



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 64 OF 2011

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

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT

AND

**IN THE MATTER OF REQUEST FOR MUTUAL LEGAL ASSISTANCE BY THE KENYA
ANTI-CORRUPTION COMMISSION DATED 6TH MAY 2008**

BETWEEN

**APEX FINANCE INTERNATIONAL LIMITED.....1ST
APPLICANT**

**ANGLO-LEASING AND FINANCE INTERNATIONAL LIMITED.....2ND
APPLICANT**

AND

**KENYA ANTI-CORRUPTION
COMMISSION.....RESPONDENT**

RULING

In its Notice of Motion dated 26th July 2011 and filed on 27th July 2011, the Kenya Anti-Corruption Commission (*as it then was called*) the Respondent in the Judicial Review application, but the Applicant in this Motion, sought three orders -

- (a) *this matter be certified as raising substantial questions of law;***
- (b) *the file be referred to the Hon. the Chief Justice for directions;***

(c) costs be provided for.

The Applicant's motion was supported by the Affidavit and the Further Affidavit of Kevin Njuguna both sworn respectively on 26th July 2011 and filed together with the Motion.

The Motion is premised upon the provisions of Article 165(4) of the Constitution which says -

"165 (1)

(2)

(3)

(4) Any matter certified by the court as raising a substantial question of law under clause(3)(b) or (d) shall be heard by the Judge an uneven number of judges, being not less than three, assigned by the Chief Justice."

The matters under Clause 3(1) and (2) of the Article 165 of the Constitution are -

(a) *the determination whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;*

(b) *under sub-clause 3(c) the determination of the question whether.*

(i) *any law is inconsistent with or in contravention of the Constitution,*

(ii) *anything said to be done under the authority of the Constitution or any law is inconsistent with, or in contravention of the Constitution,*

(iii) *any matter relating to the constitutional powers of State organs in respect of any county government and any matter relating to the constitutional relationship between the levels of government and*

(iv) *questions relating to conflict of laws under Article 191.*

According to the Motion, the fundamental questions touching the Constitution upon which the applications wishes a bench of an uneven number of judges, not being less than three are -

(i) *whether an entity which "prima facie" lacks juristic status can be heard substantively alleging contravention of its constitutional rights before the issue is determined*

(ii) *whether or not juristic status is to be presumed or is a matter of strict proof? If a matter of strict proof, by whom?*

(iii) *whether or not constitutional rights or prerogative orders can be claimed on behalf of another by a person who has no legal authority to so act,*

(iv) *the nature and extent of the right to privacy under the Constitution,*

(v) *whether the right to privacy prohibits investigations into bank accounts suspected to contain evidence of corruption and economic crimes,*

(vi) *whether or not the right to privacy extends to protecting the identities of recipients of public funds corruptly acquired,*

(vii) *the applicability of the New Constitution to acts done before its promulgation,*

(viii) *whether or not investigations into Anglo-Leasing scandal should be closed in terms with*

the Githunguri principle,

2. the subject matter is of grave concern to the Government and the public at large;

3. No rational explanation has been provided as to why the matter has been filed in the High Court at Nakuru in contravention of express provisions of law and Practice Notes.

4. The agent of the Applicant has consistently lied on oath as to his postal address and residence ostensibly with a view to showing that the matter was properly filed in Nakuru.

5. Though the Respondent has confidence in the court, it is concerned that justice must not only be done, but be seen to be done abundantly. Therefore the selection of the trial court must be consistent with the existing legal provisions as to place of suing and Practice Notes by the Chief Justice.

6. The Respondent will inter alia seek directions that this matter be heard together with Mombasa H.C. Petition No. 27 of 2011, **Midland Finance Ltd and Infotalent Ltd vs. KACC** filed by the Agent and raising the same issues.

During the hearing of the Applicant's Motion, Mr. Murei learned counsel for the Applicant put the same issues into these propositions -

(1) whether the normative institutional frameworks for fighting corruption is inconsistent with the Constitution, and therefor unconstitutional;

(2) whether an ex parte applicant having failed to establish their juristic status can be heard (whether they have locus standi) in this court;

(3) whether or not constitutional rights and prerogative rights can be claimed or invoked on behalf of another (third party) by a person who has not demonstrated a legal willingness to act in that capacity;

(4) the nature and the extent of the right to privacy, under the new constitution in relation to fighting corruption;

(5) whether termination of a prosecution by way of a nolle prosequi under the Githunguri principles is a bar to subsequent investigations into an alleged criminal offence.

