



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

PETITION NO.360 OF 2013

BETWEEN

ISAAC ALUOCH POLO ALUOCHIER.....PETITIONER

AND

UHURU MUIGAI KENYATTA.....1ST RESPONDENT

WILLIAM SAMOEI RUTO.....2ND RESPONDENT

RULING

1. The Notice of Motion dated 20th October 2013 seeks the determination of only one question; can the Attorney-General of the Republic of Kenya undertake the defence of the Respondents in the present proceedings? Whereas the Motion is premised on no legal provision, the Applicant, Isaac Aluoch Polo, acting in person, made the following Submissions summarised below and relevant to the issue above.
2. Firstly, that the Attorney-General is expected to uphold the Constitution in executing his duties and that under **Article 156(6)** thereof, he can only represent the Government and the public in civil proceedings and not individuals sued in their private capacities.
3. Secondly, that under **Section 5** of the office of the **Attorney-General Act**, where the functions of that office are enumerated, there is no provision for representation of individuals in Court proceedings.
4. Thirdly, that the Attorney General can only join the present proceedings as *amicus curiae* and not in any other capacity.
5. Lastly, that the purported representation of the Respondents by the Attorney General should be declared unlawful and his Notice of Appointment struck off the record.
6. The Attorney-General filed a Notice of Preliminary Objection to the Motion and the said notice is worded as follows;

“(1) That the Hon. Attorney-General is constitutionally on record for the Respondents in the matter.

(2) That under Article 156(6) of the Constitution, the Attorney-General has a wide

mandate to promote, protect and uphold the rule of law and defend the public interest.

(3) That the subject matter of this Petition revolves around matters of constitutionalism, the rule of law and public interest.

(4) That to the extent the Petition raises alleged commission of criminal offences by the Respondents which is caught by the principle of immunity as set out in Article 143 of the Constitution, 2010 then the Respondents remain State Officers performing official functions as donated by the people through the Constitution and should accordingly be represented by the Hon. Attorney General pursuant to Article 156(4)(b) of the Constitution, 2010.

(5) That the Court has no jurisdiction to entertain the Petition as framed.

(6) Accordingly, the Notice of Motion Application is without merit and should be dismissed with costs.”

7. In her Submissions, Ms. Munyi, learned Senior Deputy Chief Litigation Counsel argued that under **Article 156(6)** of the **Constitution**, the Attorney-General has a wide mandate to promote, protect and uphold the rule of law and defend the public interest that this is the essence of constitutionalism and it is within the Attorney General's discretion to determine when and to whom to offer his legal services in cases of public interest. She relied on the case of **Chief Nehemiah Gitonga vs Stephen Kinyanjui C.A 34/1959** for that proposition. She also relied on the decision in **Ng'ok vs AG, C.A.326/2005** for the argument that where any proceedings may affect the rights, properly or profits of Government, then the Attorney General had the power to intervene as Counsel even where a public officer had been sued in a private capacity.
8. In that regard, her further submission was that the Respondents are the President and Deputy President of the Republic of Kenya, respectively, and therefore, since the issues raised in the Petition revolve around constitutionalism, rule of law and public interest, their private and official capacities are fused and the Attorney General can properly defend them.
9. Regarding the substance of the Petition, it was Ms. Munyi's submission that the same is an abuse of Court process and the Court lacks jurisdiction to determine it because the issues raised have been litigated on and finalised in **Petition No.21 of 2012, Abdalla & 3 Others vs Uhuru Kenyatta & Anor [2012] eKLR. (Mombasa).**

Determination

10. On my part, the beginning of getting to the bottom of the single issue before me is **Article 156(4), (5) and (6)** of the **Constitution** which provides as follows;

“(1) ...

(2) ...

(3) ...

(4) The Attorney-General—

(a) is the principal legal adviser to the Government;

(b) shall represent the national Government in Court or in any other legal proceedings to which the National Government is a party, other than criminal proceedings; and

(c) shall perform any other functions conferred on the office by an Act of

Parliament or by the President.

(5) *The Attorney-General shall have authority, with the leave of*

the Court, to appear as a friend of the Court in any civil proceedings to which the Government is not a party.

(6) *The Attorney-General shall promote, protect and uphold the rule of law and defend the public interest. ”*

11. **Article 156(6)** is not difficult to comprehend as it is clear, unambiguous and requires no more than a literal interpretation. The Applicant's reliance on that sub-section would however appear to be in support of his argument that the Attorney-General can only appear in the present proceedings as *amicus curiae* because they are private to himself and the Respondents. But what is the nature of his Petition dated 10th July 2013?

