



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

PETITION NO.286 OF 2013

BETWEEN

NJENGA MWANGI.....1ST PETITIONER

JAMES MWANGI MERU.....2ND PETITIONER

AND

THE TRUTH, JUSTICE AND

RECONCILIATION COMMISSION.....1ST RESPONDENT

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

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

THE CLERK OF THE NATIONAL ASSEMBLY.....4TH RESPONDENT

THE LEADER OF THE MAJORITY PARTY.....5TH RESPONDENT

RULING ON A PRELIMINARY OBJECTION

1. The 3rd, 4th and 5th Respondents have filed the Preliminary Objection dated 10th June 2013, raising the following issues;

“a) That the High Court has no jurisdiction to hear the Application filed against the Speaker of the National Assembly, the Clerk of the National Assembly and the leader of the Majority Party in respect of acts of their respective offices in exercise of the powers conferred and vested in them by the Constitution of Kenya, the National Assembly Powers and Privileges Act and the Standing Orders.

b) That the responsibilities of the 3rd, 4th and 5th Respondents with respect to the Truth and Reconciliation Report arise only in accordance with Section 48-50 of the Truth Justice and Reconciliation Act therefore there is no cause of action known in law against the 3rd, 4th and 5th Respondents and they should be struck out of the proceedings.

c) That the Application is premature because the Petitioners have not exhausted all available avenues to ventilate their concerns regarding the Truth Justice and Reconciliation Report and due to the fact that the role of parliament is merely to table the report and oversee implementation thereof in terms of Section 46 of the Truth Justice and Reconciliation Act. Under the said Act, implementation

of the report is in the province of the relevant Minister which role is both separate and independent from tabling of the report as per Section 49 (1) of the said Act.

d) *That the allegations contained in the Application and Supporting Affidavits are vague and do not meet the threshold for grant of interim conservatory orders as was laid down in the case of Kenya Oil Co. Limited and Anor vs Petroleum Refineries Limited (2010) HCCC NO.782/2009.*

d) *That the Application is improperly before the Court and therefore lacks merit and is an abuse of the Court process since it is calculated to pre-empt or prevent Parliament from carrying out its constitutional mandate.”*

2. To put the matters into perspective, the Petitioners commenced these proceedings suit by a Petition dated 6th June, 2013 wherein they have sought *inter-alia* various declarations claiming that their constitutional rights have been violated and they have also sought orders restraining the 3rd, 4th and 5th Respondents from tabling or admitting into the National Assembly, the Report of the 1st Respondent, the Truth Justice and Reconciliation Commission (TJRC) until all the recommendations contained in the 1st Respondent's draft are expunged; and also for an order to prohibit the 2nd Respondent from operationalising the implementation mechanisms recommended by the 1st Respondent and for an order prohibiting the 2nd, 3rd, 4th and 5th Respondents from reporting to the National Assembly as to the implementation of the Report.
3. Simultaneously with the Petition, the Petitioners' filed a Chamber Summons Application dated 6th June 2013, seeking *inter-alia* conservatory orders prohibiting the 3rd, 4th and 5th Respondents from tabling the report of the 1st Respondent into parliament and from operationalizing the implementation mechanisms recommended by the 1st Respondent in its report.
4. On 10th June 2013, when the Application came before me for hearing inter-partes, I declined to grant any interim orders as prayed; and ordered that the Preliminary Objection be argued first as it raised the issue of the jurisdiction of this Court to proceed as against the 3rd – 5th Respondents for reasons set out above. Jurisdiction is everything and without it a Court has no powers to make any further step - See **Motor Vessel Lolians' vs. Caltex Oil (Kenya) Ltd (1989) KLR 1.**

The 3rd, 4th and 5th Respondents Submissions

5. Ms. Lumallas presented arguments in support of the case for the 3rd, 4th and 5th Respondents. It was her position that this Court lacks jurisdiction to hear and determine this matter as filed against the Speaker of the National Assembly, the Clerk of the National Assembly and the Leader of the Majority Party (the 3rd – 5th Respondents respectively) and claimed that under **Article 117** of the **Constitution** Members of Parliament are entitled to speak freely on their own mandate and they have also the right to all relevant freedoms while in Parliament. Further, that **Section 29** of the the National Assembly Powers and Privileges Act. (**Cap. 6**) denies jurisdiction to any Court to act against decisions of the Speakers and she relied on the case of **Dr. Nyoya & 6 Others vs the Attorney General & 3 Others eKLR (2004)** where Ringera J. stated that Courts' do not act in vain nor are they an academic forum. She also relied on **Republic vs Judicial Commission of Inquiry into the Goldenberg Affair No.102/2006** where it was held that any finding against the mandate of parliament is itself unconstitutional. Reliance was also placed on **Kiraitu Murungi & 6 Others vs Hon. Musalia Mudavadi & Anor HCC. No.1542 of 1997** where it was held that Members of Parliament have absolute immunity for what they do in Parliament. In addition, she emphasised that in **Raila Odinga vs Franics Kaparo & Clerk of the National Assembly HCC. No.394 of 1993** where it was stated that what happens in Parliament is not examinable elsewhere.
6. Ms. Lumallas thus contended that this Court cannot usurp the mandate of Parliament and in this case, Parliament only receives the report of the 1st Respondent and the implementation of that report is a matter reserved for the executive. She added that the **Standing Orders of Parliament** at **Article 2** have defined what laying or tabling of a document means and it was her submission that the Petitioners have not challenged the unconstitutionality of the **Truth, Justice** and

