corruption case. It is only after the applicants' advocates perused the court file that they established that the order remitting the file back to the trial court had been issued two years back.

14. Mr. Esmail submitted that an ex parte order issued without hearing the parties offends the rules of natural justice, is not fair administrative action and is contrary to Article 47 of the Constitution. In his view, where a court is responsible for such action, it is judicial policy to set aside such orders *ex debito justitiae*. Counsel relied on the decision in **R vs Chief Land Registrar ex parte James Njoroge Njuguna (2012)eKLR** and **R vs Chairperson, Business Premises Rent Tribunal and Others ex parte Ibrahim Sheikh Abdulla [2015]eKLR**.

15. While conceding that the discretion of the court is very broad, the applicants' reference, according to Mr. Esmail, raises very weighty constitutional issues on whether the AG had power to revive legislation which had been repealed, and whether the Director of Public Prosecution (DPP) has power to prosecute people under repealed legislation.

16. While further conceding that there has been delay in proceeding with their reference, the applicants submitted that no prejudice had been occasioned to the office of the (DPP) which is a public office, that would stop the reference being heard today. Their submission was that the witnesses for the DPP are available and the case can still be heard if the reference is dismissed.

17. Counsel further alleged that the averments contained in the affidavit sworn on behalf of the DPP contained falsehoods as he was not present when the applicants took a fresh plea; and that taking a plea in the absence of the applicants' Counsel was a violation of their rights under Article 50. Counsel submitted that the applicants had made a feverish attempt to have the reference heard and determined once they were arraigned in court after the file was sent back to the trial court, and it was his plea that the application be allowed and the reference allowed to proceed.

18. The DPP opposed the application in reliance on an affidavit sworn by Ms. Vera Omollo, a prosecution counsel in the office of the DPP.

19. In her replying affidavit, Ms., Omollo states that in 2004, the applicants lodged a constitutional reference which, inter alia, sought to have the proceedings before the trial court halted and the file referred to the Chief Justice for consideration. She states that the application was determined by Majanja J on 12th August 2013 and the court made an order that the matter should be referred back to the Chief Magistrate's court for hearing and final determination. She further avers that Mr. Esmail represented the applicants when their plea was taken again before the trial court, and that before the matter was set down for hearing, the said Counsel had constantly appeared and given the trial court the indication that he was representing the applicants in Anti-corruption Case No 6 of 2004.

20. Ms. Omollo also makes averments with regard to the application by Mr. Esmail to have the prosecution adjourned for the purpose of having the reference heard by the High Court. She avers that upon the Court declining to grant the adjournment, Counsel walked out of Court and the matter proceeded in his absence, but in the presence of the accused persons, the applicants herein, who were afforded a chance to cross-examine the witness, though they did not avail themselves of the opportunity.

21. She further deposes that the matter has been pending since 2006 and the applicants have never bothered to prosecute their constitutional reference. They had enjoyed conservatory orders between 2004 and 2013, a period of approximately nine (9) years. They also never challenged the orders of Majanja J made on 12th August 2013 but only revisited the issue in 2015 when the trial court gave directions and the matter was rightfully scheduled for hearing.

22. According to the DPP, the order referring the file back to the trial court was made in the absence of both parties. At the time the order was made, the applicant had not filed any documents, even though directions had been made in October 2006 directing the parties to file documents, orders which were made in the presence of Counsel for the applicants. The matter was then stood over generally until 2013 when the Court, on its own motion, referred the file back for hearing by the trial court. The DPP submitted that the order of the Court referring the file back could not be faulted when the applicants had not complied with earlier orders of the Court.

23. It was also the DPP's submission that it is not fair or in the interests of justice that a trial be kept pending for 11 years, and it would set a bad precedent if the Court were to agree that parties can keep their application pending before the High Court while enjoying a stay of their prosecution.

24. In his submissions in reply, Mr. Esmail contended that the applicants had not applied to have their prosecution stopped, but had merely raised constitutional issues. It was his submission that while it's not in the interests of justice that a prosecution is stopped for 9 years, it is also not in the interests of justice that weighty constitutional issues should not be heard.

Determination

25. I have already set out at the beginning of this ruling the chronology of events leading to the present application. Four things stand out with regard thereto.

26. First, the constitutional reference was raised by the applicants' Counsel in 2004, that is eleven years ago. It came up before the High Court, in the presence of the applicants' counsel, but in the absence of the respondent, then the office of the Attorney General, whom the record indicates had not been served by the applicants, in 2006. The matter was set for mention, at which mention directions were again given for filing of documents, and a second mention date to confirm compliance given. On this second mention date, there was no appearance for the parties, and it would appear that the AG was never served. The matter was then stood over generally. Thereafter, the applicants took not a single step for 8 years with respect to their reference. It next appeared before the Court, on the Court's motion, on 12th August 2013, when it was sent back to the lower court for trial in accordance with the law.

27. The second notable thing is that the applicants, who were represented by Counsel, did not take any steps in the matter until they were summoned to court in 2015. This was after the High Court had sent the matter back to the trial court on 12th August 2013. While the order had been made in 2013, the applicants only woke up when the trial court indicated its intention to proceed with the prosecution.

28. The third thing that stands out is the applicants' submission, through their counsel, that they had not sought the stoppage of their prosecution. Yet, in the last nine years, they have not taken a single step to pursue the constitutional reference which effectively put a stop to their prosecution. Indeed, as is evident from the submissions of their counsel before me, the position of the applicants is contradictory: they wish to stop their trial from proceeding until the constitutional reference they have not pursued for nine years is heard and determined, while at the same time contending that they had not wished to stop their prosecution.

