



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc. Appli. 1140 of 2007

WILFRED KARUGA KOINANGE.....APPLICANT

Versus

THE REPUBLIC.....RESPONDENT

RULING

On 16th October 2007 the applicant, Wilfred Karuga Koinange filed a Petition of Appeal pursuant to Sections 65 and 67 (4) of the Constitution of Kenya against the Republic. The appeal arises from Makadara Anti Corruption Case ACC No. 22/07 **REP V WILFRED KARUGA KOINANGE**, where the magistrate allegedly failed to frame questions for the determination by the High Court upon being moved to do so by the Applicant. The Appellant seeks the following orders;

- (a) That the Appeal be allowed, ruling and order of the Principal Magistrate delivered on 3rd October 2007 be quashed and set aside;
- (b) That the questions raised by the Appellant be referred to this court for determination;
- (c) That this court be pleased to issue such orders with or give directions as the court may consider appropriate for the purpose of ensuring that justice is duly administered.

On 28th November 2007 the Appellant/Applicant filed the Chamber summons dated 27th November 2007 in which he seeks the following orders;

- (2) That the court be pleased to issue an ex parte conservatory order staying all further proceedings in Anti corruption CRC Case 22/07 filed by the Respondent before the Chief Magistrate's Court Makadara against the Applicant, pending hearing and determination of this application.
- (3) This Hon. Court be pleased to issue a conservatory order staying all further proceedings in Anti-Corruption CRC Case 22/07 filed by the Respondent before the Chief Magistrate's Court Makadara against the Applicant, pending rendering the hearing and determination of Petition No. 1140 of 2007 lodged by the Applicant.
- (4) That the court be pleased to issue any other order, writ or direction that the court may consider appropriate for the purpose of ensuring that justice is duly administered and the Applicant's fundamental rights enforced or otherwise secured pending the hearing and determination of position No. 1140 of 2007 lodged by the Applicant.

The Chamber summons is supported by the affidavit sworn by the Applicant on 27th November 2007 grounds found in the body of the application and Skeleton arguments filed in court on 28th May 2005. James Otieno Olola, an advocate working with KACC filed an affidavit dated 4th February 2007 and skeleton submissions on 18th April 2006 in reply to the Chamber Summons. Kenya Anti Corruption Commission was enjoined to the proceedings as an Interested Party. Another affidavit in opposition to the Chamber Summons was sworn by Patrick Omwenga Kiage, Special Prosecutor for the Attorney General. Counsel also file skeleton arguments on 28th May 2008.

Briefly, the facts of this case are that on 12th July 2006 the KACC Interested Party herein, issued the Applicant with a statutory notice under S. 26 of the Ant-corruption Economics Crimes Act. On 8th August 2006, the Applicant requested the KACC to await determination of the issues in **CHRISTOPHER NDARATHI MURUNGARU V KACC CA 43/06**, which were similar to those raised by the notice under S.26 of the Anti Corruption & Economic Crimes Act. The said case was determined in December 2006. The applicant was arraigned before the Chief Magistrate's Court Makadara on 29th March 2007 and was charged with the offence of failing to comply with S.26 of the Anti-Corruption and Economic Crimes Act. He denied the offence and the case was fixed for hearing on 29th September 2007. It is the Applicant's case that the statutory notice issued on the Applicant did not comply with the specifications laid down by the High Court in the **MURUNGARU CASE** as it did not specify the property or assets in respect of which it was issued, and the time when the suspected corruption was committed. When the matter came up for hearing before the Magistrate, the Applicant sought a reference to be made to the High Court under the interpretation and Enforcement jurisdictions under the Constitution but the trial magistrate declined to refer the matter to the High Court and on 3rd October 2007, the Applicant appealed pursuant to S.67 (4) of the Constitution and then moved this court for conservatory orders of stay so that the matter before the lower court can await the determination of the appeal.

In response to the Respondent's contention that the application before the court was incompetent, Mr. Kaluu who urged the application on behalf of the Respondent submitted that the Gicheru Rules, Legal Notice 6/06 are silent on the procedure to be adopted by a party who wishes to obtain an interim order after filing an appeal under S. 67 of the Constitution. That since the Rules provide for conservatory orders, the court has to adopt an analogous procedure in order to obtain relief. Counsel relied on the case of **OLIVE JAUNDO V AG OF GUYANA (1971) AC 972** where the privy council held that where the Constitution does not provide the procedure to be adopted it can be made in any way to enable the Applicant approach the court. That in **PATTNI & ANOR V REP (2001) KLR 264** the court also held that where no specific procedure is provided for, the party can adopt any procedure that is recognized in law.