12. The Petitioner's Supporting Affidavit is lengthy and may not *per se* meet the expectations of an Affidavit in support of a Constitutional Petition but the Petition itself would show the Petitioner's grievances. It indicates that both Respondents, between 27th August 2010 and August 2011, were Cabinet Ministers and officials of political parties contrary to **Article 77(2)** of the **Constitution** which provides as follows;

“(1) ...

(2) *Any appointed State officer shall not hold office in a political party.”*

13. Further, it is the Petitioner's case that had they been disciplined for contravening the above Article, then pursuant to **Articles 75(2)** and **(3)** of the **Constitution**, they would not today be the President and Deputy President of the Republic of Kenya, respectively, and so certain orders are sought against them which I deem appropriate to reproduce as follows;

“(1) *The Court declares that the Respondents, having been in contravention of Article 77(2) of the Constitution, as from 27 August 2010, and the 1st Respondent having subsequently so been found by the High Court, should have been expeditiously disciplined pursuant to Articles 75(2) and 259(8), a discipline involving dismissal or otherwise removal from appointed State office in their capacities as Ministers in the Cabinet.*

(2) *The Court declares that notwithstanding that the Respondents were not dismissed from appointed State office, they stood dismissed or otherwise removed from the said appointed offices by operation of the law, pursuant to Article 2(4) of the Constitution.*

(3) *The Court declares that by the operation of Article 75(3) of the Constitution, the Respondents were rendered disqualified from holding any other State office. Consequently, any holding of State office by the Respondents, whether as Member of Parliament, Deputy Prime Minister, Minister for Finance or President, or as member of Parliament, Minister for Higher Education, Science and Technology or Deputy President, was invalid, pursuant to Article 2(4) of the Constitution.*

(4) *The Court orders the Respondents' holding of the offices of President and Deputy President to cease with immediate effect, as they are not qualified to so hold these or any other State offices.*

(5) *The Court orders the Respondents to pay general damages amounting to the cost of holding a Presidential by-election, and the sum total of salaries and allowances they received as State officers over the period they have been dismissed or otherwise removed from office, the damages payable to the State, and their liabilities being joint for the cost*

of the Presidential by-election and several for the unlawful salaries and allowances they separately received.

(6) The Court orders the Respondents to pay the Petitioner's costs, according to Schedule VI of the Advocates Act, 2006, assessed on a party to party basis."

14. It is on the basis of the foregoing that Ms. Munyi has urged this Court to find that since the issues raised relate to the rule of law, the public interest and constitutionalism, then the Attorney-General can properly defend the Respondents although they have been sued in their private capacities.

15. I have taken time to reflect on the matter and regarding representation by the Attorney General in Court proceedings, certainly **Article 156(4) (b)** is crystal clear; that he shall represent the National Government in legal proceedings other than criminal proceedings. The proceedings before me are not against the National Government because the Respondents by whatever measure and whatever the significance and importance of their respective offices, cannot be "the government". "Government" has been defined as "to signify the established system of political rule, the governing power of the Country consisting of the executive and the legislature considered as an organised entity and independently of the persons of whom it consists from time to time" – per Dixon J, in **Burns vs Ransley [1949] A.L.R. 817.**

16. In the Kenyan context, the two levels of Government; national and devolved, form the Government of Kenya and the Constitution deliberately limited the role of the Attorney General to legal proceedings involving the National Government, and devolved Governments are left to seek their own legal representatives. But it must be noted that his advise as opposed to representation is to "the Government" in the wider context as defined above.

17. **Article 156(4)(c)** is an interesting addition to the above mandate because he can perform such other functions as shall be conferred by an Act of Parliament or by the President. I have not heard Ms. Munyi to have alluded to the appearance by the Attorney-General in the present proceedings as having been done under that Sub-Article and I will say no more on that issue.

18. But having stated the above, I must turn to the authorities cited by Ms. Munyi. In **Chief Nehemia Gitonga (supra)**, the Appellant was a Kikuyu Chief during the emergency and the Respondent had alleged that the former had used his lorry on a number of occasions without pay by threatening the Respondent with detention. The dispute went to Court and on appeal to the Court of Appeal at Nairobi, an objection was raised as to whether a crown counsel could properly represent the Chief **Gould J.A.** for the majority, after examining the applicable law (at the time) concluded that "***the right of audience before this Court is governed, not by the Civil Procedure (Revised) Rules, 1948, but by the Eastern African Court of Appeal Rules, 1954, which, by virtue of para 18(2) of the Eastern Africa Court of Appeal Order-in-Council 1950, have effect as if contained in that order. Such portions of the rules as are relevant in the present case are:***

"16.(1) In all proceedings in the Court a party may appear in person or by any advocate who is entitled for the time begin to practise before the Superior Court of any Territory;

"2.(1) 'Advocate' includes any person having under these rules the right of audience on behalf of another person in the Court;

"16(6) Her Majesty's Attorney-general and solicitor-general for each of the territories and the legal secretary and deputy legal secretary of the East Africa High Commission shall have the right of audience and shall take precedence over all other advocates. Other legal officers of the Governments of the territories or of the East Africa High Commission having a professional legal qualification shall have the right of audience in all causes and matters within the scope of their official duties ..."

