



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
PETITON NO. 657 OF 2009

HON. JOHN MICHAEL NJENGA MUTUTHO..... PETITIONER
V E R S U S

ATTORNEY-GENERAL..... RESPONDENT

AND

KENYA ANTI-CORRUPTION COMMISSION..... INTERESTED PARTY

RULING

Introduction

1. This ruling pertains to a preliminary objection dated the 16th of December 2009 raised by the respondents with regard to the Petition. The preliminary objection was urged before me on the 25th of January 2012 by Mr. Kiage for the Respondent. Mr. Murei appeared for the Interested Party and supported the objection while Mr. King'ara presented the petitioner's position in urging the court not to uphold the objection.
2. Mr. Kiage submitted that the preliminary objection is based on section 84(3) of the old Constitution with regard to the jurisdiction of the court. Under Section 84(3), the rule is that if in a subordinate court a question arises as to the contravention of section 70-80 of the Constitution inclusive, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous and vexatious.
3. Pursuant to section, 84(6), the Chief Justice promulgated rules to give effect to the Constitution. These are ***The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of The Individual) High Court Practice and Procedure Rules, 2006 (the Gicheru Rules)***. The rule in question is Rule 24 which requires reference in the same terms as required under Section 84(3) of the Constitution. The trial court should apply its mind and once it eliminates frivolity or vexation, then it frames the question in form E and refers it to the High Court for determination. These provisions were in operation when the petition before the court was filed and were saved by the Transitional Provisions of the New Constitution.
4. Mr. Kiage submitted further that the petition and all other documents filed pursuant to it are improperly before the court as section 84 of the Constitution provides a mechanism for reference of such

matters. Filing a petition such as this is to avoid an imperative judicial step, that of the subordinate court being satisfied that there is a constitutional issue that should be referred to the High Court. He contended that the provisions in the Constitution and the Rules made pursuant thereto are mandatory.

5. Mr. Kiage relied on the decision of the court in the case of **Rael Chelangat Chepkonga-v-Attorney General H.C Misc. Case No. 384 of 2008** and quoted the words of Wendoh J who, in striking out the petition, noted that-

'There are criminal proceedings before the Chief Magistrate Court No. CRC 520/06. The issues raised before the court arose in that case. The rules are clear as to the procedure to be adopted. It is not true that in all cases one has to file a petition. One files a petition if the issue is a fresh one and not arising in proceedings before another court. I do agree with the Respondent that the Rules do provide a procedure which should have been adhered to by the Petitioner.

6. He also relied on the case of **Heiwa Auto (K) Ltd & Another –v-OCPD Central and Others H.C. Misc. Appl. No. 300 of 2000**, **Peter Maina Gacheru –v- Attorney General High Court Petition No. 1188 of 2007** and **Talib Abubakar –v-Commissioner of Police and the Attorney General High Court Petition No. 732 of 2008** in all of which, on facts similar to the case before the court, a similar conclusion was reached.

7. He argued that the rules must be followed as the High Court gets to intervene by way of reference or of appeal if the application for referral is rejected.

8. With regard to the argument that the Gicheru Rules were unconstitutional as having been enacted prior to the new Constitution, he submitted that all laws in force before the new Constitution had been saved by the Sixth Schedule, Rule 7, and the Gicheru Rules remain in force by virtue of the Constitution. Until new rules are made under Article 22 of the new Constitution, the Gicheru Rules remain in force. Further, the petitioner could not rely on the Rules to bring his petition and at the same time argue that they are unconstitutional.

9. Mr. Kiage urged the court to strike out the application as it is premature and incompetent and should not occupy the court's time.

10. Mr. Murei for the Interested Party submitted that the Preliminary Objection which the Interested Party had also raised was well grounded in law and in the Constitution. It is raised on the basis of what is in the pleadings, and for the purposes of the preliminary objection, the court should assume the truth of what is pleaded by the petitioner.

11. He submitted that there are public interest reasons why section 84(3) was enacted: criminal proceedings should be heard expeditiously, and the presiding magistrate should be give authority to conduct the case without undue interference by the High Court.

