



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 1 OF 2014

BETWEEN

ALEX NCHORE OCHAKO.....PETITIONER

AND

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

THE COMMISSIONER OF POLICE.....3RD RESPONDENT

RULING

1. Before me is a Chamber Summons Application dated 2/1/2014 in which the Applicant, Alex Nchore Ochako is seeking orders under **Article 23** of the **Constitution** and **Legal Notice No.6 of 2006** to restrain the Respondents from arresting and/or prosecuting “The **Governor Nairobi City County** and/or **Women Representative Nairobi City**” pending the hearing of the Petition. The Governor is one, Evans Kidero while the Representative is one Rachael Shebesh.
2. The grounds in support are set out in the body of the Application and in summary, the Applicant alleges that;
 - i) *the intended prosecution is brought in bad faith and meant to humiliate the Governor.*
 - ii) *The Respondents have ignored other serious crimes to focus on the Governor of Nairobi.*
 - iii) *The Applicant has a legitimate expectation that the Governor will be allowed to execute his mandate without hindrance.*
 - iv) *The Governor is a peaceful person who has never used force on any other person.*
 - v) *The intended accused persons have been negotiating settlement of their respective complaints against each other.*
3. The Respondents were served in Court but since the matter was initially being argued ex-parte, I heard Mr. Ondieki only and his submissions were principally based on the above grounds and also on the depositions made by the Applicant in his Supporting Affidavit sworn on 2/1/2014.

4. At this stage all I am required to do is to ascertain whether the Applicant has made out a *prima facie* case to warrant grant of the conservatory orders and in that regard my opinion is as follows;
5. Firstly, **Article 157** of the **Constitution** grants the Director of Public Prosecution (DPP) wide powers with regard to prosecution of crimes and in **Articles 157(10)** he is not obligated to obtain the consent of any person or authority (including this Court) to commence criminal proceedings and shall not, in doing so, be under the direction of any person or authority. However he shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the Legal process when initiating any prosecution, (**Article 157(11)**).
6. Secondly, this Court can only intervene and invoke its jurisdiction under **Article 165(3)(d) (i)** of the **Constitution** where the Director of Public Prosecutions (DPP) acts in contravention of that obligation and where he has acted in a manner that is “*vexatious, oppressive, malafides, frivolous or taken up [a prosecution] for other improper purpose such as undue harassment of a party or abuse of the process of the Court*” - See **Gulam and Anor vs Chief Magistrate's Court & Anor [2006] eKLR**.
7. Thirdly, the power by the High Court to intervene “*must be exercised sparingly*” and “*prosecution aimed at securing private vengeance or vindictiveness must be stopped as contrary to public policy and the public interest*” - See **Gulam** (supra).
8. Fourthly, and applying the above principles to the above case, neither in his Affidavit nor in Mr. Ondieki's submission has the Applicant shown, even at a *prima facie* level, that the Director of Public Prosecutions (DPP) has acted in contravention of his constitutional duty aforesaid.

In fact the whole Application, with respect, is full of generalities, politically correct but legally untenable arguments and is speculative and premature.

9. For the above reasons alone, I would have quickly dismissed the Application. However, the Application made one fundamental statement which has swayed my mind to rethink that position. He has urged the point that the suspects, who were involved in a well publicised physical altercation, have been discussing a possibility of settlement of their respective complaints against each other. That therefore there is need for that settlement to be concretised. Although little evidence of that fact was given, I will give him the benefit of doubt in that regard.
10. I say so also because **Article 159(2) (i)** of the **Constitution** provides that one of the principles to guide exercise of judicial authority shall be the application of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. I am aware that the issues in contest revolve around alleged criminal acts and ADR may not be applicable in the common usage of the term. But it is also true that under **Section 176** of the **Criminal Procedure Code**, in cases of “*common assault, or for any other offence of a personal or private nature*” the Court is granted the power to encourage reconciliation between the parties. Reconciliation, in my view, should be encouraged both before commencement of criminal proceedings and during the criminal proceedings if **Article 159** is to have any meaning at all. To argue otherwise would render the whole purpose of it meaningless when applied to minor crimes.

I take that view because the suspects, I gather, are set to face offences relating to assault and lesser offences and therefore **Section 176** of the **Criminal Procedure Code** as read with **Article 159** of the Constitution are properly applicable even at this stage of the proceedings.

11. Fifthly, **Article 159(2)(a)** of the **Constitution** obligates Courts to do “*justice ... to all, irrespective of status*” and I would have made same orders if the suspects were the lowliest in society and the same arguments had been made before me.
12. Lastly, therefore and despite my misgivings about the way the Application was framed and

argued, the single issue which has swayed my mind would necessitate that the appropriate **INTERIM ORDERS** to be made are the following;

- 1) *Let Evans Kidero and Rachael Shebesh, the suspects in the intended prosecution, within the next 7 days enter into dialogue with a view to reconciliation on such terms as they may think fit.*
- 2) *If they are unable to reach such reconciliation within that period, then the Director of the Criminal Investigations Departments on a date to be fixed by this Court, arraign the two in the Magistrate's Court and charge them as ordered by the Director of Public Prosecutions.*
- 3) *This matter shall be mentioned on 13/1/2014 for further orders and directions.*
- 4) *In the meantime, conservatory orders in terms of prayer 3 of the Application dated 2/1/2014 are granted until 13/1/2014.*

13.Orders accordingly.

DATED THIS 3RD DAY OF JANUARY, 2014

ISAAC LENAOLA

JUDGE

Further Order

Let the Respondents in the meantime file their responses by 7/1/2014. Applicant at liberty to file.

ISAAC LENAOLA

JUDGE

3/1/2014