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

Misc. Crim. Appli. 877 of 2007

LABAN MAKIYA OMANGI ……..1ST APPLICANT

PETER OPANDE ……....2ND APPLICANT

JAMES MUYANGA …….3RD APPLICANT

FRIDAY MWAFUGA ……..4TH APPLICANT

- VERSUS -

REPUBLIC ……RESPONDENT

RULING ON A PRELIMINARY POINT

What is substantively before the Court is a *Notice of Motion* dated and filed on 21st December, 2007, brought under ss. 60 and 65(2) of the Constitution of Kenya, and ss. 3(3) and 4 of the Criminal Procedure Code (Cap. 75, Laws of Kenya). The applicants also cite as a basis for their application a decision of the High Court constituted as a Constitutional Bench, in *Githunguri v. Republic* [1985] KLR 91.

The application carries two prayers:

(i) that the continued prosecution of each and all of the applicants in the Nairobi Chief Magistrate's Court Criminal

Case No. 1361 of 2004, be declared to amount to an abuse of the process of the Court; and

(ii) that the said case against each of the applicants, "be stayed permanently".

Counsel for the respondent, *Mr. Mbugua Mureithi* on 19th June, 2008 filed a notice of preliminary objection to the application. The objections are that the application fails to comply with mandatory procedures and is incompetent, and not properly before the Court. It is stated in the objection that the respondent has properly exercised its constitutional and discretionary mandate to prosecute; that the matters complained of have in the past been the subject of unambiguous judicial decisions; that the applicants are not coming to Court with clean hands; that the applicants be not allowed to profit from their own mischief.

In the submissions, learned counsel *Mr. Mureithi* urged that since the applicants were invoking the High Court's jurisdiction under s. 65(2), they ought to have come by *Originating Notice of Motion*, under rule 2 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 (Legal Notice No. 6 of

2006). Had the said procedure been adopted, counsel urged, then the application would qualify as a *constitutional application*, and would in the first place be placed before a Judge for directions in accordance with rule 5 of the aforesaid rules. Counsel urged that the instant application had not complied with the said rule 5, and so had not been placed before a Judge for directions as to mode of hearing. Counsel submitted that an application such as the instant one, "may not just be founded on the substantive provisions of the Constitution, otherwise the rules would be redundant".

Mr. Mureithi submitted that the application had been erroneously brought under s. 3(3) of the Criminal Procedure Code (Cap. 75, Laws of Kenya) which thus provides:

"*Notwithstanding anything in this Code, the High Court may, subject to the provisions of any law for the time being in force, in exercising its criminal jurisdiction in respect of any matter or thing to which the procedure prescribed by this Code is inapplicable, exercise that jurisdiction according to the course of procedure and practice observed by and before the High Court of Justice in England at the date of the coming into operation of this Code."*

Counsel urged that the foregoing provision was inapplicable – because there are governing rules in place, in the shape of Legal Notice No. 6 of 2006.

The application also claims to be founded on s. 4 of the Criminal Procedure Code, which *Mr. Mureithi* urged, does not constitute a proper foundation for the same; that section stipulates:

"*Subject to this Code, an offence under the Penal Code may be tried by the High Court, or by a subordinate Court by which the offence is shown in the fifth column of the First Schedule to this Code to be triable."*

As learned counsel noted, s. 4 of the Criminal Procedure Code provides for courts with jurisdiction to try specified categories of criminal offences.

Learned counsel contested the propriety of founding the application not on a specific and proper law or legal instrument, but on case-authority, *Githunguri v. Republic* [1985] KLR 91. Counsel urged that "a precedent does not lay down a procedure for making an application" and does not necessarily embody the concept of the inherent power of the Court.

Mr. Mureithi attributed incompetence to the application, furthermore, on the ground that the 2nd named applicant was not properly enjoined as a party; to incorporate this applicant, there is a bare deposition by 1st applicant that he has authority to act on behalf of 2nd applicant. What is annexed as authority by 2nd applicant is neither signed by 2nd applicant, nor authenticated by notarization even though the said authority is stated to be emanating from a foreign country. Such authority, counsel submitted, is not in proper form, and does not empower 1st applicant to act for 2nd applicant.