12. He submitted that in the petition before the court, even though the petitioner argues that he raises issues related to the civil suit, the prayers revolve around Criminal Case No. 2400 of 2005. He referred to the petition and pointed out that all the prayers in the petition, from a –i, relate to and mention Criminal Case No. 2400 of 2005. None of the prayers related to the civil suit in the High Court.

13. Mr. Murei submitted that in any event, if there was a constitutional issue arising in the civil suit, the High Court Civil Division can handle the matter as per the Gicheru Rules. It was not an excuse to say that the petition also mentions contraventions of the petitioner's rights outside the criminal case. He relied on **High Court Petition No. 1 of 2009 - Douglas Kepchumba Ruto –vs- A.G. at page 73** and urged the court to uphold the objection and allow the criminal case to proceed to determination.

14. On the petitioner's argument that Justice Gacheche had ruled that the preliminary objection and the application for conservatory orders be heard together, he submitted that the matter was starting *de novo* and the question of jurisdiction must be inquired into before the application on merits can be heard. He

relied on the case of **Owners of Motor Vessel (“Lilian S” -v- Caltex Oil (Kenya) Ltd (1989) KLR 1.**

15. Finally, on the argument that the Gicheru Rules had been made before the new Constitution, Mr. Murei submitted that the Rules had been expressly saved by section 19 of the Sixth Schedule.

16. Mr. King’ara for the petitioner urged the court to overrule the preliminary objection. He argued that the preliminary objection does not consist of a point of law which has been pleaded or which arises by clear implication of the pleadings as enumerated in the case of **Mukisa Biscuits Manufacturing Co. Ltd. -v- West End Distributors Ltd. (1969) 696 E.A.** Further, the points raised cannot be determined without looking at the facts, and finally, he contended that no issues have been raised in the subordinate court as required under section 84. If they arise, this would be outside the content of a preliminary objection as set out in the **Mukisa Biscuits** case.

17. In Mr. King’ara’s view, the preliminary objection was predicated upon the provisions of the old Constitution which are not saved by the new Constitution. The court is being asked to dismiss the matter without listening to it on the basis that the old Constitution was flouted. He argued that the petitioner came to court under the provisions of section 84 of the old Constitution and that it is not mandatory that allegations of violation of the Constitution are made in the lower court. He submitted that the Gicheru Rules are unconstitutional if they make raising the issues there mandatory.

18. It was also Mr. King’ara’s contention that the provisions of section 84(1) and (2) give the High Court original jurisdiction. There is nothing to prevent the petitioner from filing a hybrid application to avoid a multiplicity of suits. The issues the petitioner was raising relate to issues in the Magistrate’s Court and the High Court. The petitioner was complaining about the conduct of the Interested Party in High Court Civil Case No. 1477 of 2005 – KACC –v- John Michael Njenga Mututho and Others.

19. He dismissed the decisions relied on by the respondents as having been made before the new Constitution came into force and were dealing with different factual situations, were only persuasive and not binding on the court.

20. He argued that this court was the right forum for adjudication of the constitutional issues raised by the petitioner and relied on the decisions of the court in the case of **Githunguri-v-Republic (1986) KLR 1** and **Njagi Marete -v- Attorney General Nairobi Misc. Case No. 668 of 1986** for support.

Findings

21. When this matter first came before me on the 30th of November 2011, Mr. King’ara for the petitioner applied to have the matter start *de novo* as Justice Gacheche who had heard the matter partly had disqualified herself from proceeding with the matter. On the 25th of January 2012, when the matter came up for hearing, the court permitted the respondent to argue the preliminary objection on the question of jurisdiction dated 16th December 2009. This is in view of the position with regard to preliminary objections as set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd. –vs- West End Distributors Ltd [1969] EA 696** where the Court held that **“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on jurisdiction of the court.”**

See also the decision with regard to the issue of jurisdiction in the case of **Owners of Motor Vessel (“Lilian S”) -v- Caltex Oil (Kenya) Ltd. (supra)**

22. The objection by the respondent and the interested party revolve around the jurisdiction of this court to hear this petition in light of the provisions of the Gicheru Rules. The Gicheru Rules were made by the Chief Justice pursuant to the provisions of Section 84(6) of the old Constitution. Section 19 of the Sixth Schedule to the new Constitution saves the Gicheru Rules by providing as follows:

‘ Until the Chief Justice makes the rules contemplated by Article 22, the Rules for the enforcement of

the fundamental rights and freedoms under section 84 (6) of the former Constitution shall continue in force with the alterations, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with Article 22.'