Reconciliation Act (TJR Act) and it is therefore unclear what complaints the Petitioners have with the Report. In any event, she alleged that Parliament did not have any role in preparation of the report as it was prepared outside Parliament and thus it cannot be penalised for a report it has not prepared.

7. She urged me to strike out the 3rd, 4th and 5th Respondents from the Petition since the Petitioners have failed to disclose any cause of action as against and she relied on the *obita dictum* in **Kiro wa Ngugi & 6 Others vs The Truth Justice and Reconciliation Commission & 6 Others, Nrb Misc. Appl. No.192 of 2013** where I said something about the same Respondents.

1st Respondent's Submissions

8. Mr. Gatonye for the 1st Respondent supported the Preliminary Objection, on two grounds. Firstly; he submitted that the role of Parliament cannot be usurped by the Court, as the role of Parliament under the **TJR Act** is clear; it anticipates and pre-empts any action by the National Assembly that may prejudice the Applicants. He claimed that the issue before this Court was not the one of jurisdiction *per se* but one for good order; that the Court should not proceed to hear the Application and the Petition as against the 3rd to 5th Respondents and cautioned that the Court must refrain from intruding into the realm of the National Assembly unless there is a clear violation of the Constitution.
9. As regards the tabling of the report, Mr. Gatonye submitted that the Petitioners have not demonstrated that the 3rd – 5th Respondents had anything to do with the 1st Respondent's report or that they have used it to the prejudice of the Applicants. He thus claimed that they should not be subjected to the hearing if they are not properly enjoined in the proceedings. He argued that the role of the National Assembly was only to receive the report and there was nothing more than that as it cannot investigate or do anything else.
10. Mr. Kuria for the Attorney General, the 2nd Respondent, herein was in agreement with Mr. Gatonye and supported the Preliminary Objection.

The Petitioner's Case

11. Mr. Kilukumi for the Petitioner claimed that the Preliminary Objection as raised related only to the 3rd – 5th Respondent and even if upheld, cannot dispose of the proceedings. He claimed that the Civil Procedure Provisions do not apply to constitutional matters and only Legal Notice No.6 of 2006 was applicable. He claimed that 'threatened' violation of the Constitution has been alleged but no evidence has been given of that fact. He thus submitted that an apprehension of violations is not sufficient and he argued that there cannot be a basis for an anticipatory order against what Parliament may or may not do.
12. He further submitted that the 3rd – 5th Respondents have been cited in the Petition because they are necessary parties since they superintend the implementation of the report and that the 3rd – 5th Respondents are the ones that give efficacy to any orders issued by the Court.
13. On the issue of jurisdiction, Mr. Kilukumi submitted that it has been admitted that jurisdiction was not an issue but he claimed that the privilege of Parliament cannot be a shield to judicial scrutiny. He relied on the case of **Peter Ngoge vs Francis Ole Kapara & 4 Others (2007) & KLR and Njoya & Others vs the Attorney General & 3 Others (supra)** to make the point that all Members of Parliament must protect the Constitution.
14. He distinguished the **Kiro wa Ngugi** case (supra) by stating that it was a “Judicial Review” matter and as such the principles applicable there are different while the issue before this Court is on the constitutionality of the provisions and recommendations of the report; in so far as they allege a violation of fundamental rights and freedoms.

It was thus Mr. Kilukumi's Submission that the 2nd – 5th Respondents are the implementers of the Report and that the tabling of the report is not an innocuous act but creates a permanency of a disputed report. He referred the Court to the **Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament, 21st Edition London, Butterworths (1989) 543-544** to buttress that point.

Determination

15. Having set out the parties Submissions as above, I believe the only issue for determination is whether the 3rd – 5th Respondents are properly enjoined in these proceedings owing to the issue of Parliamentary privilege. This issue is intertwined with that one of jurisdiction as raised by Ms. Lumallas. I will first address my mind to the issue of the Parliamentary Privilege. I agree with Ms. Lumallas, that **Article 117** of the **Constitution** grants Members of Parliament the freedom to express themselves freely in the National Assembly. This Article provides;

“(1) There shall be freedom of speech and debate in Parliament.

(2) Parliament may, for the purpose of the orderly and effective discharge of the business of parliament, provide for the powers, privileges and immunities of Parliament, its committees, the leader of the majority party, the leader of the minority party, the chairpersons of committees and members”.

