



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL CASE NO.192 OF 2013

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF
CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF THE REPORT OF THE TRUTH, JUSTICE AND RECONCILIATION
COMMISSION PUBLISHED IN VARIOUS NEWSPAPERS IN KENYA**

BETWEEN

KIROIRO WA NGUGI.....1ST APPLICANT

MICHAEL S. CHEPKWONY.....2ND APPLICANT

SIMON LOKOMA.....3RD APPLICANT

JOHN MUTUA MUTIA.....4TH APPLICANT

FRANK S. MUHORO.....5TH APPLICANT

HEZEKIAH M. ONKOBA.....6TH APPLICANT

MORRIS MUTUAK.....7TH APPLICANT

AND

**THE TRUTH, JUSTICE AND
RECONCILIATION COMMISSION.....1ST RESPONDENT**

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

THE SPEAKER OF THE NATIONAL ASSEMBLY..... 3RD RESPONDENT

THE SPEAKER OF THE SENATE.....4TH RESPONDENT

THE CLERK OF THE NATIONAL ASSEMBLY.....5TH RESPONDENT

THE CLERK TO THE SENATE.....6TH RESPONDENT

THE LEADER OF THE MAJORITY PARTY

IN THE NATIONAL ASSEMBLY.....7TH RESPONDENT

RULING

1. The Chamber Summons dated 7th June 2013 is premised on the provisions of **Order 53 Rule 1(2)** of the **Civil Procedure Rules** and the Applicants seek leave to institute judicial review proceedings in the nature of orders of certiorari and prohibition to *inter-alia*:

i) quash certain recommendations contained in the Report of the Truth, Justice and Reconciliation Commission (TJRC), particularly at Volume IV pages 9, 10, 14, 23, 27, 29, 31, 36, 41, 53, 55, 56, 57, 60 and 62. The recommendations range from apologies to be tendered by the President, State security agencies, the British Government and the Judiciary for alleged injustices and gross violations of human rights committed during the mandate period of the TJRC, to repeal of oppressive laws (e.g. the **Indemnity Act**), conclusion of investigations into political assassinations (e.g. of Robert Ouko), ratification of conventions by the Kenya Government (e.g. the International Convention for the Protection of all Persons from Forced Disappearance), the prosecution of certain named Government officials and specific recommendations on the management of land and protection of wildlife areas and public lands.

ii) quash certain recommendations contained in the TJRC Report relating to the implementation and monitoring thereof.

iii) quash the recommendations in the said Report that relate to the reparation framework.

iv) prohibit the 2nd, 3rd, 4th and 5th Respondents from tabling the Report under **Section 48(4)** of the **TJR Act**.

2. Further, that the leave so granted should operate as ***“a stay to bar the 2nd, 3rd, 4th and 5th Respondents jointly or severally from tabling in Parliament the Report of the TJRC and to restrain the Clerks to the National Assembly and the Senate from receiving and/or acting on the said Report pending filing, hearing and determination of the Substantive Notice of Motion or until further orders of the Court.”***

3. In the body of the Application, the following grounds are raised in support thereof;

a) that the Report aforesaid is incomplete; – it is argued that contrary to **Section 5(a)** of the **TJR Act**, the Report is not an accurate, complete and historical record of violations and abuses of human rights and economic crimes inflicted on persons by the State, public institutions and holders of public office between 12th December 1963 and 28th February 2008.

b) that contrary to **Section 5(a)** of the **Act**, the TJRC acted *ultra vires* its statutory powers and mandate – it is the Applicants' case that TJRC exceeded its mandate by *inter-alia*, making recommendations relating to the colonial era (i.e. 1895 to 1963) and also after 28th February 2008.

Further, that TJRC adopted a liberal interpretation of its mandate and the consequence was that it gave new meaning to economic crimes contrary to the **Anti-Corruption and Economic Crimes Act**, repudiated **Section 34** of the **TJRC Act** and denied amnesty to persons who otherwise qualified for such amnesty.

c) that contrary to **Section 30** of the **Act**, the TJRC abused its powers by; employing victims as statement takers; establishing an Amnesty Committee pursuant to **Section 22** of the **Act** yet it has foregone its powers to recommend amnesty; by purporting that in exercise of its mandate, its legal powers override or are superior to the President, the Judiciary and other Constitutional

officers and Independent offices.

