



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 539 OF 2012

MOHAN GALOT.....1ST PETITIONER

SANTOSH GALOT.....2ND PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

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

CHIEF MAGISTRATE, MILIMANI COMMERCIAL COURTS.....3RD RESPONDENT

PRAVIN GALOT.....4TH RESPONDENT

RAJESH GALOT.....5TH RESPONDENT

RULING

1. In their petition dated 25th November 2012, the petitioners seek orders to stop their prosecution in Criminal Case Nos1554 and 1555 of 2012. The said petition, which is supported by an affidavit of the same date sworn by the 1st petitioner, seeks among others, the following orders:

a. A declaration be and is hereby made that the independence if the 2nd respondent in the institution and continuation of criminal proceedings does not override the constitutional and fundamental rights and freedoms of individuals, to a fair trial, the right to administrative action that is expeditiously efficient, lawful, reasonable and procedurally fair and a fair hearing in the investigation, arrest and prosecution of alleged criminal offenses.

b. A declaration be and is hereby made that the arrest, arraignment in court and intended prosecution of the petitioners in Criminal Cases No 1554 and 1555 of 2012, Republic vs Mohan Galot and Santosh Galot over their status of the shareholders and directors and the power to deal as such with properties of Galot Industries Ltd is a denial, violation or infringement, or threatened denial, violation or infringement of the petitioners constitutional and fundamental rights and freedoms.

c. The 1st, 2nd, 4th and 5th respondents be and hereby directed to pay the petitioners general damages of not less than Ksh5,000,000,000.00 for the 1st, 2nd, 4th and 5th respondents' denial, violation or infringement, or threatened denial, violation or infringement of the petitioners' constitutional and fundamental rights and freedoms.

d. An order of certiorari be and is hereby issued to remove from the 3rd respondent, bring to the High Court and quash the entire proceedings in Criminal Cases No 1554 and 1555 of 2012, Republic vs Mohan Galot and Santosh Galot.

e. An order of injunction and/ or prohibition be and is hereby issued restraining the 3rd respondent from continuing with the proceedings in Criminal Cases No 1554 and 1555 of 2012, Republic vs Moham Galot and Santosh Galot

f. An order of injunction and/ or prohibition be and is hereby issued restraining the 1st, 4th and 5th respondents by themselves, officers, agents servants or otherwise howsoever from initiating any criminal complaints against the prisoners over the status of the shareholding and directorship of Galot Ltd, Manchester Outfitters Ltd, Galot Industries Ltd, King Woollen Mills Ltd, Galot International Ltd, Mohan Meakin Kenya Ltd, London Distillers Kenya Ltd and M.G Park Ltd

g. An order of injunction and/ or prohibition be and is hereby issued restraining the 2nd respondents by himself, officers, agents servants or otherwise howsoever from instituting and/or continuing with any criminal prosecutions against the prisoners over the status of the shareholding and directorship of Galot Ltd, Manchester outfitters Ltd, Galot Industries Ltd, King Woollen Mills Ltd, Galot International Ltd, Mohan Meakin Kenya Ltd, London Distillers Kenya Ltd and M.G park Ltd.

2. At prayer 3 of their application for conservatory orders dated 25th November 2012, the petitioners prayed that the matter be referred to the Chief Justice for constitution of a bench of an uneven number of judges to hear the petition. The basis of the application is that there are a number of cases concerning the Galot Group of companies but despite the pendency of those cases the 1st petitioner was arrested and arraigned in court on charges of fraud and forgery on the same issues.

3. When the matter came up on 26th November 2012, the court directed that as there were orders of stay issued in another matter involving the same parties, this petition should await the outcome of that matter. With regard to the constitution of the 3 judge bench, the court directed the petitioners to submit on it in accordance with the directions issued by the Chief Justice in his directions of 25th September 2011. The application for referral of the matter to the Chief Justice to constitute a three judge bench was heard on 19th September 2014.