23. These Rules are therefore, in my view, applicable to any matter where issues relating to contravention of fundamental rights are raised. The Rules provide as follows

24. 'Where in proceedings in a subordinate court a question arises as to the contravention of any of the provisions of sections 70 to 83 (inclusive) of the Constitution, and the presiding officer is of the opinion that the question raised is not frivolous or vexatious, he may refer the question to the High Court in Form E set out in the Schedule to these Rules.'

25. 'Where a party to proceedings in a subordinate court alleges contravention of his fundamental rights or freedoms under sections 70 to 83 (inclusive) of the Constitution in relation to himself, he shall apply informally to the presiding officer during the pendency of the proceedings that a reference be made to the High Court to determine the question of the alleged violation.'

26. 'If the presiding officer is satisfied that there is merit in the allegation made under rule 24, and that it has not been made frivolously or vexatiously, he shall grant the application whereupon the court shall frame the question to be determined by the High Court in Form F set out in the Schedule to these Rules.'

24. The petition in this case dated 12th November 2009 is expressed to be brought under section 84 (1) of the Constitution and under the Gicheru Rules. The petition is intitled "**In the Matter of the Chief Magistrate's Court Nairobi Criminal Case No. 2400 of 2005 Republic –v- John Michael Njenga Mututho**". On the face of it therefore, the petitioner's intention in filing this petition was to challenge alleged contraventions of his rights in the criminal case. Any subsequent reference to a civil case is therefore, in my view, an afterthought.

25. A consideration of the prayers sought in the petition is also quite telling. All the prayers in the petition, apart from the last prayer which is a prayer for costs, seek various orders and declarations in respect of the criminal case. It seems to me therefore that there is no constitutional issue raised in respect of the civil case referred to by the petitioner. If a constitutional issue were to arise in the civil case, Rule 23 of the Gicheru Rules empowers the court seized of the matter to deal with it as a preliminary point.

25. In the event that there is a violation of the petitioner's constitutional rights in the criminal case pending before the Chief Magistrate's Court, what is the option provided by law for dealing with the alleged contravention? In the case of **Rael Chelangat Chepkonga -v- The Attorney-General H.C Misc. Application No. 384 of 2008** the court observed at page 3 of the judgment that

'There are criminal proceedings pending before the Chief Magistrate's Court No. CRC 520/06. The issues raised before the court arose in that case. The rules are clear as to the procedure to be adopted. It is not true that in all cases one has to file a petition. One only files a petition if the issue is a fresh one and not arising in proceedings before another court. I do agree with the Respondents that the Rules do provide a procedure which should have been adhered to by the Petitioner. Rules of procedure are not made for beauty but to achieve a certain purpose. In this case, it would avoid duplication of results and even save on costs if the Applicant were to abide by Rules 25 and 26 of Legal Notice No. 6/06. I do uphold the preliminary objection and hold that the petition as filed is incompetent and offends Rules 25 and 26 of the Legal Notice 6/06 and is hereby struck out with costs.'

26. In **Peter Maina Gacheru & Another –v- Attorney General JR Petition No. 1188 of 2007**, the court observed at page 8 of the judgment that

'It is not in dispute that when the Petitioner filed this originating summons, the criminal proceedings were on going in the lower court. Rule 25 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual High Court Practice and Procedure

Rules 2006 requires that a party to proceedings who alleges contravention of rights under Section 70-83 of the Constitution should raise the issue informally before the presiding magistrate, who will consider the issues and determine whether they are vexatious.