Sub-rule 16(6) was added by r.7 of the Eastern African Court of Appeal (Amendment) Rules,

1956, and, having regard to the specific officers referred to in the first sentence of the sub-rule it is, in my opinion, plain that those who hold the office of Crown counsel are included among the “other legal officers” referred to in the second sentence. It follows that, provided this case is a cause or matter within the scope of his official duties, Mr. Rumbold has the right of audience and is within the definition of “advocate” for the purposes of the rules.”

19. Reading the above finding against the express provisions of **Article 156(4)(b)**, it is obvious that neither the **Civil Procedure Rules, 2010**, the **Advocates Act, Cap.15 Laws of Kenya** or even the Rules cited by Gould J.A apply and so the authority is of no use to the Respondent and is clearly both inapplicable and distinguishable to that extent.

20. Regarding the **Ng'ok Case (supra)**, the only point of departure is that the institution that the Attorney General sought to represent was a State Corporation, viz the Investment Promotion Council and not an individual. The Court after analysing relevant authorities including **Chief Nehemiah** stated as follows;

“This is in our view, a typical case where the Attorney General has unquestionable right to represent a State Corporation in Civil Proceedings. It follows from the foregoing, and, we hold, that the superior Court erred in law in excluding the Attorney General from representing IPC and in striking out the Appearance and Defence and counter-claim filed on its behalf by Attorney General. This is an additional and strong reason why the appeal should be dismissed”

21. I am generally in agreement with the above finding and that is precisely why this Court has previously taken the view that where for example any organ of the national Government is sued or an individual is sued in his official capacity as an executive or functionary of Government, the Attorney-General can properly appear for that organ or office – **See Okoiti Omtata & Anor vs The Attorney General & Others, Petition No.446 of 2013**

22. In the present case, the Respondents as can be seen have been sued because;

- (i) *they were officials of political parties (certainly not 'government')*
- (ii) *they were also ministers (certainly part of 'government')*

23. Do the above facts and the law then entitle the Respondents to representation by the Attorney-General? That question can only be answered by reference also to **Article 156(6)** because Ms. Munyi has argued that there is “*public interest*” involved in the present Petition and since the Attorney General is enjoined to uphold the public interest, then he should be allowed to appear and defend the Respondents. I disagree. The question of “*advise*”, “*legal representation*” and “*public interest*” cannot be lumped together because the Constitution has demarcated them as such. Whereas the Attorney General is enjoined to uphold the public interest in the discharge of his mandate, the Constitution specifically limited his role as “*advocate*” and one cannot properly import public interest as a basis for legal representation. I therefore adopt the same approach as Ojwang J. (as he then was) as quoted in **Ng'ok (supra)** where he stated thus;

“I have not been convinced by the old authorities cited by counsel for the defendants tending to show that the Attorney General, who is appointed under the Constitution as the Government's Chief legal adviser has an unfettered discretion to provide legal services to all-and-sundry provided only that in his reckoning a particular suit has some kind of impact on Government interest.”

24. In agreeing with the learned Judge, all I am stating is that the Respondents are presently part of Government but the actions complained of really turn on their past (principally as officials of political parties and at the same time, ministers in Government). I do not see how those actions can be termed actions of the national Government to attract representation in Court by the

Attorney General.

25. Ms. Munyi's argument that the Respondents' official and personal status' is fused is far-fetched, to say the least. In fact, as an example, their on-going trials at the International Criminal Court indicate that they are facing those charges as individuals and not as part of Government. They are, in those proceedings, represented by private legal Counsel and not the Attorney General.

26. It is obvious that I see merit in the objection but before I make final orders, Ms. Munyi also sought orders that the Petition should be struck off for reasons set out in her objection elsewhere reproduced above. Having found merit in the Petitioner's objection, it is obvious that I cannot delve into her objections because once I have found that the appearance by the Attorney General is irregular, then any pleadings filed by him are also irregular.

27. I shall uphold the objection as filed and argued and will strike out the Notice of Appointment dated 2nd October 2013 with the further order that the Respondents should be served with a mention Notice on a date to be given shortly and they may appoint private Legal Counsel to represent them in these proceedings. There shall be no orders as to costs.

28. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY OF JULY, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Petitioner present

Miss Munyi for Respondents

Order

Ruling duly delivered.

ISAAC LENAOLA

JUDGE

Further Order

Mention on 29/8/2014. The Respondents to be served.

ISAAC LENAOLA

JUDGE