



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

Petition 17 of 2011

**IN THE MATTER OF: CHAPTER FOUR ON THE BILL OF RIGHTS, OF THE
CONSTITUTION OF THE SOVEREIGN REPUBLIC OF KENYA, 2010**

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION
AND THE PROTECTION OF THE FUNDAMENTAL RIGHTS OF THE INDIVIDUAL) HIGH
COURT PRACTICE AND PROCEDURE RULES, 2006**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER THE CONSTITUTION OF KENYA 2010 to wit CONTRARY TO
ARTICLES 19, 21,22, 23, 27, 38, 47 & 50**

AND

**IN THE MATTER OF: CONTRAVENTION OR BREACH OF THE CONSTITUTION OF
KENYA to wit, Article 258**

AND

**IN THE MATTER OF: THE INTERPRETATION, IMPLEMENTATION AND
ENFORCEMENT OF THE CONSTITUTION OF KENYA to wit ARTICLE 259**

AND

**IN THE MATTER OF: THE CONSTITUTION OR OTHERWISE OF THE ACTION OF THE
DISTRICT CRIMINAL INVESTIGATIONS OFFICER (DCIO), THE 3RD RESPONDENT
HEREIN, TO CHARGE SOPHIA ABDILLAHI CHACHA, THE PETITIONER HEREIN IN
CRIMINAL PROCEEDINGS NO. 635 OF 2011, MALINDI PETITIONER HEREIN IN
CRIMINAL PROCEEDINGS NO 635 OF 2011, MALINDI CHIEF MAGISTRATE 'S COURT**

BETWEEN

SOPHIA ABDILLAHI CHACHAPETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS1ST RESPONDENT

THE COMMISSIONER OF POLICE2ND RESPONDENT

RULING

1. On 12th October, 2011 the Petitioner herein filed a petition against the Director of Public Prosecutions (DPP), the Commissioner of Police, the District Criminal Investigations Officer (DCIO) and the Chief Magistrate Court (CMC) Malindi as the 1st to the 4th Respondent. Also named are eleven interested parties being the Commissioner of Lands, the Chief Land Registrar, the District Land Registrar, Kilifi, the Town Clerk, Municipal Council of Malindi, the Kenya Revenue Authority, the District Commissioner Malindi, Chengo Kivumbi Mitsingila, KRE Kenya Real Estate Ltd, Fidelity Export and Import Ltd, Esther Alphonse Mlombo, and lastly the Kenya Anti-corruption Commission parties being the Commissioner of Lands, the Chief Land Registrar, the District Land Registrar, Kilifi, the Town Clerk, Municipal Council of Malindi, the Kenya Revenue Authority, the District Commissioner Malindi, Chengo Kivumbi Mitsingila, KRE Kenya Real Estate Ltd, Fidelity Export and Import Ltd, Esther Alphonse Mlombo, and lastly the Kenya Anti-corruption Commission the predecessor of the current Ethics and Anti-corruption Commission.

2. The principal prayers in the Petition are c, d, and e. Prayer c seeks an order for judicial review by way of certiorari to bring up and quash the decision of the 3rd respondent (DCIO) to charge the petitioner in criminal case no. 635 of 2011, before the Malindi Chief Magistrate's Court. Prayer d seeks an order of judicial review by way of prohibition to prohibit the 4th Respondent (named as the Chief Magistrate's Court Malindi) from charging and prosecuting the petitioner in Criminal Case No. 635 of 2011, at CMC Malindi. In prayer e, the petitioner seeks an order of judicial review in the form of mandamus to compel the 2nd Respondent (the Commissioner of Police (CoP) to investigate the offices of the Commissioner of Lands, the Chief Lands Registrar, the Land Registrar Kilifi, the Town clerk, Municipal Council of Malindi and the directors/shareholders of Fidelity Exports and Import Limited.

3. Pausing there, it is apparent that prayer (d) presents obvious legal difficulties as the 4th Respondent against whom it is sought is not charged with the mandate of charging or prosecuting criminal suspects. Rather, that duty falls upon the DPP under Article 157 of the Constitution. At the same time, prayer (e) it cast in such vague terms as to lack substance. Besides, under article 157 (10) the DPP is insulated from interference in the exercise of his duties under Article 157(4) of the Constitution.

4. I have not specifically highlighted prayer (a) and (b), which in my view amount to asking the court to declare the obvious; namely, that the "*petitioner has rights under chapter four of the Bill of Rights as a citizen*", and that the said rights are "*not those limited by virtue of Article 24 of the Constitution.*" Such declarations would be superfluous. But of even more concern, the specific rights in chapter four upon which all the prayers are predicated are not specifically stated.

5. In pointing out the foregoing, I am conscious that the subject of this ruling is not the Petition itself but an interlocutory application. However, the originating pleadings, are the petition, which the court is entitled to look at even at this stage (see **MUSLIMS FOR HUMAN RIGHTS (MUHURI) AND 2 OTHERS V. ATTORNEY GENERAL & 2 OTHERS eKLR 2011**).

