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

Misc Appli 287 of 2006

THE REPUBLIC OF KENYA.....APPLICANT

VERSUS

KENYA ANTI-CORRUPTION COMMISSION….....….1ST RESPONDENT

THE CHIEF MAGISTRATE'S ANTI-CORRUPTION COURT, NAIROBI……..2ND RESPONDENT

EX PARTE

JOSPHERT KONZOLO ……..... ……APPLICANT

IN THE MATTER OF: AN APPLICATION BY JOSPHERT KONZOLO

FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: THE CHIEF MAGISTRATE'S ANTI-

CORRUPTION COURT AT NAIROBI

CRIMINAL CASE NUMBER ACC 6 OF 2006

REPUBLIC – vs – JOSPHERT KONZOLO

RULING

The applicant **JOSPHERT KONZOLO** sought and obtained leave of this court to apply for orders of

"**certiorari to remove into this court and quash the charge sheet filed in Chief Magistrate No. 6 of 2006 by the first respondent against the applicant",**

and again,

"**prohibition directed to the Chief Magistrate's Anti-Corruption court Nairobi, prohibiting him/her and any other Magistrate's court of similar Jurisdiction from trying, hearing or further hearing and determination of the Chief Magistrate's Anti-Corruption Court, Criminal Case No. ACC 6 of 2006, between THE REPUBLIC vs JOSPHERT KONZOLO".**

The aforesaid leave was granted by Visram, J on 14.7.2006, however, he declined to order that the leave granted do operate as a stay.

Instead he directed that the substantive application be filed and served within 8 days. It was this application which came before me for hearing, but before I could listen to it, the 1st respondent, the Kenya Anti-corruption Commission, raised a Notice of Preliminary Objection, filed on 25.7.2005 to the effect that,

1. "***The applicant had filed a previous application, HCMCA No. 34 of 2006, which has not been properly withdrawn. Hence this application is an abuse of the process of court".***

2. "***The orders sought are against parties who are not parties to the suit",***

3. "***The application is fatally defective".***

Mr. Murei, counsel for the 1st respondent challenged the applicant's withdrawal of the previous application for Judicial Review filed in HCMisc. Application No. 34 of 2006, on grounds that he did not seek court's leave before withdrawing it, as Judicial Review has a special procedure which require that leave be sought before withdrawal is effected as there is no such thing as withdrawal or discontinuation of an application once filed.

The second point of objection related to the parties sued i.e. the Kenya Anti-Corruption Commission and the Chief Magistrate's Court.

The 1st defendant's counsel submitted further that the person who charged the applicant is the Attorney General who is also prosecuting the applicant, yet he has not been joined in these proceedings as a party. That his appearance in court is as the advocate for the Chief Magistrate, named as the second respondent.

That the role of the 1st respondent is to investigate and recommend as it did, that the applicant be charged, which was done by the Attorney General.

The 3rd ground of objection was referred to as "**defects**" in the application for example, the order seeking "**certiorari**" to quash the charge sheet.

This prayer was said to be in vain as the charge sheet is merely an expression of a decision taken to charge the applicant, which decision has not been challenged.

The counsel referred to HCMisc. Application No. 1223 of 1995 **BOB MATHEWS STOCKBROKERS vs THE MINISTER FOR FINANCE & OTHERS** where the court held,

"**In my opinion, the only way the stock-broker would have benefited from this motion would have been by seeking an order of certiorari to quash both the decision by the Authority not to renew the licence and the Ministerial affirmation of that decision. That has not been sought in this motion".**

The advocate submitted further that the Attorney General can decide to file another charge sheet, if this one is quashed, since the applicant is only seeking to quash the charge sheet filed and not the Attorney General's decision to charge him.

