



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI(MILIMANI LAW COURTS)

MISC CIV APPLI 1148 OF 2007

COLLINS YUDA OCHIENG OWAYO.....APPLICANT

Versus

KENYA ANTI-CORRUPTION AUTHORITY.....RESPONDENT

RULING

On 18th October 2007, Collins Yuda Ochieng Owayo filed a Petition dated 17th October 2007 pursuant to Section 84 (1) of the Constitution of Kenya for alleged contravention of his fundamental rights and freedoms under Sections 70, 72, 74, 75, 76 and 77 of the Constitution,

The Petition is brought against the Kenya Anti-Corruption Commission, The Honourable the Attorney General on behalf of the Commissioner of Police. He seeks several orders and declarations therein:

On the same date, the Applicant filed a Chamber summons dated 17th October 2007 seeking that the Honourable Court be pleased to grant the Petitioner a conservatory order staying the proceedings in Chief Magistrate's Court Makadara Anti-corruption case **No. 27/2007, Rep v Collins Yuda Ochieng Owayo**, pending the hearing and determination of the petition and any other relief that the court may deem just to grant and that costs be in the cause. The Application is supported by the Affidavit of the Applicant sworn on 17th October 2007.

The Applicant depones that about July 2006, the 1st Respondent served him with a Notice under S. 26 of the Anti-Corruption and Economics Crimes Act, No. 3 of 2003, the Notice is exhibited as 'CY001' In response to the 1st Respondent, vide a letter dated 2nd August 2006, he indicated to the 1st Respondent that the Notice was a violation of his constitutional rights. Things went quiet. The Applicant was then charged before Makadara Chief Magistrate's Court in CRC 27/07 on 30th March 2007, with the offence of failing to comply with the Notice dated 12th July 2006 and furnish the statement of his property under S. 26(1) as read with S.26(2) of the Anti Corruption & Economic Crimes Act No. 3 of 2003, see proceedings 'CY003'.

He denied the offence and asked to be allowed to make a reference to the High Court under S.67 of the Constitution challenging the constitutionality of S. 26 of the Anti-Corruption and Economic Crimes Act so that the same would not be applied retrospectively. When he made an informal Application before the trial court, that court in its ruling of 7th August 2007 declined to grant the request and ruled that no constitutional questions had arisen and that the Applicant should apply to the High Court directly. Mr. Amuga, Counsel for the Applicant submitted that it is not their case that S.26 of the Anti-Corruption and

Economic Crimes Act is wholly unconstitutional but only as far as the offences that were purportedly committed before 2003 are concerned they are new under the Act and the enactment of a law with sections to make law that was not law then, has a retrospective effect.

Counsel cited the case of **JOSHUA KULEI V KENYA ANTI CORRUPTION COMMISSION MISC 1459/06** where the court considered a similar notice and noted that it was an important issue on the question of retrospective Application and that the proceedings were stayed on that basis. He urged the court to stay the criminal proceedings in Makadara to await the outcome of the Petition.

In opposing the Application, Mr. Kennedy Bosire, a Principal Forensic Investigator, with Investigation and Asset Tracing Department at the 1st Respondent, swore a replying Affidavit dated 25th October 2007. Mr. Ruto who appeared on behalf of the 1st Respondent submitted that this Chamber Summons Application is intended to delay the hearing and determination of the Criminal Case in Chief Magistrate's Court Makadara because the Applicant has not even shown what rights have been infringed. That the Applicant first moved the court under S.67 of the constitution and upon the court declining to grant the orders he now seeks redress under the Bill of Rights. That the Petitioner has not disclosed what rights have been infringed. That the Counsel is now seeking to have S. 26 of the Anti-Corruption and Economic Crimes Act declared unconstitutional and yet that issue has already been resolved in **DR. CHRISTOPHER MURUNGARU V THE KENYA ANTI CORRUPTION COMMISSION MISC APPLICATION 54/06**. That the above case ruled that S.26 is an investigatory tool and is not unconstitutional. That the issue of retrospective application does not apply because corruption has been an offence in Kenya since 1956 by dint of the Prevention of Corruption Act and corruption offences were preserved by virtue of S. 29(e) of Interpretation and General Provisions Act, Cap 2 Laws of Kenya, and S. 71 of the Anti-Corruption and Economic Crimes Act 2003. That in any event, the charges before the Criminal Court relate to disobedience of a notice, an offence created in 2003, the Applicant is not being charged for a past offence. Counsel further said that the stay in **JOSHUA KULEI CASE** was issued to await the outcome of the **MURUNGARU CASE**.