16. I am also in agreement, that under **Section 29** of the National Assembly (**Powers and Privileges Act**) (**Cap.6**), Courts cannot exercise jurisdiction in respect of acts of the Speaker and other officers of the National Assembly but I am certain that under **Article 165(3) (d)** of the **Constitution**, this Court can enquire into any unconstitutional actions on their part. But where is the jurisdiction I am exercising with respect to the Speaker and other officers of the National Assembly?

17. Mr. Kilukumi agrees that the role of the National Assembly with regard to the tabling of the report is clear. **Section 48(1) (4)** of the **TJR Act** provides as follows;

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

It is clear therefore the enabling Act of the 1st Respondent envisaged a scenario where after it has compiled its report, it shall hand over the same to the President and thereafter the Minister shall table the report to Parliament.

18. The orders sought in the Petition in so far as the tabling of the report is concerned are against the 3rd – 5th Respondents. None of them is the Minister responsible for tabling the report. In the circumstances, I am in agreement with Mr. Gatonye that the Petitioners have not demonstrated that the 3rd – 5th Respondents have anything to do with the tabling, operationalizing and final implementation of the report. Indeed, I am aware that the role of the 3rd – 5th Respondents was limited to receiving the report and have no interest in the report *per se* nor the implementation thereof. The **TJR Act** has provided at **Section 49** the procedure on regards the implementation of the report. This Section provides as follows;

“(1) The Minister shall, upon the publication of the report of the Commission, operationalise the implementation mechanism or arrangement in accordance with the recommendations of the Commission under Section 48(2) (f) to monitor the implementation of the recommendations of the Commission and to facilitate their implementation.

(2) The implementation committee shall publish the reports of the Government in the appropriate form and submit its own quarterly reports to the public evaluating the efforts of the Government and the efforts of any other person or body concerned to implement the recommendations of the Commissions...

(3) Implementation of the report of the Commission shall commence within six months

upon publication.

19. Similarly, **Section 50** has provided that the Minister shall report to the National Assembly the status as to the implementation of the report. This Section provides;

“(1) the Minister shall report to the National Assembly within three months of receipt of the report of the commission, and twice a year thereafter, as to the implementation of the commission's recommendations.

(2) All recommendations shall be implemented, and where the implementation of any recommendation has not been complied with, the National Assembly shall require the Minister to furnish it with reasons for non-implementation”

20. I have deliberately reproduced **Sections 49 and 50** of the **TJR Act** to demonstrate that the 3rd – 5th Respondents have no role in the tabling, implementation, and reporting on the status on the report. It can now be seen that it is the statutory duty of the Minister to do so and clearly, the 3rd – 5th Respondents are wrongly enjoined and I so find. In the circumstances, I can do no better than reiterate my earlier sentiments in **Kirirowa Ngugi** case (supra) where I stated that;

“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?

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.”

21. It therefore follows that the Preliminary Objection must succeed on this point alone.

23. I now turn to consider the issue as raised by Ms. Lumallas that the Petitioners have not exhausted all other avenues available to them in having their issues addressed. I have looked at the Petition filed herein, and as stated elsewhere above the Petitioners have sought various declarations that their fundamental rights and freedoms have been violated by the 1st Respondent's mandatory recommendations as contained in its report dated 3rd May 2013. I do not know of any other avenue that the Petitioners can use in having a determination as to whether their rights have been violated or at all save by proceedings filed in this Court.

24. I am alive to the constitutional provisions at **Article 22(1)** that enables every person the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been violated. The jurisdiction of this Court to determine the proceedings so instituted is found in **Article 23(1)** of the **Constitution**. This Article provides that this Court has the jurisdiction to hear and determine Applications for redress of a denial, violation, or infringement of a right in the Bill of Rights. The same Article has provided for reliefs available to a person whose rights have been infringed. The jurisdiction

to hear and determine the violation of fundamental rights as contained in the Bill of Rights is further provided for under **Article 165(1)(b)** of the **Constitution**. This Court has often held that it has jurisdiction to determine whether a fundamental right or freedom has been violated.

Indeed, this jurisdiction has not been disputed and so I am clear in my mind that the Petition in so far as it alleges a violation of the fundamental rights and freedom is properly before me and I so find.

16. From the foregoing, it follows that the Preliminary Objection is upheld on one issue of law only and the 3rd, 4th and 5th Respondents are struck out of the present proceedings. No prejudice would be caused to the Petitioners as if and when certain parts of the offending report are expunged, their relief shall have been made complete.

17. As regards costs, the nature of the matter necessitates that each party should bear its own costs

18. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 16TH DAY OF JULY, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Ismail for Petitioner

Mr. Mohammed for 2nd Respondents

Order

Ruling duly delivered.

ISAAC LENAOLA

JUDGE

Mr. Ismail

I seek leave to appeal.

ISAAC LENAOLA

JUDGE

Mr. Mohamed

No objection.

ISAAC LENAOLA

JUDGE

Order

Leave to appeal is granted. Copies of the Ruling to be supplied to parties.

Mention on 19/7/2013

ISAAC LENAOLA

JUDGE