4. Mr. Havi, Learned Counsel for the petitioners, submitted that the substantial question of law raised in the matter is with regard to the provisions of section 193A of the Criminal Procedure Code, which provides that:

“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

5. According to Mr. Havi, the petitioners have taken the view that their prosecution in matters which are the subject matter of HCCC No. 298 of 2009, 55 of 2012 and 430 of 2012 will contravene their rights to fair administrative action and fair hearing which are guaranteed under Articles 47 and 50 respectively. It was his contention that this was a substantial question of law, placing reliance on the case of **Martin Nyaga Wambora & 4 Others vs Speaker of the Senate & 6 Others Pet no 3 of 2014(Consolidated with Petition No 4 of 2014, Judicial Review No 6 of 2014 and Misc. Application No 4 of 2014)** with

regard to what constitutes a substantial question of law.

6. Mr Havi submitted that the key issue in this petition is whether the Director of Public Prosecution can, in reliance on section 193A of the Criminal Procedure Code, institute and proceed with a criminal prosecution on a matter the subject of a civil suit instituted before the criminal case in light of the provision of Article 47 and 50 on fair administrative action and fair hearing respectively.

7. He asked that the matter be certified as one raising a substantial question of law and be referred to the Chief Justice for constitution of a three judge bench.

8. In opposing the application, Mr. Ojwang, Learned State Counsel appearing for the 1st and 3rd respondents submitted that the applicants have not satisfied the court that the matter raises a serious constitutional issue that requires a 3 judge bench; that the applicant has referred to several civil cases while the petition emanates from a criminal case in which the petitioners are being charged for falsifying documents and making illegal transfers, a purely criminal offence. Counsel argued that what the petitioners were not revealing was that this application is an attempt to delay this matter, which had been filed in 2012. He prayed that the application be disallowed so that the matter could proceed.

9. Mr. Muranga for the Director of Public Prosecutions also opposed the application. It was his submission that the application was an attempt to delay the matter and that the issue of a 3 judge bench should have been raised at the earliest opportunity possible. There was nothing, in his view, to warrant hearing of the matter by a bench of 3 judges.

10. Mr. Anzala for the 4th respondent also took the view that the application should be disallowed. He submitted that a single judge is sufficient to hear and determine the matter; and that there is no substantial question of law raised to warrant constitution of a 3 judge bench. It was his submission that the question raised by the petitioners is whether civil and criminal proceedings can run concurrently; that it is not in dispute that the courts have been consistent in the principle that civil and criminal proceedings can run concurrently; that the court has not been shown any conflicting decisions on the point; and that the principle of law is settled.

11. With regard to the case of **Martin Nyaga Wambora vs Speaker, County Assembly of Embu**(supra), Counsel submitted that the court in that case had held that the determining factor on whether a matter raises a substantial question of law is that it is an open question which had not been pronounced upon by any court.

12. Mr. Kaka for the 5th respondent also agreed that the matter did not raise a substantial question of law to warrant a 3 judge bench. It was his view that this application is a clear attempt to delay the matter further, taking into account the logistics involved in the appointment of a 3 judge bench.

13. Counsel submitted that while the petitioners were relying on three civil cases in their bid to stop the criminal prosecution, they were not disclosing that one of the criminal cases they were attempting to stop, namely Criminal Case No.1555 of 2012, had nothing to do with the civil cases cited, the charge facing the petitioners being that of forging a state officer's signature. It was his submission that there is no substantial question of law to be determined by a 3 judge bench and that a single judge was capable of handling the matter.

14. Having heard Counsel for the parties, I take the following view. The petitioners have, in their application and submissions, cited two different reasons for the constitution of a three judge bench. In his submissions, Mr. Havi argued that the substantial question of law raised by the present petition was on the constitutionality of section 193A of the Criminal Procedure Code, which allows the simultaneous prosecution of an individual alongside civil cases. He alleged that the said section violates the petitioners' rights under Articles 47 and 50.

15. However, in the grounds in support of the application, the petitioners argue that recent decisions of

the High Court have refrained from quashing or prohibiting criminal prosecutions by the 2nd respondent, citing his independence, contrary to numerous previous decisions of the High Court and the Court of Appeal, as well as provisions of the Constitution, that the abuse of the exercise of the 2nd respondent's powers can be restrained. They argue that as a result, the 2nd respondent has, in reliance upon the said recent decisions, abused his powers of institution and continuation of criminal proceedings, resulting at times in the gross violation of individuals' fundamental rights.