Mr. Murei referred to the Notice of Motion served on him dated 17th July, 2006, supported by a statement dated 13th July, 2006. He contended that this was not the same statement which accompanied the application for leave, and that besides, the Notice of Motion application was filed in the same suit as the application for leave, contrary to the decision of Sergon, J in H.C. Misc. Application No. 327 of 2003 **REPUBLIC v FUNYULA LAND DISPUTES TRIBUNAL AND 3 OTHERS**, where the learned Judge held *inter alia*,

2. "Under order 53 Rule 3(1) the substantive motion can only be filed after leave has been granted. The Law does not envisage a situation where the motion is filed under the file through which leave was issued. The chamber summons is considered spent when leave has been granted. The applicant should thus originate the proceedings by filing the Notice of Motion in a separate miscellaneous application. The failure to adhere to this practice renders the whole motion fatally defective for being improperly before the court."

(the above underlining is mine).

The 1st respondent's counsel prayed for the striking out of the application with costs.

Mr. Gikonyo, state counsel appearing for the Attorney General for the Chief Magistrate's Anti-Corruption Court, Nairobi, associated himself with the submissions of counsel for the 1st respondent and reiterated the point that the non-joinder of the Attorney General as a party in these proceedings renders them defective as the order of certiorari and prohibition sought refer to the decision by the Attorney General to charge and prosecute. The applicant in the Chief Magistrate's Court, yet he has not been made a party to the suit. Mr. Gikonyo urged the court to strike out the application filed.

Mr. Lubullellah, for the applicant conceded that the applicant filed a previous application being H.C. Misc. Application No. 34 of 2006, but discontinued it pursuant to a "**Notice of Discontinuous and/or withdrawal of application dated 25th January, 2006**".

The notice read,

"**TAKE NOTICE that the applicant hereby discontinue and/or withdraws the application dated 25th January, 2006".**

That notice was filed in court in H.C. Misc. Application No. 34 of 2006, on 28th June, 2006. It was to be served on the Attorney General.

Mr. Lubullelah contended that that previous application had not been heard and no issues had been determined in it, which would bind this court. He submitted further that no law has been cited in support of the proposition that that mode of withdrawal is not permissible.

With regard to the submissions that the applicant has not challenged the decision to charge him, the counsel submitted that those are matters of fact to be argued during the hearing of the application and cannot form the basis of a preliminary objection.

The applicant, according to his lawyer, is aware of the Constitutional powers of the Attorney General to prosecute suits. He does not want to stop him from doing so, but his substantive complaint is against the Kenya Anti-corruption Commission who acted, "**maliciously to prosecute him, as the intended prosecution is at their behest,"** as - they confirm that they are the complainants in Criminal Case No. 6 of 2006, lying before the Chief Magistrate's court.

The 1st respondent was said to lack the legal capacity to constitute itself as a complainant in a case.

On the matter of non-joinder of the Attorney General as a party, Mr. Lubullelah submitted that there is no law which makes it mandatory to enjoin the Attorney General in Judicial Review application, and,

besides, non-joiner does not make the application defective.

As regards the decision by Sergon, J in **REPUBLIC vs FUNYULA LANDS TRIBUNAL & 3 OTHERS**, he submitted that this decision is of a court of con-current jurisdiction and therefore not binding on this court. He termed the application valid, arguable and well merited. He prayed the court to dismiss the Notice of Preliminary Objection and allow the application to proceed for hearing.

In a rejoinder counsel for the 1st respondent submitted that his client, Kenya Anti-corruption Commission recommended prosecution of the applicant, and the Attorney General made the decision to charge him, that is why the Attorney General should have been made a party.

I have considered the submissions of both learned counsel.

As was submitted by counsel for the applicant, I did not find any legal backing for the objection taken that leave of the court must be sought to withdraw a previous application such as was done by the applicant herein in a Judicial Review.

Its withdrawal before being heard did not in my opinion cause any prejudice to the 1st respondent.

