



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

Petition 503 of 2009

IN THE MATTER OF SECTION 84 (1) OF THE CONSTITUTION OF KENYA

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER SECTION 77 OF THE CONSTITUTION**

BETWEEN

JOSEPH MUNYIRI MUNENE PETITIONER

AND

ATTORNEY GENERAL..... 1ST RESPONDENT

CHIEF MAGISTRATE'S COURT, NAIROBI..... 2ND RESPONDENT

RULING

Christopher John Kirubi seeks to be enjoined to the petition filed by Joseph Munyiri Munene as an Interested Party. The Applicant is the co-accused of the Petitioner in Cr C 900 of 2008 which is the subject matter of this petition. A copy of the charge sheet has been exhibited as 'CJ K 1'. On 15/9/09, the court rendered its ruling denying the Petitioner conservatory orders of staying the hearing of the Chief Magistrate's case No. 900/08. The Petitioner was granted leave to appeal, which he did. Later, the Petitioner and Respondent agreed to stay further hearing of the criminal matter pending the hearing and determination of this petition. It is Mr. Kirubi's contention that the said order directly affects him to his detriment as he is an Interested Party in the proceedings before this court and Court of Appeal. That the consent between the Petitioner and Respondent has adversely affected his rights to an expeditious hearing of the criminal case and he requests to be enjoined to these proceedings.

In opposing the application, Mr. Ngatia counsel for the Petitioner deponed that the complaints raised in the petition are personal to the Petitioner and shall not in any manner hinder the Applicant or other accused persons from proceeding with the hearing of the criminal trial as scheduled. He denied that the Petitioner and Attorney General had filed a consent on the issue of stay because the Court of Appeal had declined to accept the consent. He exhibited the proceedings before the Court of Appeal. The appeal is yet to be concluded on its merits. Counsel submitted that the matter is scheduled to go before the Chief Justice on 23/11/09 for appointment of a bench but due to this application they are engaged in this application, it is prejudicing the Petitioner's position. Counsel relied on the ruling of Ojwang J in **LSK V AG PETITION 185/08** who held that there cannot be an Interested Party in a constitutional reference and

that therefore the Applicant is a busy body in this application.

It is not in dispute that the Applicant is the co-accused of the Petitioner herein in Cr C 900/08. They are charged with 12 others for the offence of conspiracy to defraud contrary to section 317 of the Penal Code. The Applicant is charged with a 2nd count of Breach of Trust contrary to section 127 of the Penal Code. At prayer (e) of the petition, the petitioner seeks to prohibit the Respondent or any other person or court from authorizing or hearing Criminal Case No. 900/09 and or any charges or complaints arising therefrom. That prayer does not indicate that the criminal charges would be prohibited only in respect of the Petitioner. The whole criminal case will be stayed generally. If the order is granted, it will directly affect the Applicant. If the Court of Appeal orders a stay of the criminal proceedings as prayed in the appeal, that order too would directly affect the Applicant because it is a stay of all the criminal proceedings in Cr C 900/08.

Though Mr. Ngatia submitted that an Interested Party is alien to proceedings under S 84 of the Constitution, I do not agree with that proposition. Rule 22 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the individual) High Court Practice and Procedure Rules, 2006 allows an affected party to come into the proceedings and set aside orders granted ex parte.

The rule reads:

“A person affected by an order under rule 20 may apply to set aside such order.”

Rule 20 empowers the court to grant interim orders pending determination of the application. In my view an Interested Party has the same meaning as an affected party. In applications of this nature, the court allows complainants in criminal cases coming into the proceedings as Interested Parties because the orders of the court would directly affect them. In ***MEME V REP I (2004) KLR 637***, a bench of three judges held that an application under S 84 of the Constitution. Interested Parties can be enjoined. The Applicant had challenged criminal proceedings pending in the lower court and that court held that such Constitutional applications should be given the widest possible participation and should involve Interested Parties. The Applicant will be prejudiced if the criminal proceedings are stayed and as there will be a delay in the hearing and the criminal case, will remain abeyance till the petition is heard and concluded. The Applicant’s intention is to challenge the consent that was supposed to be filed by the Petitioner and Attorney General. Even if the consent has been overtaken by events, the appeal is still alive and for hearing and the Applicant can still challenge it.

I find that there is room for Interested Parties under section 84 of the Constitution and in this case, the Applicant is an Interested Party as regards the outcome of the Appeal and even the petition and I will grant him leave to be enjoined to these proceedings in that capacity. Costs of the application to be in the cause.

Dated and delivered this 23rd day of November 2009

R.P.V. WENDOH

JUDGE

Present

Ms Ngonde holding brief for Mr. Ngatia for Petitioner

No appearance for 1st Respondent

No appearance for 2nd Respondent

Mr. Njagi – Interested Parties/Applicant

Muturi court clerk