Mr. Kiage, Special Prosecuting Counsel attached to the Attorney General's Office filed a Replying Affidavit dated 26th October 2007 in opposing the Application. Mr. Kiage associated himself with submissions of Mr. Ruto and added that the Application is incompetent as the Commissioner of Police who is cited as a Respondent did not play any part in the proceedings before the Makadara Court as the Commissioner never charged the Applicant with the offence that the Applicant faces.

Secondly, Counsel submitted that the Application is incompetent because the Chief Magistrate's Court, Makadara which is the trial court has not been enjoined to these proceedings.

Thirdly, Mr. Kiage submitted that the notice now under challenge was issued in July 2006 and the Applicant never took steps to challenge it till 17th October 2007, over 15 months later. According to Counsel, there has been inordinate and unexplained delay in bringing this Application. That even if the delay is blamed on the Application made before the trial court, that court rendered its decision on 7th August 2007 when a date for the hearing of the Criminal Case was given for 30th October 2007 but that, it took the Applicant another 2 months, from August to October to file this Application. Counsel urged that the delay of 2 months is inordinate and unexplained. Counsel concluded that this Application is meant to delay the hearing of the Criminal Case.

As regards the constitutionality of Section 26 of the Anti Corruption and Economics Crimes Act, Counsel submitted that that issue is moot because it was resolved in the **MURUNGARU CASE**, when the court affirmed the constitutionality of S.26. He said that the issue of retrospectivity does not apply because the offence the Applicant faces in Makadara is failure to comply with a notice which offence was committed on 12th July 2003 and the offence was created in May 2003 when the 2003 Act came into operation.

In reply, Mr. Amuga maintained that there was no delay in bringing this Application. As regards the joinder of the Commissioner of Police Counsel said that the Charge Sheet was preferred by the Kilimani

Police Station.

I have now considered all the rival arguments on the Chamber Summons, the Affidavits filed, exhibits and authorities that have been relied upon. The Notice served on the Applicant which the genesis of these proceedings is dated 12th July 2006 and it 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 YOU COLLINS YUDA OCHIENG OWAYO 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 any 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 of up to Kshs. Three hundred thousand (Kshs.300,000/=) 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 was issued on 12th July 2006 and the Applicant was given 30 days within which to comply. It expired on 13th July 2006. The notice of 12th July 2006 further notified the Applicant of the consequences of non compliance with the notice. The Applicant admits that he did not comply with the notice but his Counsel addressed a letter to the Respondent, dated 2nd August 2006, complaining that the notice was a violation of his rights. He took no further steps to challenge the notice which was a threat to his fundamental rights until the charge that he now faces in Makadara court was preferred on 30th March 2007.

What the Applicant is challenging is the constitutionality of this notice. One of the grounds of challenge is that it has a retrospective effect. It was Mr. Amuga’s contention that what was not an offence in 2003 is being criminalized. I think Counsel has it all wrong, what is under challenge is the notice issued pursuant to S. 26 of the Anti Corruption & Economics Crimes Act which was enacted in 2003. The Notice was issued on the Applicant in July 2006 and he failed to comply as from 13th August 2006. The offence under S. 26 (2) of furnishing of statement of property became an offence as from 2003 and cannot have any retrospective effect.

I think the Applicant has in mind the possible charges that may arise from the compliance with the notice which seeks an inventory of his property from 1991-2002, if at all he were to be charged. But the act of furnishing of ones property under S. 26 does not necessarily mean one will be charged with an offence. What he may furnish may help the Respondent in other investigations or he may be called as

upon a witness or even help the Respondent exonerate him from any suspicion. In any event the Prevention of Corruption Act which was repealed upon commencement of the 2003 Act, had been in operation before 1991 and the 2003 Act preserved corruption offences and under S.71 (3) (a) the 2003 Act, prohibits retrospective application of the Act. So that no person can be charged with an offence under the new Act, which was not one in the old Act. S. 77 (4) of the Constitution also offers protection against retrospective effect of any law. So far, the Applicant has not been charged with any such offence and the issue of retroactivity does not arise.