Counsel urged that in this case, the test is whether the Applicant has demonstrated that he has an arguable Appeal and that it will be rendered nugatory if an order of stay is not granted.

Mr. Kiage in opposing the application relied on his replying affidavit and skeleton arguments dated 16th May 2008 and 27th May 2008 respectively. Counsel submitted that the appeal is wrongly filed before this court and should have been in the Criminal Division of the High Court. That such an appeal is not contemplated by the Gicheru Rules but should have been under the Criminal Procedure Code. That S.67 of the Constitution does not provide for any interim relief and under S. 347(2) of the Criminal procedure Code allows one to appeal on matters of law and fact and that the same makes provision for bail and stay upon one filing an appeal. That the Gicheru Rules are clear there is no reason why one should adopt an analogous – procedure.

It was Counsel's submission that the appeal arises from an order which is not final. That S.67 (4) of the Constitution is couched in clear terms, that if the question is not referred to the High Court then one can appeal to the High Court. That in this case the magistrate found that there was no question and there cannot be an appeal under S. 67 (4) of the Constitution. Counsel also urged that there are no Constitutional issues before the court as there are no two or more interpretations regarding a

constitutional provision that needs to be resolved. Counsel also went on to submit that there is no substantial question of law that needs to be determined in this matter because the Highest Court of the land has settled the issue of the constitutionality of S. 26 of the Anti-Corruption and Economic Crimes Act already. Counsel relied on the case of **COLLETES LTD V BANK OF CEYLON S C NO. 6/82, CA 325/75** in which the supreme Court of India discussed what a substantial question of law means. It was the Respondent's contention that the application before the court is incompetent because R 20 of Gicheru Rules donates power to the Court to give conservatory orders and the instant petition is not prescribed under Rule 12 which is an original jurisdiction and R 29 provides for stay when there is a reference pending determination by the High Court.

Lastly Mr. Kiage submitted that the applicants are guilty of delay in that they were served with the notice on 26th July 2006, arraigned in court on 29th March 2007 and waited till the hearing date to raise the question and that this court has determined that same issue in the cases of **COLLINS YUDA OCHIENG OUMA V KACC MISC 1148/07** and **JOB K. KILACH V KACC MISC 1076/07**

Mr. Kimani, Counsel for the KACC opposed the Chamber Summons and associated himself with the submissions made by Mr. Kiage. He urged that the appeal and Chamber summons are an abuse of the court process because there is no right of appeal under S. 67 (1) of the Constitution, that the decision declining to make a reference to the High Court is not a final decision within the meaning of S.67 (4) of the Constitution, that where the court declines to take cognizance of a constitutional issue under S.67 (1) nothing remains on which a final decision can be made. Counsel urged that a criminal appeal can only be preferred in the Criminal Division of this court after a conviction, an acquittal or rejection of charge by lower court. That a right of appeal has not yet accrued. That the petition envisaged under the Gicheru Rules is not a petition of appeal. Mr. Kimani further submitted that the Applicant preferred this method of appeal to evade the elaborate procedure of seeking stay and appeal under the Criminal Procedure Code.

He also urged that nothing new has been raised in this matter in order for the court to revisit the ratio decidendi in the **MURUNGARU AND SAITOTI CASES**. That this petition and Chamber summons application emanate from a notice issued pursuant to S. 26, 27, which the court in the **MURUNGARU CASE** held that they are investigative tools which form an integral part of the criminal justice system. He relied on the case of **R V BAILEY 1956 NORTHERN IRELAND LAW REPORTS** in which the court held as above that investigative steps are part of the administration of criminal justice and the courts will normally be reluctant to intervene in the said Criminal process

In **JARRET & OTHERS V SEYMOUR 1993 F C A 616**, the court also held that the court should only interfere in Criminal proceedings by way of Judicial Review in exceptional circumstances and this court was urged to uphold that principle.

