



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Miscellaneous Application 103 of 2009**

**ANTHONY MKALA CHARO CHITAVI.....APPLICANT**

**versus**

**ATTORNEY GENERAL & THREE OTHERS.....RESPONDENTS**

**RULING**

Anthony Mkala Charo Chitavi filed the petition dated 12<sup>th</sup> February 2009 under S 84 (1) of the Constitution. He alleges that his rights under S 77(2)(a) of the Constitution are likely to be contravened and seeks the following orders;

- (1) The court do prohibit the Respondents, their agents or employees from suspending, terminating or in any way dismissing the Petitioner from his employment as Managing Director of Malindi Water and Sewerage Company Ltd allegedly in enforcement and application of and in accordance with S.62 (1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003, Laws of Kenya;
- (2) A declaration that the provisions of S 62 (1) of the KACC Act are unconstitutional in respect of the Applicant;
- (3) A declaration that the provisions of S 62 (1) of the KACC Act are inconsistent with the Constitution and are therefore null and void.

The Petition is supported by an affidavit sworn by the Petitioner on 12<sup>th</sup> February 2009. Filed simultaneously with the petition is a Chamber Summons brought under Rules 20 and 21 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms) High Court Practice and Procedure Rules, 2006 and S. 3A Civil Procedure Rules in which the Applicant seeks an interim order prohibiting the Respondents from suspending, terminating, or in any way dismissing the Petitioner/Applicant from his employment as Managing Director, Malindi Water & Sewerage Company Ltd. until the hearing and determination of this Application and 2ndly for an order prohibiting the Respondent from terminating his employment till the petition is heard and determined. The Chamber Summons is based on grounds found in the body of the Chamber Summons and an affidavit filed on 12<sup>th</sup> February 2009.

The Petitioner/Applicant is an employee of Malindi Water and Sewerage Company Ltd where he works as Managing Director, since 3<sup>rd</sup> October 2008. Before that, he worked as the Managing Director, Mombasa Water and Sewerage Company Ltd. About 23<sup>rd</sup> January 2009, the Applicant was charged in Chief Magistrate's Anti-Corruption case 2/09 at Mombasa Chief Magistrate's Court, with offence of

abuse of office for allegedly awarding a tender to an Insurance Company which was alleged to have been the unsuccessful bidder. The matter is yet to be heard, but that there is a likelihood that he will be suspended from his position as the Managing Director of Malindi Sewerage Company in accordance with the provisions of Section 62(1) of Anti-Corruption and Economics Crimes Act. That S 62(1) of the said Act requires that a public officer who is charged with corruption or an economic crime be suspended from employment from the date of the crime. That the said provision is unconstitutional for prohibiting the Petitioner to be in gainful employment notwithstanding that the Petitioner has not been found guilty of any offence and that he may be suspended for an offence he allegedly committed when working for a totally different employer. That S 72 (2) (a) of the Constitution does not envisage the situation he finds himself in. That S 62 (1) is inconsistent with S.77 (2) (a) which presumes that one is innocent until proved guilty. That there is unlikelihood of the Petitioner interfering with investigations since he is no longer employed by Mombasa Water and Sewerage Company Ltd. Which is a different entity from Malindi Water & Sewerage Co. Ltd.

The 2<sup>nd</sup> Respondent opposed the Chamber Summons and Reverend David Randu, the chairman of the 4<sup>th</sup> Respondent swore a replying affidavit dated 11<sup>th</sup> March 2009. He admitted the facts leading to the filing of this petition but deposed that suspension from duty does not violate S 72 (2) (a) of the Constitution as it is meant to pave way for the smooth running of the company and the hearing of the pending case. That in any event the petitioner will be paid his half salary and he should make way for investigations as he is likely to interfere if kept in his current work place.

In addition to the Replying Affidavit, Mr. Onyiso Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent submitted that it did not matter whether the Applicant was employed in Mombasa, or Nairobi. He is still a public servant and there is real danger of interference and in any event the right to gainful employment is not a Constitutional right and in any case that is not pleaded.

That to be entitled to an interim or conservatory order under Rules 20 and 21, the applicant has to demonstrate that he has a prima facie case with high chances of success and that if the order is not granted, he is likely to suffer irreparable loss.

In this case, the Applicant contends that he works for a different entity and so S 62 (1) of the Anti-Corruption & Economic Crimes Act should not apply to him. The body he works for is actually owned by the Ministry of Water and Irrigation. He is a public servant. As correctly pointed out by the Applicant's Counsel, S 62 (1) was enacted for a purpose, so that public officers who were on suspension would not interfere with investigations. In this case, the Applicant is a public servant working for Malindi Water & Sewerage Company and he should have shown that there is no likelihood of him interfering with the investigations relating to the Mombasa Case. He has not done so.

The Applicant also alleges interference with his right to gainful employment. Firstly, he has not pleaded such right and has not pointed to the existence of such right. The Applicant also alleges discrimination against him if he is sent on suspension but he has not demonstrated against whom he is discriminated and the nature of the discrimination as categorized under S. 82 (3) of the Constitution. Besides S 82 of the Constitution which offers protection against discrimination has not been pleaded. If the court grants the order, it is the Applicant who will be favoured against other public servants who have been or may be charged with such offence.

Section 70 of the Constitution states that the rights under the Bill of Rights are not absolute. They are subject to public interest and rights of others. There are limitations provided for under each section of the Bill of Rights Ss 71-83. The Applicant should have demonstrated that the right under S 72 (2) (a) is absolute and his rights are likely to be breached.

From the above observations, I find that the Applicant has not demonstrated that he has a prima facie case with high chances of success and the court declines to grant the prayer for interim conservatory order. If he is suspended he will be entitled to ½ salary. If proved innocent he will be paid all his outstanding dues and no harm will be suffered.

Accordingly the Chamber Summons application is dismissed with costs being in the cause.

Let the Applicant file his submissions and the matter be heard expeditiously to determine his alleged rights once and for all.

Dated and delivered this 27<sup>th</sup> day of July 2009.

**R.P.V. WENDOH**

**JUDGE**