Mr. Mureithi submitted that there was no provision for amending the application so it may comply with the law, and consequently it should be dismissed.

Learned counsel *Mr. Bowry*, on behalf of the applicants, maintained that the application is valid and should be heard on the merits; and he urged that only *merits* be considered, because the applicants, who are alleging abuse of Court process, "should not be seen to be without a remedy in law."

Not only had the applicants relied on the *Githunguri* case as a *legal foundation* to their application, they invoked it as a source of *precedent* of a binding nature. In this regard, reliance was placed on the following passage in the *Githunguri* case ([1985] KLR 91, at p. 101).

"*We are not persuaded that in Kenya [Magistrates' Courts] have a discretion to refuse to hear a criminal case prosecuted by the Attorney-General or his representative on the ground that it is an abuse of the process of the Court.*

"*…[The] High Court has an inherent jurisdiction and a …. a person charged before a Surbordinate Court and considering himself to be the victim of oppression may seek a remedy in the High Court by way of an application for a prerogative order."*

Mr. Bowry obviously relied on the statement as to the scope of action, in situations of abuse of Court process in the Subordinate Court, available to the High Court as drawn in the *Githunguri* case from the English case, *DPP v. Humphreys* [1976] 2 ALL ER 497 at pp. 527 – 33 (set out in the *Githunguri* case [1985] KLR 91, at p. 101):

"*It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexations that the judge has the power to intervene. Fortunately, such prosecutions are hardly ever brought but the power of the court to prevent them is in my view, of great constitutional importance and should be jealously preserved" (per Lord Salmon).*

Learned counsel submitted that in any case in which the applicant alleges abuse of prosecutorial powers, the Subordinate Court loses its jurisdiction; and the applicant then gains a right to come to the High Court. And the High Court's jurisdiction lies in s. 65 (2) of the Constitution which donates the supervision competence; in the words of counsel, "under those powers the High Court has the mandate to deal with a matter which has arisen in the lower Court, and which the lower Court cannot hear." Counsel urged that the applicant's path to the High Court is, in such circumstances, defined by ss. 3(3) and 4 of the Criminal Procedure Code – and the "only avenue" for realizing the same is "the miscellaneous application".

Mr. Bowry urged that it was not right for the applicants to proceed by virtue of Legal Notice No. 6 of 2006; because, in his words: "*We are not invoking the Constitution; we are not saying any fundamental rights and freedoms have been breached. The question is: has there been an abuse of the process of the Court?"* Counsel urged that the applicants were not concerned at all with any requirement for a "Constitutional Bench" to be set-up; they were only concerned with "the prosecution's conduct of the case" – so there was no requirement for compliance with the terms of Legal Notice No. 6 of 2006. This was not a constitutional reference, counsel urged. He submitted that the Court, in dealing with this question, could invoke its *inherent powers*. Counsel noted that his line of submission was borne out by the fact that the lower Court, while referring this matter to the High Court, did not rely on the Constitution or any other law. Counsel explained the propriety of s. 4 of the Criminal Procedure Code as a foundation for this application, on the basis that the High Court has the power to deal with *any* justiciable matters, be they simple or complex – and so the matter referred to this Court by the Surbordinate Court is properly before the Court; and so the applicants' Notice of Motion is proper in every respect.

As to the position of 2nd applicant, counsel urged that the authority entrusted to 1st appellant is in electronic form, and it emanates from an applicant who is ailing and is unable to travel from Uganda.

Learned counsel *Mr. Imende*, for the interested party, came to make the point that even though the trial Court had directed that certain emerging constitutional issues be placed before the High Court for determination, this was delayed, and so the instant application was coming up without the opportunity for the said Constitutional issues to be determined as well. This disjunction was occasioned by the fact that the trial Court file had been brought to the High Court, at the time the said constitutional-rights infringements were being urged before the learned Magistrate; and as a result, the 7th accused (the interested party) is now in a predicament. Counsel was asking that the lower Court file be remitted to that Court, so the question of referring certain Constitutional issues to the High Court may be considered.