6. Now turning to the application itself, the same was filed contemporaneously with the Petition on 12th

October 2011. The same is expressed to be brought under Rule 20 and 21 of the Constitution of Kenya (Supervisory) Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 as read with Article 22(4) of the Constitution, 2010 and article 23(3)(c)(sic).

7. I consider it necessary to set out verbatim the prayers contained in this Chamber summons. They are that:

- (i) This honourable court be pleased to dispense with service of this application at the first instance and orders the same as urgent (sic)
- (ii) The Honourable Court be pleased to issue conservatory order staying the implementation of the decision of the 3rd Respondent to charge the Petitioner in Criminal Proceedings No. 635 of 2011 Malindi Chief Magistrate's Court pending the interpartes hearing and determination of this Application.
- (iii) The Honourable Court be pleased to issue a conservatory order prohibiting the 4th Respondent from charging the Petitioner in Criminal Proceedings No. 635 of 2011, Malindi Chief Magistrate's Court pending the hearing and determination of this application.
- (iv) Any orders that the court may deem fit to grant in the circumstances
- (v) The costs of this application be provided for.

8. Evidently, prayer (iii) above presents the same legal difficulty identified with respect to prayer (d) of the main petition.

Prayer (ii) along with prayer (iii) appear to be the key prayers of the Chamber Summons. On the face of it they seek orders "pending the hearing and determination of this application," i.e the Chamber Summons. On 12th October 2011 when Mr. Binyenya argued this application ex parte on behalf of the Petitioner, the court declined to grant to issue any conservatory order and directed him to serve the Respondents. Prayers (ii) and (iii) as expressed in the Chamber Summons are therefore spent. Unfortunately, none of the Respondents urged these matter in their respective written submissions.

9. The court is alive to the requirement under Article 159(2) of the Constitution to place emphasis, on substance more than form or technicalities, while considering matters before them.

However, parties seeking redress in court are duty-bound to articulate with as much precision and care as possible, their respective pleas before the court, both orally and through pleadings. Notwithstanding these misgivings, the court is entitled to look at the substance of the Chamber Summons, and at any rate prayer (iv) thereof appears to provide some saving grace.

10. The Chamber Summons is supported by the affidavit of Sophia Abdillahi Chacha the Petitioner. From the affidavit, the Petitioner's complaint relates to the 3rd Respondents intention to charge and prosecute the Petitioner, actions that she describes as "against (her) individual freedoms and rights under the Constitution thereby scuttling (her) fundamental rights to campaign for the available posts"(sic). She asserts that her Petition raises weighty issues touching on the alleged breach of her rights, and challenges the constitutionality of the administrative action of the 3rd Respondent. She depones that she is "apprehensive that unless the conservatory orders is granted, the Respondents will continue with the flagrant breach of her inalienable Fundamental Rights and Freedoms." She also relied on the contents of her affidavit in support of the petition.

11. The Respondents opposed the application, through Mr. Kemo appearing on behalf of the 1st, 2nd, 3rd and 4th Respondent. Mr. Kemo filed grounds of objection stating that:

1. The Petitioner has not demonstrated the specific rights breached and the manner in which her said

rights have been violated by the Respondent.

2. There is no evidence to prove that the Respondents have failed to perform their constitutional obligations under the constitution.

On behalf of the 7th, 9th and 10th Interested Parties, Mr. Kenga filed grounds of opposition, dismissing the application by the Petitioner inter alia, as incompetent and misconceived, frivolous, scandalous and vexatious and an abuse of the court processes. The 7th Interested Party filed a Replying affidavit.

12. The parties agreed to dispose of the application by way of written submissions which principally took cue from the respective positions taken in affidavits and grounds earlier filed.

I must point out however, that the submissions by Mr. Binyenya dwelt at length on the contents of the Petition itself rather than the Chamber Summons under consideration. The submissions contain a long narrative of the events giving rise to the criminal case intended against the Petitioner. Counsel also referred the court to the **MUHURI** case as well as **CENTRE FOR RIGHTS EDUCATION AND AWARENESS CREAW) & 7 OTHERS VS ATTORNEY GENERAL [1011]e KLR** on the applicable legal principles.

13. Counsel for the 7th Interested Party referred to the Replying affidavit filed by the 7th Interested Party on 18th November 2011 in opposition to the petition and application, which similarly delves into the substance of the Petition. The counsel further submitted that the petitioner is attempting to prevent the police from performing their duties in respect of the complaint by the Interested Party yet without proof of any violation of any of her rights and fundamental freedoms.

14. For their part, the 1st to 4th Respondents submitted that the Petitioner has not shown a prima facie case to warrant the issuance of a conservative order, that the Petitioner has not demonstrated which rights have been violated and how. Mr. Kemo took issue with the contents of the Petition and also cited as authority, the **MUHURI** and **CREAW** Cases (Supra).