The Chamber summons is brought pursuant to S.60, 65, and 84 of the Constitution and Rules 20 and 29 of the Rules made under S.84 of the Constitution under Legal Notice 6/06 commonly referred to as (Gicheru Rules). The Rules provide the procedure by which one will approach the court under S. 60, 65, 67 and 84 of the Constitution. Rule 20 provides that a judge before whom a petition under Rule 12 is presented may hear and determine an application for conservatory orders. Rule 29 then provides that the High Court can order stay of proceedings before a Subordinate Court. Rule 12 provides procedure by which one can enforce fundamental rights and freedoms of the individual under Sections 70 to 83 (inclusive) of the Constitution, and that shall be made directly to the High Court by way of a petition. The provision envisages that the jurisdiction of the court exercised thereunder is an Original jurisdiction not an appellate one as the Applicant has purported to do by coming to court by way of petition of appeal. It is clear from the petition filed that it is a petition of appeal – an appeal from the orders of the subordinate court. That is not what is envisaged by Rule 11, 12 and 20 of Legal Notice 6/2006.

In addition to the above, under R. 29 that has been invoked, the court can order stay of proceedings of a subordinate court following a reference made pursuant to Sections 24, 25, 26 and 27 of the Rules. The format of the questions to be framed and referred to court should be in Form E & F. The said forms refer questions of alleged contraventions to the High Court for determination. Again it is clear from the said Rule 29 read together with the format provided under Form E and F that the court would be exercising

original jurisdiction but not appellate jurisdiction.

The Applicant moved this court under S.67 (4) of the Constitution when the magistrate declined to frame a constitutional question as requested. S. 67 (4) requires that the subordinate court or court martial should have made a final decision on civil or criminal proceedings on a question as to interpretation of the constitution that an appeal can lie. The question is then whether the subordinate court made any final decision on the question before it. The magistrate found that there was no question for determination and so that was a final decision as far as that court was concerned and was appealable under Section 67 (4) of the Constitution.

It is the Applicants contention that there is no procedure provided in the Gicheru Rules as to how they could approach the court in such a situation where the subordinate court declined to consider framing of a constitutional question and that based on the authorities of **PATTNI** and **JAUNDO CASES**, moved this court by way of appeal. In the **PATTNI CASE** the court observed that if there are no Rules in place for approaching the court then one can do so by any procedure recognized in law. The Applicant was then trying to justify their decision to approach this court by way of appeal which means that they are admitting that it is not the manner provided to approach the court. The question then is how would the Applicant move the High Court once the magistrate declined to find that there was a substantial question to be referred to the High Court for determination. What was before the court were criminal proceedings. It is the Applicants own contention that it was a final order and therefore the only right of appeal lay under to the High Court under S.347 of the Criminal Procedure Code (CPC). The same allows the High Court to consider both matters of fact and law. Under S. 357 Criminal Procedure Code provides for admission to bail or stay pending hearing of the appeal.

As properly observed by Mr. Kimani a criminal appeal has to be heard by 2 judges unless the CJ directs in writing that it can be heard by one judge. The Applicant cannot avoid this procedure of appeal by taking the short cut of transforming this appeal into a petition of appeal to be heard by the Constitutional Court. The proper place for the Applicant to file the petition of appeal should have been in the Criminal Division of this court using the procedure provided under the Criminal Procedure Code. This court has been subdivided into Divisions for better administration of justice, and the Applicant cannot choose to breach this administrative arrangement to suit his convenience. The subordinate court having declined to frame the question the Applicant should have appealed to the High Court under S.67 (4) for the said interpretation of those provisions that were in issue, instead of pursuing a procedure that is not available under the said rules.

Was there any substantial question or issue for the lower court to refer to the High Court? The **COLLETES CASE** considered what a substantial question means, Shervananda J. stated as follows; **“The proper test for determining whether a question of law raised in the case is substantial would be whether it is of general public importance or whether it directly or substantially affects the rights of the parties and, if so, whether it is either an open question in the sense that it is not finally settled by the Supreme Court or by the privy council or is not free from difficulty or calls for discussions of alternative views.**

If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying these principles or the plea raised in palpably absurd, then the question would not be a substantial question of law. The court also quoted with approval, the view of the court in **SUBBARAO V VEERAJU**, **“When a question of law is fairly arguable, where there is room for difference of opinion on it, or where the courts below thought it necessary to deal with the question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the Highest court, as if the general principles to be applied in determining the question are well settled and the only question was of applying these principles to the particular facts of the case, it would not be a substantial question of law.”**

Bearing in mind the above definition of what a substantial question of law is, in the case before the magistrate, the Applicant was challenging the notice issued to the Applicant on 12th July 2006 under the