(6) what is the nature and extent of the right to fair administrative action under Article 47 of the Constitution in relation to the fight against corruption.

Mr. Murei submitted that these are substantial questions of law which require determination by a bench larger than one, and that they are issues which the court should have regard to in referring the matter to the Chief Justice, the importance significance of the subject matter, public interest and whether it may affect legislation.

Lastly, there is the question of forum shopping.

Mr. Olaly Cheche counsel for the original Applicant/Respondent opposed the Respondent's Motion. In his view, there are no matters raised which cannot be determined by one judicial mind. It was not demonstrated that the Bench in Nakuru is incompetent, and that the issues raised can be determined by one judge. Counsel relied on my decision in **Nakuru H.C. Petition No. 6 of 2010 (KIPSANG & 4 OTHERS VS. A. G. & ANOTHER)** where I declined to refer a matter to the Chief Justice to empanel a bench of 3 judges as I thought the issues could be determined by one Judge. Counsel submitted that the issues raised are academic and do not go to the root of the case. Counsel referred to Article 159(2)(a) of the Constitution which provides that justice shall be administered without

undue regard to procedural technicalities.

Without saying so, what the Respondent really wishes to have, is an order transferring this case to Nairobi. None of us in this station has any clue why this case was filed here. But giving the Respondent the benefit of doubt, and determine the Motion in terms of the prayers sought and certify that the it raises substantial questions of law which require reference of the case to the Chief Justice to empanel a bench of three to determine the questions raised by the Respondent, the question I would ask is what criteria should the single judge consider in referring a matter to the Chief Justice?

I am grateful to Mr. Murei, learned counsel for the Respondent. He provided me with precedents to answer that question.

In **JOSEPH KIMANI & 2 OTHERS -VS- ATTORNEY-GENERAL & 2 OTHERS** [2010] eKLR the court restated the constitutional position under Section 60 of the former Constitution;

"that the High Court is always a constitutional court and single judge has the power and jurisdiction to hear and determine constitutional matters under Section 60 of the Constitution, yet if a judge in his/her opinion and discretion having considered the issues for determination is of the view that the issues are of such significance, of public interest and may affect legislation or public policy, and that it would be prudent for the matter to be heard by a bench of more than one judge, then the judge may refer the matter to the Hon. Chief Justice for directions with a view to empanelling a bench of more than one judge to deal with the matter. This is purely an administrative function for the Chief Justice who is the head of the Judiciary ..."

A similar position was expressed by Chunga C. J. in **KENYA BANKERS ASSOCIATION VS. MINISTER FOR FINANCE & ANOTHER (NO. 3)** [2002] 1 KLR 56 wherein the learned Chief Justice, said -

"In an application under Section 84 of the Constitution the factors to be considered in determining the number of judges to hear an application of this nature are: -

- (a) the nature of the application,***
- (b) the issues raised, the complexity, the importance of the application and public interest in the application as a whole or in any of the issues raised.***

The same factors were reiterated in **JOHN PETER MUREITHI & 2 OTHERS VS. ATTORNEY GENERAL & 5 OTHERS** [2007] eKLR.

In **ALI SAID CHIZONDO & 2 OTHERS VS. REPUBLIC, (CA)** Mombasa Misc. Criminal Application No. 8 of 1998, Chesoni C.J., gave the following background to the quest for a three judge bench -

"There is now an established practice in the High Court for the Chief Justice to be asked to constitute a bench of three judges to hear and determine constitutional questions both of interpretation and of enforcement in exercise of the court's original and referral jurisdiction. This practice has led to the development of the three judge bench acquiring the designation of a "Constitutional Court". Whereas it is legally mandatory for a three judge bench to deal with constitutional questions under Section 67, there is no such requirement in respect of constitutional questions which arise under Section 84(2) and 84(3). However the development of a three judge bench must have some reasons like the Chief Justice who empanel (sic) the bench of three judges taking into the account the seriousness of the constitutional questions, and the respect for the conventional wisdom that many heads are better than one."

