



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
MISCELLANEOUS APPLICATION NO. 95 OF 2011

IN THE MATTER OF: **THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF: **THE TRUTH, JUSTICE AND RECONCILIATION ACT (NO.6 OF 2008)**

AND

IN THE MATTER OF: **THE NATIONAL ASSEMBLY (POWERS AND PRIVILEGES) ACT (CHAPTER 6 OF THE LAWS OF KENYA)**

AND

IN THE MATTER OF: **THE TRIBUNAL APPOINTED TO INVESTIGATE THE CHAIRMAN, TRUTH JUSTICE AND RECONCILIATION COMMISSION**

AND

IN THE MATTER OF: **RULE 10 OF THE RULES OF PROCEDURE OF THE TRIBUNAL APPOINTED TO INVESTIGATE THE CHAIRMAN, TRUTH JUSTICE AND RECONCILIATION COMMISSION**

AND

IN THE MATTER OF: **ALLEGED AND/OR THREATENED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 19, 20, 21, 25, 27, 28, 35, 47, 48 AND 50 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF: **AN APPLICATION BY BETHUEL KIPLAGAT FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

BETWEEN

BETHUEL KIPLAGATAPPLICANT

AND

THE CHIEF JUSTICE OF THE
REPUBLIC OF KENYA1ST RESPONDENT

THE TRIBUNAL APPOINTED TO INVESTIGATE CHAIRMAN, TRUTH JUSTICE AND

RECONCILIATION COMMISSION2ND RESPONDENT

THE HON. JUSTICE (RTD.) ONESMUS K. MUTUNGI.....3RD RESPONDENT

THE HON. (RTD.) BENJAMIN PATRICK KUBO4TH RESPONDENT

THE HON. LADY JUSTICE

WANJIRU KARANJA5TH RESPONDENT

R U L I N G

The Applicant is the chairman of the Truth, Justice and Reconciliation Commission (“the Commission”) which was created under the Truth, Justice and Reconciliation Act (No. 6 of 2008) (“the Act”). The objectives of the Commission are to promote peace, justice, national unity, healing, and reconciliation among the people of Kenya by, among other things:-

- (a) establishing an accurate, complete and historical record of violations and abuses of human rights and economic rights inflicted on persons by the state, public institutions and holders of public office, both serving and retired, between 12th December 1963 and 28th February 2008;
- (b) investigating gross human rights violations and violations of international human rights law and abuses which occurred, including massacres, sexual violations, murder and extra-judicial killings and determining those responsible for the commissions of the violations and abuses;
- (c) determining ways and means of redress for victims of gross violations and abuses; and
- (d) recommending the prosecution of the perpetrators of gross human rights violations.

The Commission is in operation, but its Chairman (the applicant) is facing an inquiry by a Tribunal (the Tribunal appointed to Investigate the Chairman, Truth, Justice and Reconciliation Commission) appointed by the Chief Justice on 10th December 2010 under section 17(2) of the Act under Gazette Notice No. 15894 (“the Gazette Notice”). The Tribunal’s mandate is:-

“To investigate the conduct of the Chairman of the Truth, Justice and Reconciliation Commission, Ambassador Bethwell Kiplagat, including, but not limited to, the allegations that the said Chairman’s past conduct erodes and compromises his legitimacy and credibility to chair the Commission; his past is riddled with unethical practices and absence of integrity; he has been involved in, linked to or associated with incidents considered to be abuse of human rights; is likely to be a witness in the same matters that the Commission is mandated to investigate”

and to make a report and its recommendations not later than six months from the date of the Gazette.

The applicant feels aggrieved by the fact that the Tribunal, whose members are the 3rd to 5th Respondents, is going to investigate into his past conduct when, he argues, the only conduct such a Tribunal can be appointed to investigate is conduct while “in office”. His case is that what the Tribunal has been appointed to investigate is contrary to sections 16 (c) and 17 (1) of the Act. The investigation is scheduled to begin on 27th April 2011, and the court was informed that witnesses have been lined up.

The applicant by motion went before the Tribunal and sought an order that it had no jurisdiction to inquire into his past conduct. There were other prayers, just like in the present matter. The motion was found to be fatally defective and incompetent and was struck out. This followed a preliminary objection taken by the Assisting Counsel. The Tribunal found that it had jurisdiction to inquire into the past conduct of the applicant. This is how it expressed itself.

“Rerverting to the key issue of jurisdiction of this Tribunal, we are totally convinced that the mandate of this tribunal is adequately stated and contained in the appointing instrument being Gazette Notice No. 15894, published on 10th December, 2010. From the said Gazette Notice, it is clear to us and everybody willing to read and understand, that the Tribunal’s mandate also covers the conduct of the subject during the period pre-dating the subject’s appointment as a Commissioner and the Chairman of TJRC. That the subject was interviewed or vetted by other organs does not mean that such organs could not have over looked some aspects of the subject’s conduct prior to his appointment to the Commission.”

The decision was rendered on 12th April 2011.

On 20th April 2011 the Applicant filed this application seeking leave to apply for Judicial Review orders in the nature of *certiorari*, prohibition and mandamus. He wanted to apply for an order of *certiorari* to remove into this court and quash the Gazette Notice establishing the Tribunal or alternatively, an order of *certiorari*, to remove into this court and quash all parts of the Gazette Notice that authorizes the Tribunal to investigate his past conduct. He wanted to apply for an order *certiorari* to remove into the court and quash the decision and Ruling of the Tribunal dated 12th April 2011. There were other prayers. The application was heard on 20th April 2011 and leave granted. The court asked that the issue of whether such leave should operate as stay, as was sought by the applicant, be heard on 26th April 2011. This is the issue under consideration. The matter was argued before me by Mr. Mc Court for the Applicant and Mr. Okello for the 2nd to 5th Respondents. The 1st Respondent was represented by Mr. Onyiso who had not filed any replying affidavit or grounds of opposition. I have considered the arguments and written submissions by Mr. Mc Court and Mr. Okello.

