REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli 1076 of 2007

JOB KIPKEMEI KILACH…………………….……...………………….APPLICANT

Versus

KENYA ANTI-CORRUPTION COMMISSION & TWO OTHERS....RESPONDENT

RULING

On 24th September 2007, the Petitioner, Job Kipkemei Kilach filed this petition pursuant to Sections70 (a) and (c), 74 (1) 76, 77 (1), (4), (7) and (8); and S. 84 (1) of the Constitution, alleging contravention or likely contravention of his fundamental rights and freedoms under the above Sections. The Petition is brought against the Kenya Anti-Corruption Commission (KACC) the Hon. The Attorney General (sued on behalf of the Government of Kenya) and the Chief Magistrate Makadara Law Courts (1st to 3rd Respondents). The Applicant seeks several declarations and orders against the Respondent.

On the same date, the Petitioner filed the Chamber summons dated 24th September 2007 in which he seeks the following orders:

1) That the Hon. Court be pleased to certify this Application as urgent and the same be heard ex parte in the 1st instance;

2) That this Hon. Court be pleased to issue orders restraining the 1st and 2nd Respondent from further prosecuting or in any other manner proceeding with Chief Magistrate CRC No. 21/07 pending before Chief Magistrate's Court Makadara;

3) That this court be pleased to issue orders directed to the Chief Magistrate Makadara or any other judicial officer whoever from conducting any further action in the Chief Magistrate's Court, CRC 21/07 pending the full hearing and determination of this Application or with the further orders of the Hon. Court;

4) That this court be pleased to grant the Petitioner interim or conservatory orders of stay pending the determination of this Petition;

5) That this court be pleased to make such other or further orders as it may deem fit and just to grant;

6) Costs of the Application be in the cause.

The Chamber Summons is brought pursuant to 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 and is premised on grounds found in the body of the application and an affidavit dated 24th September 2007 sworn by the Applicant. The Applicant also filed skeleton arguments dated 2nd November 2007.

In opposing the Chamber Summons, Olga Sewe the Principal Attorney, Crime Reading Department of KACC and James Otieno Olola, Counsel for the 1st Respondent swore Affidavits dated 12th October 2007, skeleton argument dated 31st October 2007. The 2nd Respondent also opposed the Chamber Summons and relied on skeleton arguments dated 2nd November 2007 and filed in court on the same date.

The Applicant had on 31st October 2007 filed a Notice of Motion dated 30th October 2007 seeking to have all the Respondent's Counsel be disqualified from representing their various clients. Mr. Kiplenge, Counsel for the Applicant decided to argue this Notice of Motion within that Chamber Summons. The 1st Respondent had filed grounds of opposition to the Notice of Motion dated 5th October 2007 and Mr. Kiage Counsel for the 2nd and 3rd Respondent had also filed a Replying Affidavit dated 6th November 2007 in opposition to that Application.

A brief factual background of this case is that the Applicant is a retired Civil Servant having retired from the Central Bank in 1994, after being questioned over the loss of Kshs.13.5 billion from the Central Bank of Kenya. He was later arrested on 7th June 1994 and charged with CRC 4053/1994 (charge sheet JKK) for an offence of stealing by a person employed in the Public Service. The Attorney General attempted to enter a nolle prosequi in court to pave way for the Bosire Commission of Enquiry but the same was not allowed and it was referred to the High Court vide Misc Application 252/03 for directions. The directions have not been given to date. That after the conclusion of the Bosire Commission of Enquiry, the Applicant was asked to make fresh statements at CID Headquarters and he was served with a notice dated 12th July 2006 requiring him to furnish the Director with information concerning all his property (JKK3). His Counsel, Mr. Kiplenge responded to the letter to the effect that the same would prejudice his case in the Magistrate's Court and Court of Appeal, that the notice contravenes S. 77 (8) of the Constitution and that Act 3 of 2003 was being applied retrospectively. However, on 25th March 2007 the Applicant received a court summons dated 23rd March 2007 requiring his attendance at the Resident Magistrate's Court on 29th March 2007 for a charge of failing to comply with the notice to furnish a statement of his property contrary to section 26 (1) & 26 (2) of the Corruption & Economics Crimes Act. He denied the offence and the case was scheduled for hearing on 18th September 2007 on which date the advocate intended to raise several constitutional matters on contravention of the Applicant's rights, but the Counsel Mr. Kiplenge was held up before Justice Nambuye in HCC 1649/01 (cause list JKK 5). That he presented the said cause list to the Magistrate and sought adjournment till 2.30 p.m. but the Magistrate stood down a witness ACC 35/07 (JKK 6 cause list) to allow the Director of KACC Justice Ringer to testify without the Applicants participation and cross examination. That as a result, the Applicant was not given a fair hearing, was denied representation by Counsel and the ruling that was slated for 28th September 2007 would be delivered against him. That the Notice dated 12th July 2006 is unconstitutional in that it breaches his rights against self incrimination Clause 3 of the letter has a retrospective effect in that it requires him to state how he acquired properties between 1991 to 2002; that Anti Corruption & Economic Crime Act 2003 No. 3 came into force on 2nd May 2003 and it can only apply to offences committed on 2nd May 2003 and that criminal law cannot operate retroactively.