Reliance was made on the **KULEI CASE** in which the court granted stay because it considered the constitutionality of S.26 to be an important point, that needed investigation by the court. Stay was granted pending the determination of the Appeal filed by Dr. Murungaru in the Court of Appeal or the determination of the Originating Summons filed in the High Court. The High Court rendered its decision in the **MURUNGARU CASE** on 1st December 2006 when it affirmed the constitutionality of S. 26 of the Anti Corruption and Economic Crimes Act and held that the section was an investigatory tool. It was further held that the notice issued there under did not breach any rights under S.72 (liberty), S.74 (inhumane treatment), S.77 (2), (7) (Fair trial and presumption of innocence and protection from self incrimination); S. 82 (Discrimination). The court also held that S.26, 27, 28 of the Anti-Corruption and Economic Crimes Act 2003 were not inconsistent with Sections 70 (a) & (c) , 76, 77 and 82 of the Constitution. The **KULEI CASE** is therefore inapplicable having been overtaken by the decision in **MURUNGARU CASE** which determined the constitutionality of S. 26 and I do agree with Mr. Kiage that the question of the constitutionality of S. 26 is a moot one. The notice challenged herein is similar to that in the **MURUNGARU CASE** and this court cannot arrive at a different decision from that of the Constitutional Court and I therefore find no basis to grant conservatory order challenging the notice.

The Applicant was served with the Notice under challenge about 12th July 2006 and was given 30 days to comply. On 2nd August 2006 he wrote to the 1st Respondent complaining that the notice threatened breach of his rights but despite that fact, the Applicant did not take action to challenge the said notice but instead, sat back and did nothing till the 1st Respondent preferred the charges against the Applicant over a year later, on 30th March 2007. Even then, when the matter came up in court, the Applicant did not move with speed to protect the alleged threats to his rights by way of such Application. To be precise, he moved this court after 15 months of the issue of the notice. When the trial court rejected his Application to file a reference, the Applicant went to sleep again for two months yet he knew a hearing date had been given by the court, for hearing of the Criminal Case. He now wants the court to stay the Criminal Case. I do agree with the Respondents Counsel that there has been unexplained and inordinate delay in bringing this Application. The delay is unjustified because from the time of the service of the Notice the Applicant was desirous of challenging the notice but never did anything. There is no justifiable reason for this court to stay the proceedings before Makadara Court to wait for the Applicant to take his sweet time to come to this court, waiting till last minute to try and stop the court proceedings when he had been aware of this for over a year. In my view this application for conservatory orders is meant to derail and delay the proceedings in the Chief Magistrate's Court Makadara and is an abuse of the court process and this court would not be inclined to exercise its discretion in favour of an indolent party.

On the incompetence of the case, I believe the nonjoinder of the trial Chief Magistrate's Court is an important issue but it can still be taken up at a later stage because I believe the Applicant can seek to amend and join other parties. As respects the joinder of the Police Commissioner to these proceedings, I also think it is an issue that should be taken up in the Petition. I do note that the charge sheet in the criminal case emanated from Kilimani or Jogoo Police Station. I would decline to deal with that issue at this stage.

In sum, I do find that the Applicant being guilty of laches and for the other reasons given in the ruling ie of the mootness of the question of the constitutionality of S.26 of the Anti-Corruption and Economic Crimes Act 2003, I find that a conservatory order of stay is not merited and I decline to grant the same. The case in Makadara should proceed to further hearing and this Petition be set down for hearing to be determined on merit.

Dated and delivered this 13th day of November 2007.

R.P.V. WENDOH

JUDGE

Read in the presence of:-

Mr.Okumu holding brief for Mr. Amuga for Petitioner

Mr. Ruto for 1st Respondent

Mr. Kiage for 2nd Respondent

Daniel: Court Clerk