27. The court went on to observe that if the trial court finds that the issues raised are substantive, he will frame the issues and refer them to the High Court for hearing and determination, and the criminal case is stayed. If, however, it finds that the issues raised are vexatious, it will dismiss the application and proceed with the hearing of the criminal case. The court then concluded that

‘This procedure is meant to reduce any would be vexatious matters being sent to the High Court when they do not raise any constitutional issues, they save on the court’s time and avoid unnecessary delays in the cases before the lower courts. Of course if the magistrate declines to refer the matter to the High Court as a reference, then the aggrieved party should have a right of appeal. This procedure is mandatory. The procedure was put in place for a purpose and it has to be adhered to.

28. In my view, the decisions cited above represent the correct position on the matter. The Rules made under Section 84(3) of the old Constitution provide the constitutionally mandated procedure for invoking the protection of constitutional rights in an ongoing criminal prosecution. Rules 24, 25 and 26 are clear on how and in what circumstances references to the High Court will be made from an ongoing prosecution. To hold otherwise would be to defeat the purpose of the Rules and to trivialise the exercise of the jurisdiction conferred on the High Court. As the Court observed in the case of **Douglas Kipchumba Ruto -v- the Kenya Anti-Corruption Commission and 2 others HC. Petition No. 1 of 2009**, the constitutional jurisdiction of the High Court risks being trivialised by constantly being invoked in frivolous cases. As in that case, the proper forum for the petitioner in this case to ventilate his claim with regard to violation of his rights is before the criminal court where the case has already been substantially heard.

29. I am fortified in my view of this matter by a consideration of the reasons for the very clear constitutional provisions which form the basis of the Gicheru Rules. By requiring that the court before which a matter is proceeding first hears the allegations of contravention of rights and determines whether they merit being referred to the High Court, the intention was, in my view, to ensure that frivolous claims, intended to defeat the criminal justice process, are not made to the High Court. A situation in which any person who has a pending criminal matter files an independent petition before the High Court alleging violation of rights in the criminal process, by-passes the constitutional and legislative process and stays the criminal process as in the present case would be clearly against the public interest and the administration of justice.

30. The petitioner, whom the court was informed from the Bar has already taken the 27th of February 2012 for the hearing of the criminal matter, will have the opportunity to raise the allegations of violation of his rights in the criminal case. A cursory glance at the matters deponed to in the affidavit in support of the petition and the petition itself, however, shows that what the petitioner asks of this court is to embark on an analysis of the evidence that would form his defence in Criminal Case No. 2400 of 2005. As the court noted in the case of **William S.K. Ruto & Another -v- Attorney General High Court Civil Suit No. 1192 of 2005-**

Having considered all the above, we find and hold that the applicants’ rights have not been violated in anyway. As can be deduced from paragraph 11 to 21 and 23-30 of Mr. Ruto’s affidavit, the applicant has actually tried to pre-empt the prosecution’s case by setting out his defence. We find and hold that the petitioners can only make such a defence at the trial court but not at this forum. In WAGATHONI’s case (supra) it was held that analysing of the evidence should be done in the trial court.’

30. What the petitioner is asking this court to do is to assess the evidence that ought to form his defence in the criminal court. This is not a trial court. The responsibility for receiving and weighing evidence lies with the trial court. If the trial court finds that there is a violation of the constitutional rights of the petitioner, or is satisfied that the petitioner’s allegations in that regard are not frivolous, then it can refer

the same to this court.

31. The same pertains to the alleged violations of the petitioner's rights with regard to the civil case. The High Court seized of that matter is a court of concurrent jurisdiction with this court. It has the same jurisdiction as this court under **Article 165(3)** of the Constitution to hear and determine any constitutional issue arising in the proceedings.

32. In the circumstances, I find that the preliminary objection by the respondent and the Interested Party is well founded and uphold the same. The upshot is that the chamber summons application dated 12th November 2009 and this petition are struck out with costs.

33. I am grateful to the Counsels appearing for the parties in this matter for their well researched arguments and submissions.

Dated and Delivered at Nairobi this 20th day of February, 2012

Mumbi Ngugi
Judge