There should be no question that the Tribunal is a body inferior to this court and therefore subject of supervision by the court. Such supervision is by way of judicial review by the orders of *certiorari*, mandamus and prohibition. Certiorari is meant to quash orders made without jurisdiction or in excess of the same (**Kenya National Examination Council –Vs- Republic, Civil Appeal No. 266 of 1996 at Nairobi**). Mandamus is meant to compel performance of a public duty and not to perform duty in a certain manner. Prohibition is meant to forbid a tribunal from continuing with proceedings in excess of jurisdiction or in contravention of the laws of the land but not to correct the course, practice or procedure, and does not lie where a decision has not been made.

The Applicant went before Justice Mwilu and obtained leave to bring judicial review proceedings. The Judge must have been satisfied that, on the material available, the Applicant had an arguable case (**Republic –Vs- Communications Commission of Kenya and Others [2001] 1E.A. 199**). I raise this because Mr. Okello submitted during this application that the Applicant does not have an arguable case. Mr. McCourt’s submission was that, by being granted leave, it was clear the Applicant had an arguable case. All that the court would like to indicate on the issue is that the Respondents are at liberty to challenge the leave by an application to the Judge who granted it.

For the avoidance of doubt, however, the issues being raised by the Applicant are critical. He is arguing that the Act created the Commission whose appointment followed a rigorous and lengthy process that involved a selection panel, the National Assembly and the President. Under section10(6) of the Act the Commissioners were supposed to be men and women of good character and integrity, not linked or associated with human rights violations of any kind or in any matter which is to be investigated, and be impartial. The Applicant is saying that his past conduct was investigated following which he was found fit to serve and was appointed. Under sections 16(c) and 17(1) of the Act he is supposed to be removed from office:-

- (a) for misbehavior or misconduct;
- (b) if convicted and sentenced to jail for over 3 months without an option of a fine;
- (c) if convicted of an offence involving moral turpitude but not sentenced;

(d) if he is not able to discharge the functions of his office by reason of physical or mental uniformity; or

(e) if he is absent from three consecutive meetings of the Commission without good cause.

He contends that a Tribunal under section 17 (2) can only be formed to instigate a question of his removal from office under section 17(1) and that is only in relation to his conduct while in office. It cannot be formed, it is submitted on his behalf, to investigate into his conduct prior to his appointment.

The Tribunal observed that the organs that interviewed or vetted the applicant could have overlooked some aspects of his conduct prior to his appointment to the Commission. Mr. McCourt wondered whether, given section 12 of the National Assembly (Powers and Privileges) Act (Cap. 6), the decision by the National Assembly to recommend the applicant for appointment can be questioned. It is clear that this case seriously questions the process of vetting that was undertaken.

For me, the applicant is faced with a serious moral issue. His appointment was on the basis that his conduct, character and integrity were beyond reproach, and that he was going to be an impartial arbiter in whatever proceedings that were going to be conducted by him. It was expected that he was not involved, implicated, linked or associated with human rights violations of any kind or in any matter which the Commission is supposed to investigate. But now, he is faced with a situation where his past has allegedly been dug out and his own Commission may very well be seeking to investigate him. The issue is not whether the allegations being levelled against him are true. What is material is that the Commission will want to investigate the circumstances surrounding the death of Robert Ouko, the Wagalla Massacre and the Ndungu Report on Illegal/Irregular Allocation of Public Land and in each case he is being adversely mentioned. He cannot sit in judgment when the issues are being discussed. Justice will cry if he were allowed to sit in judgment, be a witness and an accused, all that the same time. My advise is that he should do the honourable thing.

But that does not mean that the question of jurisdiction that he is raising against the Respondents is not a legitimate one. If the vetting process was faulty, does that mean it can be re-opened by the Tribunal? Is it not possible that any citizen can approach the High Court for a declaration that the Applicant is unfit to serve as Commissioner/Chairman? What happens if the Tribunal were to be allowed to investigate the Applicant regarding his past conduct and on basis of its findings recommends his removal, and when this case is heard and determined it turns out the Tribunal had no jurisdiction? The Applicant will have been prejudiced beyond repair. Precious time and resources will have been spent on a futile exercise.

This suit will eventually come for hearing and therefore nothing should be said at this stage that may prejudice any party or embarrass the court that will deal with the matter. I appreciate that the life of the Tribunal is about to end, although experience has shown that such term may be extended. I consider that the Commission is, under its acting Chairperson, proceeding with its work. The Tribunal is a creature of a statute and can only do that which the statute and its Rules permit it to do. If it engages in anything beyond the statute it becomes amenable to the supervisory jurisdiction of the High Court. The Applicant is saying that the Chief Justice and the Tribunal are, in seeking to deal with his past, purporting to do that which the Act does not allow. Whatever other remedy that he may have, I find that the proceedings subject of the leave should be filed and heard. In the meantime, I order that the leave granted shall operate as a stay. I have taken into consideration that the matters that the Tribunal is going to inquire into, as shown in the notice to the Applicant dated 3rd March 2011, do not include conduct after appointment.

In the special circumstances of this case, I ask that the Applicant pays costs of this application.

DATED AND DELIVERED AT NAIROBI

THIS 27TH DAY OF APRIL 2011

A. O. MUCHELULE
J U D G E