15. Upon reading the material before me, it is possible to sketch a brief background to this matter, while taking care not to make any conclusive findings at this stage. It would appear that the Petitioner and the 7th and the 10th Interested Parties are the key protagonists in this case. Hence their affidavits and annexures thereto to the Petition are especially relevant.

16. The subject matter of the dispute between the key protagonists is a beach plot located in Malindi and known as LR CHEMBE/KIBAMBAMSHE/399. This plot seemingly had two titles, one issued to the 10th Interested party who claims it was part of her late father's property, and another to the Petitioner, who claims to have bought it from Glitter Ltd and/or the 7th Interested Party and/or Ali Mohamed Ali in 2007. The Petitioner asserts that the 7th Interested Party had acquired title to the property by adverse possession in Malindi HCCC 98 of 2006 (OS). But the 7th Interested Party denied the allegations and complained to the police when he learned about the transactions.

17. Meanwhile, the Petitioner had sold the land parcel to 8th Interested Party, Kenya Real Estate Ltd, while Fidelity Export and Import Ltd had also purchased the same property from the 10th Interested Party. Following investigations police decided to charge the Petitioner with two counts, namely forgery of the land transfer certificate in respect of the suit land, and uttering of a forged land transfer certificate, both purportedly signed by the 7th Interested Party.

18. At this stage of the proceedings, it is unnecessary, and even undesirable to delve into the facts and the law or make any conclusive findings. What the court must consider is whether the Petitioner has established a prima facie case with a likelihood of success; that the applicant will likely suffer prejudice resulting from the alleged violations or threatened violation unless the court issues a conservatory order (see **MUHURI AND CREAW CASES**) in the former case Mohamed J, as he then was stated:

“In an application for interim orders of the nature of Conservatory orders or even one for injunction, the court is not hearing and/or being called upon to determine the main Petition...(but) called upon to preserve the status quo pending the hearing of the Constitutional petition...”

19. The court, after citing with approval from the CREAM decision went on to expound on the four principles to be applied in considering whether or not to grant a conservatory order. These are discretion, arguable case, irretrievability, and balance of convenience. It is apparent that the MUHURI case further expanded on the considerations proposed in the CREAM Case.

20. In a recent groundbreaking decision, the Court of Appeal was considering legal objections of not a similar nature to the present, raised by the accused in **KAMAU MBUGUA V R eKLR 2010**. Although the appellant therein was alleging the breach of his right to a fair trial through delayed prosecution, I think the case contains a mine of wealth in terms of relevant jurisprudence, because the court searched a wide range of court pronouncements in the commonwealth. At the conclusion, the court distilled ten general principles, some of which are significant in the matter before us, such as the question of the individual’s rights vis-a-vis societal interest, the standard of proof of an alleged violation or prejudice, and the appropriateness of the remedy sought.

21. It is clear from that decision that the right of the individual applicant must be balanced against the equally fundamental interest of society in bringing those accused of crime to stand trial and account for their actions. A large part of this mandate rests upon the DPP under Article 157 of the Constitution, and he is required under sub-article 11 to exercise the power to institute, undertake or terminate criminal proceedings while having *“regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.”*

22. With the above principles in mind, I have examined the applicant’s material and I must agree with the counsel for the State and 2nd to 4th Respondents as well as the 7th to 10th Interested Parties, that the Applicant’s case falls below the prima facie standard. For two main reasons, first, that having scoured her entire material, I cannot find any specific right which she claims to have been violated or to be in danger of violation, not even the apprehension that she will not receive a fair trial. Secondly, it is not shown what particular prejudice the applicant stands to suffer or has suffered, and neither is the “weighty” constitutional question raised by her petition demonstrated.

23. There is no evidence, at all to show that the decision to charge her is oppressive or arbitrary (**see GITHUNGURI VS R 1986 KLR**) or a violation of the DPP’s mandate under the Constitution. The applicant appears to make up for lack of specifics with many generalized complaints and statements. As an illustration, in paragraph 1 of the affidavit supporting the application she says that the DCIO intends to prosecute her “against (her) individual freedoms and rights...thereby scuttling (her) fundamental rights to campaign for the available posts.”

24. In my considered view, there does exist a serious criminal dispute as to the manner in which the Applicant obtained title to the material property but that is not a matter that the applicant or anyone else can ask this court to determine at this stage, and neither would it be prudent. It seems to me, that the Applicant is merely questioning why the DCIO has decided to prefer forgery charges against her, not that in so doing any of her rights and fundamental freedoms have been breached or threatened. Being prosecuted per se does not constitute a violation.

25. In the circumstances of this case, no interim remedy in her favour commends itself to me, not even under prayer (iv) of her application, as clearly she is not deserving. Besides, where an applicant has failed to demonstrate her case to prima facie standard, the contest between the individual right and societal interest is a foregone conclusion.

For these reasons I find that the Petitioner’s application lacks merit and is dismissed with costs.

Read and delivered at Malindi this **11th** day of **May, 2012** in the presence of:

C. W. MEOLI
JUDGE