To the interested party's claim, I made a ruling as follows:

"*At this moment, what is substantively before the High Court is a preliminary objection [by the applicants]. A ruling will subsequently be given on the preliminary point; and it is at that stage that counsel for the interested party may make his informal application."*

It is clear the concern of the applicants herein is an alleged *abuse of the process of the Court*, at the trial

stage. Learned counsel *Mr. Bowry* has urged that such a notion is not a *constitutional question* in the conventional sense, and the rules of constitutional litigation in place do not provide for it; and hence the applicants, if only indirectly, are invoking something akin to the *inherent powers of the High Court*, as the way to a solution to the problem.

Learned Counsel *Mr. Mureithi*, by contrast, maintains that since the application repeatedly invokes provisions of the Constitution, the applicants must proceed by the Constitution's subsidiary legislation governing the lodgement of claims. Counsel is clearly taking the position that certain *rights of the applicants* are being asserted; and in that case, they must proceed under the governing regulations to the Constitution, and must seek the establishment of a Constitutional Bench to determine the relevant questions. The applicants' position, by contrast, is that they are making no claim in the nature of a constitutional right; they only seek to stop *abuse of Court process*. If their application succeeds, the applicants expect that the trial process in the Subordinate Court will be terminated, and they will be set free from that process.

Since the Court has not yet heard the application itself, it has not been possible to take note of the *facts* said to constitute *abuse of the process of the Court.* However, there has been as yet, no contest, of the fact that *such* is the gravemen before this Court. This matter has been brought up by advocates – therefore officers of the Court; and on that basis, taken together with the initial impressions emerging, this Court will proceed on the *prima facie* consideration that the Court has not been moved without cause.

Even though the applicants have proceeded by citing constitutional foundations to their motion, it is apparent to me that *abuse of the process of the Court* is not specifically defined in parliamentary enactments, but is rather, an immanent concept in the judicial domain. The principle is thus depicted in *Halsbury's Laws of England*, 4th ed. (London, Butterworths, 1998) Vol. 9(1), at p. 227 (para. 445):

"Abuse of process in general. The court has powers to punish as contempt any misuse of the court's process. Thus the forging or uttering of court documents and other deceits of like kind are punishable as serious contempts. Similarly, deceiving the court or the court's officers by deliberately suppressing a fact, or giving false facts, may be a punishable contempt.

"Certain acts of a lesser nature may also constitute an abuse of process as, for instance, *initiating or carrying on proceedings which are wanting in bona fides or which are frivolous, vexatious, or oppressive*. In such cases the court has extensive alternative powers to prevent an abuse of its process by striking out or staying proceedings or by prohibiting the taking of further proceedings without leave. Where the court, by exercising its statutory powers, its powers under rules of court or its inherent jurisdiction, can give an adequate remedy, it will not in general punish the abuse as a contempt of court. On the other hand, where an irregularity or misuse of process amounts to an interference with the course of justice, extending its influence beyond the parties to the action, it may be punished as a contempt."

It is clear that we are not concerned here with a specific legal question in respect of which the basis for a complaint must be a particular provision of the Constitution. It is hardly surprising, therefore, that the applicants have not attempted to make a "constitutional application" within the meaning of the governing subsidiary legislation. I would hold that there is nothing improper in the manner in which the instant application has been lodged.

As to the objection that one of the applicants is not properly enjoined in the application, firstly, short-of-sufficient evidence on the pertinent issues has been laid before this Court; and secondly, this is not the question to preoccupy the Court at this initial stage. Hence, I would hold that the outcome, in the consideration of the objection, does not turn on that point.

I hereby *disallow* the objection, and direct that the Registry shall list the application for hearing on the merits, on the basis of priority.

Orders accordingly.

DATED and DELIVERED at Nairobi this 27th day of November, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Applicants: Mr. Bowry

For the Respondent: Mr. Mureithi

For the Interested Party: Mr. Imende