- d) that the Report is biased, particularly against the Kikuyu Community and national leaders from that Community. In addition, that the Report delegitimizes all the actions of the Kenyan State and its agents against alleged Secessionists, Coup- makers, Seditious, Saboteurs and Genocidal Militants from the North-Eastern Province.
- e) that the Report was made in breach of rules of natural justice in that some of the persons against whom specific recommendations are made by the TJRC, were never given an opportunity to be heard e.g. Hon.Norman Nyagah who is implicated in the death of Dr. Chrispus Odhiambo Mbai.
- f) that the TJRC in carrying out its work and in its Report, has violated the legitimate expectations of the Applicants for all the reasons above and that its actions, errors, shortcomings and illegalities have offended the Rule of Law, fundamental human rights, compromises national unity and undermines the dignity and sovereignty of the People of Kenya.
4. The Summons is further supported by an Affidavit sworn by Kiriro wa Ngugi, the 1st petitioner, a Statement of Facts and Annexures to Mr. Ngugi's Affidavit and specifically the Report under challenge.
 5. In Submissions before me, Mr. Kibe Mungai further urged the point that if the Report is tabled before Parliament, the same would be prejudicial to the Applicants and the intended Judicial Review proceedings would be rendered nugatory. Further, that injustice would be occasioned if the Report is implemented and that it would be best if all actions towards its implementation are stayed until the issues raised by the Applicants are determined fully by the Courts.
 6. Although advocates for the Respondents were present in Court, I declined to hear them at the *ex-parte* stage of these proceedings but informed them that they were at liberty to challenge this Ruling in the usual manner.
 7. Having considered the Chamber Summons and reflected on the issues raised, my opinion is as follows;
 8. Firstly, leave is granted to an Applicant to commence judicial review proceedings only upon that party showing that, *prima facie*, it has an arguable case that is not frivolous. Further that leave is a matter of judicial discretion and like all discretion, it must be exercised judicially – **see Meixner & Anor vs. Attorney General (2005) I KLR 189.**
 9. Secondly, and applying that test to the case at hand, the Applicant has raised a number of issues relating to the TJRC Report and I have summarised some of those issues above. At this stage, I am not obligated to look at the merits or otherwise of those issues and whether in fact the actions complained of, should attract the draconian orders of certiorari and prohibition. Suffice it to say that I have perused the TJRC Report and its findings and recommendations are so serious that to shut out a party from seeking judicial scrutiny of that Report, would itself amount to an injustice. One of the statements in the preamble to the **TJR-Act, 2008** is that the **Act** was enacted with a desire **“to give the people of Kenya a fresh start where justice is accorded to victims of injustice and past transgressions adequately addressed”**. That desire can only be achieved if any Kenyan with any complaints against the Report is accorded the opportunity to express those complaints within the confines of the Law. One such mechanism is by instituting proceedings in Court to challenge any aspect of the Report that was so painstakingly crafted after the participation of many other Kenyans.

I do not see any reason to deny the leave sought and I see no prejudice to be suffered by the Respondents if I did so and in the circumstances of this case.

10. Thirdly, the Applicants have sought that upon grant of leave aforesaid, the same should operate as a stay to bar the 2nd – 7th Respondents from tabling the Report and/or receiving the Report aforesaid. During the hearing, I asked Mr. Mungai to explain the basis for that prayer and elsewhere above his answer is recorded. I am however not satisfied that the prayer for stay is justified. I say so, with respect, because **Section 48(4)** of the **TJR Act** provides as follows;

“The Minister shall table the report in Parliament within twenty one days after its publication.”

In doing the above, the Minister (in this case, the 2nd Respondent) is merely performing messengerial services. He neither seeks the adoption of the Report neither does he seek any specific action by Parliament. Similarly, all other Respondents have no specific role as regards the contents of the Report. In fact, in **Section 50** of the **Act**, the role of the National Assembly is limited to receiving periodic reports of the implementation of the Report and ensuring that any non-implementation is also reported to it, with reasons thereof. What harm will the tabling of the Report cause the Applicants and why should Parliament be stopped from performing its Statutory function?

11. In any event, it is completely unclear to me why the other Respondents, save the 1st Respondent, have been enjoined in these proceedings when in fact the real issue in contest is the Report of the 1st Respondent in which they played no role in crafting.

12. More fundamentally also, is the fact that judicial review looks to the process as opposed to the merits of a decision or action. In this case, not one act of commission or omission has been alleged against the 2nd – 7th Respondents and even later in the judicial review proceedings, I am not certain that they are to be faulted for any action(s) leading to the finalisation of the Report under attack. I say so guardedly and conscience of my role at this stage of the proceedings.

13. Lastly, it must be understood that our Constitution is specific in creating boundaries between the organs of Government. The Judiciary should be alert of that fact and should particularly be careful not to usurp the role of Parliament even as it checks the excesses of the Executive by use of the powerful tools of judicial review - **see Trusted Society of Human Rights Alliance vs Attorney General [2012] eKLR.**

14. I am therefore not satisfied that the order of stay is warranted and in the end, I shall order as follows;

- i) Leave is granted in terms of prayers 2(a), (b), (c), (d) and (e) of the Chamber Summons dated 7th June 2013.
- ii) Prayer 3 of that Chamber Summons seeking orders of stay is dismissed.
- iii) the substantive Notice of Motion seeking judicial review orders shall be filed within 7 days of today's date.
- iv) Costs shall abide the outcome of the judicial review proceedings.

15. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 11TH DAY OF JUNE, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

No appearance for Applicant

Mr. Gatonye for 1st Respondent

Mr. Mwendwa for 3rd, 4th 5th, 6th and 7th Respondent

Mr. Moimbo holding brief for Mr. Bitta for 2nd Respondent

Order

Ruling duly read.

Copies of the Ruling to supplied to parties.

ISAAC LENAOLA

JUDGE

11/6/2013