A further objection was raised on the matter of the statement dated 13.7.2006, which accompanied the ex parte chamber summons seeking leave of the court to file proceedings of Judicial Review, and the Statement accompanying the Notice of Motion in court. Both statements are dated 13.7.2006. I have read and compared them, but I find no difference in them, and consider them to be one and the same. In my opinion, the two statements meet the requirement of Order LIII Rule 4 which provides, in part "**copies of the statements accompanying the application for leave shall be served with the notice of motion…"** I do not find the objection raised on this point to be valid.

I now turn to the decision of Sergon, J in **REPUBLIC vs FUNYULA LAND DISPUTES TRIBUNAL & 3 OTHERS**, which was relied on, particularly on the point that the applicant should have filed a new suit for the substantive application as the one in which the application for leave was granted was spent.

Order LIII Rule 3 is the relevant Rule in this respect, Rule 3(1) reads,

"**When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the <u>application shall be made within 21 days</u> by notice of motion to the High Court, and there shall, unless the judge granting the leave has otherwise directed, be at lease eight clear days between the service of the notice of motion and the day named therein for the hearing".**

I do not find in the above Rule any requirement in law that the Notice of Motion be filed in a separate miscellaneous application. To this extent therefore I **<u>differ</u>** with the finding of Sergon, J, above quoted, and being a decision of a Judge of equal jurisdiction, I refuse to adopt it because I am not persuaded by it as I find no legal basis for such a finding.

I now turn to the objections taken about the Attorney General.

In the 1st place, the Attorney General is at the moment appearing in these proceedings as a defence counsel for the 2nd respondent, namely the Chief Magistrate's Anti-Corruption Court, and not as a party. These were the submissions in reply by both the advocates for the 1st and 2nd respondents.

The 1st respondent's counsel particularly referred to the decision to charge the applicant, which decision he submitted was made by the Attorney General who will also prosecute the applicant in the lower court if the hearing proceeds, and as was submitted, the orders sought in the Notice of Motion are to quash the charge sheet, and prohibit the Chief Magistrate from hearing the Criminal case. In fact Mr. Lubullelah for the applicant even went as far as submitting as has been stated,

"**the applicant's substantive complaint is against the Kenya Anti-Corruption Commission who acted maliciously to prosecute him, as the intended prosecution is at their behest…".**

This submission in my opinion begs the question, who does what, or indeed who has the powers to do what between the Attorney General and the Kenya Anti-Corruption Commission?

Annexed to the verifying affidavit which sought leave of the court to file a substantive application for leave is a charge sheets drawn by the Kenya police. It makes reference to the O.B relating to this case in their records, and gives the date of appearance in court by the accused persons. I find this to be the usual way of drawing charge sheets by the police at the direction of the Attorney General.

Attached to the charge sheet is a copy of "**Bond and Bail**" issued to the applicant Josephert Konzolo by the Kenya Anti-Corruption Commission dated 23.1.2006. It was issued "**after inquiry**" which presumably means after investigations. I did not find any charge sheet drawn by the Kenya Anti-Corruption Commission, in this case which to me means that they do not have powers to charge suspects and as at now the law only recognizes charges preferred and drawn by the police, at the direction of the Attorney General.

If that be so, then the applicant's prayer for, "**certiorari to bring into this court and quash the charge sheet filed by Kenya Anti-Corruption Commission in Chief Magistrate's Case No. 6 of 2006,**" is misguided because they have not drawn and filed a charge sheet against him. They merely issued the applicant with "**bail bond**" to attend court after investigations.

I am therefore in agreement with the submissions of both advocates for the 1st and 2nd respondents to the effect that the Attorney General is "**a necessary**" party to these proceedings and should have been named so, as evidence herein has shown that it **is still at his decision, discretion and direction** that charges are preferred and charge sheets prepared, after investigations by the Kenya Anti-Corruption Commission, who have no such powers.

Failure to make the Attorney General a party to these proceedings is therefore "**fatal"** and the proceedings must be struck out with costs to the respondent.

Dated at Nairobi this 4th day of August, 2006.

JOYCE ALUOCH

JUDGE