Mr. Kiplenge also submitted that the notice issued on 12th August 2006 is vague and that the rationale in the Case of **DR. CHRISTOPHER M. MURUNGARU V KENYA ANTI CORRUPTION COMMISSION (2006) KLR K 2 & 3)** does not apply to this case because in that case, the Applicant had not been charged but in this case, the Applicant has already been charged. Counsel also relied on the case of **JOSHUA KULEI V KACC MISC APPLICATION 459/06** in support of the proposition that the Applicant need only show that he has an arguable case for the orders to issue.

In respect to the Notice of Motion, in which Counsel wanted Mr. Kiage to opt out of these

proceedings, Counsel urged that it is unethical for Mr. Kiage to represent the Magistrate before whom the parties are appearing as he is interested in the outcome.

In opposing the Application, it is the 1st Respondent's case that the Applicant is trying to ran away from the consequences of failing to proceed with his case on 18th September 2007. Mr. Olola, Counsel for the 1st Respondent urged that when plea was taken in CRC 21/07, no constitutional issues were raised. That for 6 months since the fixing of the hearing in Makadara Court no constitutional issues were raised. That on 18th September 2007 when the matter came up for hearing, no Application for adjournment was made and the Applicant did not say where Counsel was or when he would be available. That at the trial the Applicant was given an opportunity to cross examine the 3 witnesses who testified but he said he had no questions.

That in the Applicants response to the notice of 12th September 2006 the Applicant did not ask that S. 26 of the Anti Corruption Act be declared unconstitutional. That in any case, since December 2006, the Constitutional Court ruled on S. 26 of the Anti-Corruption and Economic Crimes Act as only being investigatory but does not reverse the burden of proof and that Mr. Kiplenge must be aware of that decision and this court cannot change the finding of that court. It was Mr. Olola's contention that this Application is contemptuous of the court as it is asking the court to help the Applicant disobey a court order and that S. 26 of the ACECA, being the law it is the duty of the court to enforce it. This is what was espoused in **HOFMAN LAROCHE V SECRETARY OF STATE (1975) FC 295.** Counsel also submitted that the Magistrate exercised her discretion in proceeding with the case as she could not have acted suo motto and that in any case Mr. Kiplenge did not indicate where he was, or when he would be available. That there are other advocates in the firm of Juma, Kiplenge Advocates who could have appeared.

As to the retroactivity of the offence, it was urged that corruption has always been a crime and the notice would not have any retrospective effect. In sum Counsel submitted that this Application is only meant to delay the hearing or CRC 21/07 at Makadara Court.

Mr. Kiage in opposing the Chamber Summons argued three points, that the Applicant failed to disclose material facts; the Applicant was guilty of inordinate and unexplained delay and that the constitutionality of S. 26 of the Anti Corruption Act has been settled.

On the first issue, Mr. Kiage urged that the Applicant failed in his duty of full disclosure and candour. He relied on the following authorities:

1. NIPUN MAGINDA PATEL V AG H MINISC CA 463/05

2. THOMAS EDSON LTD V BULLOCK and

3. UHURU HIGHWAY DEVELOPMENT LTD V CBK HC 29/1995

where the courts held that a party coming to court for ex parte orders must make full and frank disclosure of all material facts which include a possible alternative remedy. If there is delay, why the delay and failure to do so disentitles one to an ex parte or interim order. It is Mr. Kiage's contention that the Applicant has told the court lies that he sought adjournment till 2.30 p.m. when the matter was heard, that the matter was only heard for 15 minutes yet it was about 45 minutes and in any case the Applicant could have moved under S.150 to have the witnesses recalled.