While there is no doubt as to the conventional wisdom that many heads are better than one the Commission's application for referral of the matter to the Chief Justice, still begs the question, is there a

substantial question of law which requires the wisdom of many minds? Is it a matter of great public interest?

Issues of corruption in high places make good headlines, and create a lot of excitement about this or that state official required to "**step aside**" or resign. No doubt this being one of the hydra-headed cases of Anglo-Leasing, has much to commend itself in generating public interest. But what is the substantial point of law which one mind of a single judge cannot answer? If it is that leave was granted to the Applicant to commence judicial review proceedings for orders of certiorari, or prohibition, that can always be answered by the single judge, either by setting it aside and therefore dismissing the whole application or maintaining the orders and in either case for good reasons.

If it is any of the thirteen (13) grounds set out on the face of the application, and reduced into the six propositions in the submissions by Mr. Murei which of those grounds would be impossible for the single judge to answer? Take a few of those grounds, commencing with the question whether or not the applicant has the juristic capacity to institute the application, **Capacity** of a party must not be confused with the jurisdiction or competence of a court of law or tribunal.

Whereas both "**capacity**" and "**jurisdiction**" are questions of law, "**capacity**" of a party refers to the competence, power or fitness of such party (*natural or juridical*) to do certain things recognised in law for instance a child a person of unsound mind, a person of who is an undischarged bankrupt etc. has no capacity to enter into a contract. "**Jurisdiction**" on the other hand refers to the power of a court to hear and decide a case. It may also refer to territorial limits within which legal authority may be exercised. A court is competent when -

(1) It is properly constituted by a judge or judges duly qualified to determine the matter, and none of whom is disqualified for one reason or another, and

(2) the subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court exercising its jurisdiction, and

(3) the case comes before court by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.

Any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided. The defect is extrinsic to the adjudication. If the court is competent, the proceedings are not a nullity, but they may be attacked on the ground of irregularity in the conduct of the trial; the argument will be that the irregularity was so grave as to affect the fairness of the trial and the soundness of the adjudication. It may turn out that the party complaining was to blame, or had acquiesced in the irregularity; or that it was trivial in which case the appeal court may not think fit to set aside the judgment. "**GOODWILL AND TRUST INVESTMENT LTD & ANOTHER VS. WITT & BUSH LTD** [NIGERIAN SC, 266/2005].

I have no doubt in my mind that the subject of corruption is not only a matter of grave concern to the Government of Kenya, but much more so to the great suffering masses of Kenya in slums, poor neighbourhoods, dry and inhospitable arid North, the perennial flood gates of Kano plains, and Budalangi, to Internally Displaced Persons and no less to us serving these Kenyans in the Judiciary.

My view is that let us not prevaricate, let us not aid and abet, let us not approbate and reprobate this hyra-headed monster that keeps on popping up in the most unlikely places. Let us slay it by taking bold decisions to confront its claims whenever and wherever it manifests itself. A lesson may then go out there that we are not a circus, but a resolute institution, determined to decide on issues at once.

Questions of jurisdiction of the court, the juristic status of a party, who may claim a constitutional right on behalf of another, the extent of the right to privacy under the new Constitution, whether the right to privacy prohibits the Commission from investigating accounts suspected to contain evidence of corruption and economic crimes, the applicability of the new Constitution to acts done before the

promulgation of the new Constitution, and whether investigations into Anglo-Leasing scandal should be closed in line with the Githunguri principle (**GITHUNGURI VS. REPUBLIC [1986]1 KLR 1** the question or choice of forum (*despite clear Practice Notes by the Chief Justice*), the question that justice must not only be done but be seen to be done, are no doubt relevant and substantial issues.

These are however issues which can be rapidly determined by a single judge, and do not deserve (*in my very humble view*), to tie down three judges who would be usefully engaged elsewhere, serving other Kenyans. There has however to be an equal boldness and willingness on the part of the Kenya Anti-Corruption Commission to deal with the substance and determine the issues raised by the application.

For those reasons, I would dismiss the Applicant's/Respondent's Notice of Motion dated 26th July 2011 and filed on 27th July 2011, and direct that costs will be in the cause.

It is so ordered.

Dated, signed and delivered at Nakuru this 3rd day of February, 2012

M. J. ANYARA EMUKULE

JUDGE