Anti Corruption & Economic Crimes Act in which KACC wanted the Applicant to disclose his properties, when they were acquired and how. As properly pointed out by the Respondent, the question of the Constitutionality of S. 26, 27 and 28 of the Anti Corruption and Economic Crimes Act was the subject of determination in the **MURUNGARU CASE (supra)** and the Constitutional Court a 3 judge bench held that the sections were investigatory tools and the issuance of the notices did not breach freedoms guaranteed under S. 72, (Liberty) S.74 (inhuman treatment) S. 77 (2) & (7) fair trial and presumption of innocence and protection from self incrimination) S. 82 (Discrimination). The court confirmed the constitutionality of the said sections. That decision has not been challenged on appeal and the question of any challenge to that section is a moot question and cannot be revisited by this court. Besides, this court has considered, similar issues in **COLLINS YUDA OCHIENG OWAYO V KACC MISC 1148/07** and **JOB KIPKEMEI KILACH V KACC HMISC 1076/07** where the Applicants were challenging the charges preferred against them pursuant to S.26 of KACC Act. This court relied on the **MURUNGARU CASE** which held that Sections 26, 27 and 28 the are investigation tools and not unconstitutional and interfering with the said decision would be rendering the KACC worthless and stripping it of this investigatory powers. In the instant case, the court has resolved the question of the constitutionality of S.26 of the Constitution in the **MURUNGARU CASE**. The issue was revisited in **OWAYO AND KILACH CASES**. In light of **COLLETES CASE**, there was no substantial question before the subordinate court to be considered. I would adopt the views of the courts in **JARRETT'S CASE** and **BAILEY CCA**, where the courts observed that the court should be slow to intervene in Criminal Proceedings except in exceptional circumstances. The court in **JARRET'S CASE** referred to the judgment of Mason C. J. in **YATES V WILSON (1989) 168 CLR 331** who had this to say;

“It would require an exceptional case to warrant the grant of special leave to appeal in relation to a review by the federal court of a magistrate’s decision to commit a person to trial. The undesirability of fragmenting the Criminal process is so powerful a consideration that it requires no elaboration by us. It is a factor which should inhibit the federal court from exercising jurisdiction under the Administrative Decisions (Judicial Review) Act 1977…….”

Although this is not a Judicial Review application as the one above, the principles apply across the board that interference with the criminal justice process is discouraged save for exceptional circumstances. In this case S.26 is an investigatory tool and the court should be slow to interfere with that tool.

The Applicant having filed an appeal and is seeking conservatory orders, would need to demonstrate that he has an arguable case. I have already considered that Section 26 which the Applicant seeks to challenge has already been confirmed to be an investigatory tool for use by KACC in the discharge of its functions and is not unconstitutional. The Applicant has no arguable case with chances of success.

I would also adopt my finding in the **KILACH AND OWAYO CASES**, that this application would not succeed in any event because the Applicant is guilty of laches. The notice under attack was issued on 12th June 2006. The Applicant did not object to it at all. The proceedings now under challenge were filed on 29th March 2007, 8 months later. Even after being arraigned in court, the Applicant never raised objection to the said notice till the matter came up for hearing on 3rd October 2007 over a year after the notice was issued. There is no explanation for the delay in objecting to the notice issued under S.26 KACCA. The objection raised comes late in the day it is an afterthought and I will find the Applicant guilty of laches and does not deserve the orders sought. This application is meant to delay and derail the determination of the criminal case before the subordinate court which is an abuse of court process.

In the case of **O'REILEY V MACKMAN 2 AC 237** a House of Lords decision and **HARRIKISSON V AG GUYANA (1979) 3 LR, NJENGA KARUME CASE** the courts have held that where a statute provides a certain procedure, that procedure has to be adhered to. In this case the Applicant is trying to use a short cut by invoking the jurisdiction under the Constitution and avoiding the procedure of appeal under the Criminal Procedure Code and that too is an abuse of the court process.

From all the above observations, this court is satisfied that apart from the Chamber Summons being improperly before the court, incompetent, an abuse of the court process, lacks merits and is hereby dismissed with costs.

Dated and delivered this 9th day of July 2008.

R.P.V. WENDOH

JUDGE

Read in the presence of

Mr. Kaluu for Applicant

Mr. Kiage for Respondent

Mr. Olola for Interested Party