29. Finally, it is noteworthy that while the applicants have conceded that there has been inordinate delay in the prosecution of their constitutional reference, they have not offered any explanation for why they have not taken any step in the matter, despite the fact that they had over 8 years before the file was referred back to the Magistrate's Court, and eleven years before they were summoned back to court, during which they could have made some effort to deal with the important constitutional issues that they allege their reference raises.

30. In the period between the start of the case against the petitioners and their present application, a lot has happened. A new Constitution has come into place that has brought considerable changes to the institutions involved in the administration of justice, and in prosecution. It also imposes a duty on every person to abide by its tenets, and commands the courts to expeditiously deal with matters before it.

31. I am in the present application faced with the need to balance two competing interests. That of the applicants who, after eleven years, now claim that they were not heard before their matter was referred back to the trial court. The other interest is that of society in the proper administration of justice, which requires that those accused of committing offences are tried and, if found guilty, convicted and punished for the offences.

32. The trial court is mandated, in dealing with a matter before it, to do so in accordance with the tenets of the Constitution. It has the jurisdiction to deal with the validity or otherwise of any charges laid against the applicants. It cannot be in the interests of justice, therefore, for this Court to stop the prosecution of the applicants, which in any event they submit that they had not sought, while the constitutional reference, which they have not thought important enough to pursue in eleven years, is prosecuted.

33. In any event, the issue that they raise is no longer a matter in controversy. Their complaint was that they had been charged with the offence of corruption in office contrary to section 3(1) of the Prevention of Corruption Act (Cap 65 of the Laws of Kenya now repealed) as read with section 23(3)(e) of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya. Their constitutional reference related to the power of the Attorney General, under Legal Notice No. 162 of 2003, to replace the word "repealed" in the said section with the word "repealing". The provision in dispute has been the matter of interpretation and it has been found that the use of the word 'repealed' was a typographical error which the Attorney General could lawfully correct under powers granted to him by the Revision of Laws Act.

34. Indeed, a three judge bench of the High Court had, well before this reference had been presented to the High Court, heard and determined the exact same challenge to the amendments to the Interpretation and General Provisions Act that the Attorney General had dealt with in Legal Notice No. 162 of 2003. In its decision delivered on 27th January 2006, the three judge bench comprising Nyamu, Ibrahim and Makhandia [JJ as they then were) had determined the issue that the applicants raise in **Misc. Appn. No 994 of 2004 – Republic vs Chief Magistrate's Court Nairobi & Others ex parte Antonine Auma Okoth**. They stated as follows:

> ***"We hold that the use of the word repealed in section 23(3)(e) was a mistake which the Attorney General could correct pursuant to powers conferred on him by s 13 of the Revision Act. Section***

13 of Cap 1 states:

"The Attorney General may, by order in the Gazette rectify any clerical or printing error appearing in the laws of Kenya or rectify in a manner not inconsistent with the powers of revision conferred by the Act any other error so appearing."

It follows therefore that the Attorney General has two distinct powers under the section:

a. ***The rectification of any clerical or printing errors appearing in the Laws of Kenya***

b. ***The rectification of any other errors in a manner not inconsistent with the powers of revision conferred by Cap 1"***

35. The Court went on to observe as follows with respect to Legal Notice No. 162 of 2003:

"Through Legal Notice No 162/2003 the Attorney General rectified the incorrect use of the word repealed appearing in s 23(3)(e) of Cap 2 by replacing it with the word "repealing". The Attorney General is not required to explain how the mistake occurred but it is clear to us that both limbs of section 13 do sufficiently empower him to do what he did. Firstly the mistake could have been a printing error or an error not inconsistent with the powers conferred on him by the Act – thus without making the correction the sub section had no meaning or would not carry the meaning intended by the legislature. This is clearly borne out by the history of Cap 1 as outlined above and the experience of other jurisdictions with equivalent subsection such as the UK and Uganda as indicated above. The correction was not inconsistent with the Act and it did not change the substance of the law but instead the correction resulted in the meaning intended by the legislature – ie the true meaning of the subsection. It did not redefine any offence or create any new offence or impose another penalty for example. The rectification did not effect any changes to the existing law because if it did separate enactment by parliament would have been necessary. (Emphasis added)

36. The section as corrected by the Attorney General by Legal Notice No. 162 of 2003, which the Court upheld as correct in the **Antonine Auma Okoth** case cited above, reads as follows:

Provisions respecting amended written law, and effect of repealing written law

(1) …..

(2)…..

(3) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not—

(a)…

(b)…

(c)…

(d)… or

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made. (Emphasis added)

37. In the circumstances, I decline to set aside the orders referring the matter back to the trial court. The issue that the applicants raise were determined by a bench constituted by the Chief Justice, albeit in a different matter, more than nine years ago. There has, indeed, been nothing to prevent the prosecution of the applicants in this case from proceeding, had the parties involved, including the office of the Attorney General and, after 2010, the DPP, been diligent in following developments in the law.

38. In the circumstances, I direct that the court file on Anti-corruption Case No. 6 of 2004 be sent back to the trial court to enable the court proceed with the prosecution of the applicants in accordance with the law.

Dated delivered and signed at Nairobi this 28th day of October 2015.

MUMBI NGUGI

JUDGE

Mr. Esmail instructed by the firm of Kilukumi & Co. Advocates for the applicants.

Ms. Ngalyuka instructed by the office of Director of Public Prosecution for respondents.