16. They therefore argue that it is proper that this petition be certified as raising a substantial question of law for hearing and determination by 3 judges of the High Court of Kenya sitting in Nairobi, in order that it may be known whether the independence of the 2nd respondent in the institution and continuation of criminal proceedings overrides the constitutional and fundamental rights and freedoms of individuals.

17. Article 164(4) provides that ***“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.”***

18. This court has had occasion to consider what a **“substantial question of law”** means, and the circumstances under which a referral to the Chief Justice ought to be made for empanelling of a three judge bench. In the case of **Hon. Mr. Justice Chemuttut & Others -vs- The Attorney General Pet No 307 of 2012 unreported**, Majanja J express himself at paragraph 8 and 9 of his ruling as follows:

[8] The Constitution does not define, “substantial question of law.” It is left to each High Court judge to satisfy himself or herself that the matter is substantial to the extent that it warrants reference to the Chief Justice to appoint an uneven number of judges not being less than three to determine a matter. In Chunilal vs Mehta vs Century Spinning and Manufacturing Co. AIR 1962 SC 1314, the Supreme Court of India, after considering a number of decisions on the point, laid down the following test for determining whether a question of law raised in the case is a substantial question of law or not. It stated, “the proper test for determining whether a question of law raised in the case is substantial would be whether it is of general public importance or whether it directly or substantially affects the rights of the parties and if so, whether it is either an open question in the sense that it is not finally settled by the Supreme Court or by the Privy Council or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is more question of applying these principles or the plea raised is palpably absurd, then the question would not be a substantial question of law”...

[9] If I were to accept the above dicta, then it would follow, that every question concerning our Constitution would be a substantial question of law. Each case that deals with the interpretation of the Constitution or our expanded bill of rights would be a substantial question of law as it is a matter of public interest, affects the rights of the parties, is fairly novel and has not been the subject of pronouncement by the highest court. This would burden judicial resources to the extent that the value of obtaining justice without delay under Article 159(2)(b) of the Constitution would be imperiled.”

19. I believe similar considerations apply in this case. The issue for determination is, depending on which angle of their two arguments the petitioners follow, whether the provisions of the Criminal Procedure Code at section 193A are unconstitutional and in violation of Articles 47 and 50; or whether there has been an abuse of the powers of the 2nd respondent in carrying out prosecutions. Should there be decisions of the High Court, as the petitioners allege, that have refused to stop or quash decisions of the 2nd respondent to prosecute, then the constitution of a three judge bench does not address the issue, for such a decision remains a decision of the High Court, and is not binding on other judges of the High Court.

20. The present petition was filed in 2012, and has not progressed since. It raises the question whether the prosecution of the petitioners is in violation of their constitutional rights in view of pending civil cases. In my view, that is a question that has been determined countless times by judges of the High Court, and that

does not need determination by a three judge bench. Should the petitioners be dissatisfied with a decision of the High Court, then they are at liberty to appeal to the Court of Appeal and thence to the Supreme Court. Again, in the words of Majanja J:

[12] We must also not lose sight of the fact that the High Court does not have the last word on the interpretation of the Constitution or the enforcement of the Bill of Rights. There is a right of appeal to the Court of Appeal and by virtue of Article 163(4) of the Constitution, an appeal as of right to the Supreme Court on Constitutional matters.”

21. In the circumstances, the application by the petitioners is dismissed. This petition shall proceed to hearing before a single judge of this Division.

Dated, Delivered and Signed at Nairobi this 22nd day of October 2014

MUMBI NGUGI

JUDGE

Mr Havi & Ms Ngania instructed by the firm of Havi & Co. Advocates for the petitioners

Mr Ojwang instructed by the State Law Office for 1st and 3rd respondent

Mr Anzala instructed by the firm of Henia, Anzala & Associates for 4th respondent

Mr Kaka instructed by the firm of Kaka Kamau & Co. Advocates for 5th respondent.

Mr Muranga instructed by the Director of Public Prosecution for 2nd respondent.