On the 2nd question, Counsel urged that the notice under challenge was issued on the Applicant on 7th August 2006, over a year ago. Even after plea was taken and a hearing date taken, the Applicant never moved that court yet he had a right to approach the High Court directly under R 11 of Legal Notice 6/06. The Applicant only came up with the allegations of violations on 24th September 2007 when the ruling was due.

On the third issue, Counsel submitted that the court determined the constitutionality of S. 26 in the **MURUNGARU CASE** which in turn also determined the **KULEI CASE.**

As to reactivity, S. 77 (4) of the Constitution prohibits specifically it. That the Criminal Act allegedly committed by the Applicant occurred on 7th August 2006 when he refused to comply with the Respondents notice under S.26 of the ACEC Act. That S. 26 of ACEC Act is only an investigatory tool and it cannot have a retroactive effect. That the same cannot be a confession as confessions were done away with.

On the question of Mr. Kiage appearance in this matter being unethical, he replied that he is appointed by the Attorney General as a Deputy Public Prosecutor to prosecute, corruption matters, Judicial Review and Constitutional Applications and that it is not for the Applicant to advise the Attorney General who he will send. That he was prosecuting before the Chief Magistrate's Court but the Applicant has chosen to sue the Attorney General, and Mr. Kiage has to represent him. That the Counsel actually failed his client and now wants to blame others.

I have now considered the rival arguments by all Counsel on the Chamber Summons, dated 24/9/07, the Notice of Motion dated 30th October 2007 the Affidavits filed by all sides, annextures thereto, skeleton arguments and authorities that have been cited by all the parties. This matter revolves around the notice served on the Applicant by the 1st Respondent's Director dated 12th July 2006. The notice reads as follows:

"**RE: NOTICE TO FURNISH A STATEMENT OF PROPERTY PURSUANT TO SECTION 26 OF THE ANTI CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003 WHEREAS JOB KIPKEMEI KILACH is reasonably suspected of corruption and Economic Crime, NOW THEREFORE TAKE NOTICE that you are required to furnish to the Director, Kenya Anti Corruption Commission within 30 days of service of this notice a written statement:**

1) enumerating all your property including (but not limited to) the description, location and approximate value of the property; and;

2) stating the times when you acquired each of the property; and

3) stating in respect of the property acquired between 1991 and 2002; particulars of how you acquired the property, whether by purchase, gift, inheritance, or other manner (which you must specify): and

4) stating what consideration or price, if any was given for the property, whether by yourself or by other person.

TAKE FURTHER NOTICE that neglect or failure to comply with the requirements of this notice is a criminal offence punishable with a fine or imprisonment with a fine or imprisonment for a term not exceeding three years, or both such fine and imprisonment.

Signed:

JUSTICE AARON RINGERA

DIRECTOR/CHIEF EXECUTIVE

The above notice gave the Applicant 30 days within which to comply. I believe the 30 days expired on 11th July 2006. The notice also notified the Applicant of the consequences of non-compliance with the notice – ie. A fine or imprisonment or both. The Applicant responded to the notice through his advocate, Mr. Kiplenge, complaining that compliance with the notice would prejudice the Criminal cases pending before the Magistrates Court, High Court and Court of Appeal; that the notice contravened S. 77 (8)

whose interpretation was the subject in **HON. MURUNGARU'S CASE** and that Act 3 of 2003 was being applied retrospectively. The Applicant took no steps towards challenging the notice. On 25th March 2007, which is about 8 months after the issuance of the notice, the Applicant was summoned to attend Makadara Court on 29th March 2007 to answer charges relating to non compliance with the notice of 12th July 2006. He denied the offence and it was fixed for hearing on 18th September, 2007. It is noteworthy that all this while, the Applicant had never challenged the said notice. On 18th September 2007 for some reason, Counsel of the Applicant did not attend court and the matter proceeded to hearing in his absence and that is when this Petition was filed.

The Applicant has moved the court about 14 months after the notice was served on him. He now wants the court to stay the criminal proceedings and stay the ruling of the court in the criminal case. I do agree with Mr. Kiage's submission that there has been unexplained and inordinate delay in bringing this Application. The Applicant has not made any attempt to explain why the delay and this court finds the said delay unjustified. He cannot wait for over a year, wait till proceedings in a criminal court have been commenced, a hearing party taking place, without making any attempt to stop them and rush to court for conservatory orders when a ruling is due. I find the Applicants action to be brought in bad faith and an abuse of the court process and this court would not be inclined to exercise its discretion in favour of a party who is indolent and sits on his rights.

The Applicant is challenging the constitutionality of the notice dated 12th July 2006. In fact he referred to the **MURUNGARU CASE** that was awaiting interpretation. That case was determined in December 2006 where the constitutional court interpreted S. 26.

One of the reasons that the Applicant objected to the notice is that it has a retrospective effect, that Act 3 of 2003 which enacted the Anti Corruption and Economic Crimes Act, was amended in 2003. I think that the Applicants argument is misplaced because what is in issue here is the notice issued on 12th July 2006 and the Applicant has been charged in the Makadara case for failure to comply with that notice. The offence that the Applicant faces was created in Act 3 of 2003. The Applicant having been charged with flouting the provisions of that Act in 2006, the Act cannot be said to have a retroactive effect. The offence under S.26 did not exist before 2003 and it cannot have retroactive effect.

If the Applicant has in mind possible charges that may arise after the compliance with the said notice which seek an inventory of all the Applicants property from 1991-2002,S. 26 of the Act being an investigatory one does not guarantee that one will be charged with an offence as a result of compliance. To the contrary, the furnishing of the property and explaining how it was acquired might even help exonerate one from suspicion or the charges he may otherwise have faced or he may be called as witness. Further to the above, the Applicant cannot issue but he never took advantage of the time needed. The law has to be obeyed to raise the issue of retroactivity because prior to the enactment of Act 3 of 2003 there was the Prevention of Corruption Act, 1991 which was repealed upon commencement of the 2003 Act and the 2003 preserved corruption offences committed before 2003. S.71 (3) of the 2003 Act prohibits retrospective Application of the Act so that no person can be charged with an offence committed before 2003 which was not an offence in the 1991 Act. S. 77 (4) of the Constitution also offers protection against retrospective application of any law and the Applicant has not shown that S. 26 of Anti Corruption Act has any retrospective effect.

In his reply to the notice of 12th July 2006, the Applicant acknowledged that they were awaiting the interpretation of S. 26 in the **MURUNGARU CASE.** The Constitutional Court rendered its decision on 1st December 2006 and inter alia, held that S. 26, 27 and 28 of the Anti Corruption & Economic Crimes Act are investigatory provisions and do not change or reverse the burden of proof in criminal cases; An investigation by the Director of Kenya Anti-Corruption or his commissioner under Section 26, 27 and 28 of the Act is Constitutionally permissible pursuant to Section 72(1) (e). Section 77 (2) (a) (h) and indeed S. 77 (7) of the Constitution are applicable only when a person has been charged with a criminal offence. The court therefore held that S. 26, 27 and 28 of the Anti Corruption and Economic Crimes Act 2003 were not inconsistent with Section 70 (a) and (c) 76, 77 & 82 of the Constitution. Mr. Kiplenge however argued that the **MURUGARU CASE** is different from the instant case because in that case the Applicant

had not been charged but in this case the Applicant has already been charged and if he complies, he will be prejudiced. Firstly S. 26 being an investigatory Section, there is no evidence that the if investigations are carried out, they will in respect of the charges that the Applicant faces in the Magistrate's Court, High Court or Court of Appeal.

Besides the cases before the magistrate's Court are not yet heard. The Attorney General's Office has the right to bring more charges or apply for amendment of the charges if necessary. But as I have observed earlier compliance with S. 26 does not mean that we will be charged but it may in fact help exonerate the Applicant in the long run or he may be treated as a witness. The constitutionality of S. 26 having been settled by the Constitutional Court. This court cannot change that finding. The Applicant has flagrantly disobeyed the law by not complying with the notice issued under S. 26 and if this court were to stay those proceedings it would be telling the Applicant "**you can disobey the law, the court will protect you.** I agree the finding in the **LA ROCHE CASE supra pg 350 "It is in the public interest that the law should be obeyed. It is in the public interest that resistance to it should be suppressed. Unless some very good reason could be shown, a court would, therefore, accede to an Application to enforce the law and to enforce it in the way in which Parliament had prescribed as the appropriate way."**

Section 26 ACEC Act Prescribes is the law, until that law is amended or repealed it must be obeyed. Whether or not that section contravened the Applicants rights or it was not good law ait was upto the Applicant to obey and dellage it once served with the notice as he had ample time to do so. The Applicant failed to comply and has been charged, for failure to comply. The law should be left to take its course.

It was the Applicants contention that the hearing before the Chief Magistrate Makadara breached his rights to a fair hearing in that he was denied an adjournment and a chance to cross examine the witnesses. The proceedings before the court were exhibited by the 1st Respondent. (See Affidavit of Mr. Olola). The record shows that the Applicant merely informed the court that his advocate was in the High Court and he was not sure when he would join him.

The court set the matter for mention at 11.00 a.m. By 11.25 a.m. Mr. Kiplenge had not yet arrived and was said to be still proceeding in the High Court. The Applicant never sought an adjournment and the court proceeded to order that the matter proceeds to hearing. Both Mr. Kiage and Mr. Olola who were present in the Chief Magistrate's Court denied the Applicants contention that the court adjourned another matter to hear the Applicants case case. Even if the court did so, it had set aside the matter for 11.00 a.m. and proceeded to hear it at 11.25 a.m. The record also shows that the Applicant was given a chance to cross examine the witnesses but asked no questions. The Applicant's Counsel had been present when the hearing date was taken. The Respondents have deponed that there are other Counsel in the firm of Juma Kiplenge Advocates which averment is not contraverted. No reason or explanation has been given to this court where Mr. Kiplenge was and why he was not in court having taken the hearing date. It would have been expected that having failed to attend court when he was aware of the hearing date, Mr. Kiplenge would swear an Affidavit to explain his whereabouts on that date. This court cannot believe that the Applicant intended to raise any constitutional questions so late in the day as something would have been on record or at least Counsel would have been present to say so since that was a very important application. Mr. Kiplenge did not even arrive late. This Application was made about 6 days later. I am inclined to agree with the Respondent's contention that this is a case where an advocate failed his client and wants to blame it on the court and other parties. Counsel should squarely face his omission and deal with it. The Makadara court has heard the case against the Applicant having exercised its discretion given the circumstances and there is no good reason for stopping the court from going ahead to render its decision. The Applicant can still exercise his right of appeal.

It was Mr. Kiage's submission that the Applicant is not entitled to the conservatory orders because he failed to make a full and frank disclosure and absolute candour. That the Applicant was not honest and forthright in that the Applicant lied to this court that he sought and adjournment which was denied and that the trial only took 15 minutes whereas it took 45 minutes. No rebuttal was made by the Applicant of this contention. Even looking witness called 3 in total and the length of the evidence adduced, the hearing cannot have taken 15 minutes. The record does not show any adjournment was ever sought by the

Applicant.

In **UHURU HIGHWAY CASE (supra)** the court observed that "…….**if the court comes to the conclusion that the Affidavit in support of the Application was not candid and did not fairly state the facts but stated that in such a way as to mislead the court as to the true facts, the court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits."** The court was quoting VISCOUNT C.J. in **THE KINGS V G C FOR CUSTOMS PURPOSES OF INCOME TAX (1977) 1 K.B.** In **NIPUN CASE (supra)** an ex parte order that had been granted was discharged for reason of misrepresentation of facts. In addition to the misrepresentation, the Applicant should have explained and justified the delay in seeking these orders. Due to misrepresentation and failure to explain the delay which I have considered earlier in this ruling, this court would not be inclined to grant the conservatory orders.

Lastly, on the question of whether Mr. Kiage should appear in this matter, Mr. Kiage has sworn an Affidavit, that he is appointed as the Deputy Public Prosecutor by the Attorney General. It is the Applicant who has decided to sue both the Chief Magistrate's Court Makadara and the Attorney General in this case and that Applicant cannot choose for the Attorney General who is to represent him. The Applicant has not shown that there is a conflict of interest for Mr. Kiage to represent both the Attorney General and the chief Magistrate. The Chief Magistrate being a Government Officer is represented by the Attorney General in any litigation and Mr. Kiage is properly on record for both parties.

In sum and for all the reasons considered in this ruling ie misrepresentation and inordinate delay, none of the prayers can be granted. Besides prayer 2 seeking to prohibit the 1st Respondent from prosecuting CRC 21/07 cannot lie as against the 1st Respondent he has no prosecutorial powers. S. 26 of the Constitution reserves prosecutional powers for the 2nd Respondent the Attorney General. None of the other orders are merited for reasons given above. Costs to be in the cause.

Dated and delivered this 14th day of March 2008.

R.P.V. WENDOH

JUDGE