



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**MISC. CIV. APPLI. 1298 OF 2004**

**JUSTICE MOIJO MATAIYA OLE KEIWUA.....PLAINTIFF**

**VERSUS**

**CHIEF JUSTICE OF KENYA AND SIX OTHERS.....DEFENDANTS**

**RULING**

By an application dated 8.10.2004 brought by way of a Notice of Motion pursuant to the provisions of SS 8 and 9 of the Law Reform Act (Chapter 26, Laws of Kenya) and Order LIII rule. Rules 3 )(O. 53, rule 2) of the Civil Procedure Rules the Applicant (a Judge of the Court of Appeal of Kenya and the Presiding Judge of the East African Court of Justice (hereinafter referred to as the “**Applicant**”) sought orders of Certiorari, Prohibition and Mandamus in the matter of the Tribunal to Investigate the Conduct of the Applicant as a judicial officer of the Court of Appeal of Kenya.

When this application came before us for hearing on 13.6.2005, Mr. Stephen Musalia Mwenesi learned Counsel for the Applicant (hereinafter referred to as “**Mwenesi**”) sought an adjournment of the hearing of the Motion on the principal ground that the Applicant wanted the court’s direction on matters which Mwenesi said had arisen from **Inter alia**

(1) The Replying Affidavit of the 7<sup>th</sup> Respondent Mbuti Gathenji (who is also the Assisting Counsel to the Tribunal) sworn on 6.12.2004 and in particular paragraphs 55 and 56 thereof stating that the Attorney General had no role in assisting the Tribunal and that the Tribunal was independent of the Attorney General’s Office.

(2) The role or a **locus standi** of the Attorney General in light of the Replying Affidavit of Margaret Nduku Nzioka who is the Chief Parliamentary Counsel in the Attorney Generals Chambers, and also Secretary to the Tribunal investigating the conduct of the Judges of Appeal, sworn on 15.12.2004.

(3) The Replying Affidavits of :-

(1) Stephen Kanyinke Ole Ntutu sworn on 19.11.2004

(2) Sylvester Kitilai Ole Ntutu sworn on 19.11.2004

According to Mwenesi the issues to which the above captioned Affidavits had given rise to were-

(1) Whether certain parties including Mwenesi himself who had been adversely mentioned in ground No. 8 of the allegations against the Applicant in the Tribunal, that he Mwenesi conspired with other

persons mentioned in that ground to defeat the cause of justice should be served with the Notice of Motion of 8.10.2004 and made parties thereto. The other parties were to be Stephen Kanyinke Ole Ntutu and Sylvester Kitilai Ole Ntutu, and Ol-kiombo Ltd a company of which it was common agreement by Counsel the Applicant held shares and was Chairman of its board;

(2) Whether these parties should be joined as parties (presumably as Interested Parties,) to the Notice of Motion;

(3) Whether the applicant should be granted leave to amend the statement of facts

(4) Whether the applicant should be granted leave to reply to the Affidavits of Stephen Kanyinke Ole Ntutu and Sylvester Kitilai Ole Ntutu respectively;

(5) Whether or not a stay should be issued against the production of statements (which are likely to be produced to the hearing at the Tribunal), now being adduced or produced before the subordinate courts namely Nakuru Chief Magistrates Court Criminal Case No. 1445 of 2000 and Nairobi Chief Magistrate's Court Criminal Case No. 2157 of 2000 (**Republic vs Livingstone Kunini Ole Ntutu and HCCC No. 1565 of 2000 (Livingstone Kunini Ole Ntutu vs Narok County Council and Ol-kiombo Ltd)**) of which the major complainants were the Narok County Council.

(6) What was the *locus Standi* of the Attorney General in the Tribunal?

In a brief response to these submissions, Mr. Obwayo, learned Counsel for the 1<sup>st</sup> – 6<sup>th</sup> Respondents (all inclusive), opposed the application, on all grounds advanced by the Applicant's Counsel. There must be notice to amend the grounds of the application. There was none in this case. The affidavits of Stephen Kanyinke Ole Ntutu and Sylvester Kunini Ole Ntutu were not properly on record as they are not parties to the application. The only Affidavits the court should consider are those of the 7<sup>th</sup> Respondent, Mbuthi Gathenji learned Assisting Counsel to the Tribunal, and Margaret Nduku Nzioka learned Secretary to the Tribunal.

It was now late for the Applicant to wish to join either Stephen Kanyinke Ole Ntutu or Sylvester Kunini Ole Ntutu as their Affidavits were on record when the Application (Notice of Motion) was fixed for hearing before the Honourable the Chief Justice. They should have indicated their desire then to be heard under rule 6 of Order LIII (O.53 rule 6).

Order LIII rule 4 (2) permits a party to reply to an affidavit if it raises new matters. Paragraphs 55 and 56 of the Replying Affidavit of Mbuthia Gathenji raise no new matter. The issues raised in these paragraphs, whether the Attorney General is competent to advise the Tribunal in its deliberations, are issues of law. There is no basis for seeking to file a further affidavit in reply thereto.

Mr. Obwayo submitted that since the adjournment is sought in order to file a Further Affidavit, should the court find that such affidavit is not called for, then it should not allow the application for adjournment as the same is sought merely to delay the hearing of the Notice of Motion herein and the Tribunal's own proceedings. Despite the Applicant's indication per letter to us that there was a problem with the court file, the problem was not with the court file but with the Applicant's own wish to delay these proceedings further. If the court is inclined to grant the adjournment, it should vacate the stay of the Tribunal's proceedings under rule 1(4) of Order LIII.

The 7<sup>th</sup> Respondent, Mr. Mbuthi Gathenji, associated himself with the submissions by Mr. Obwayo, learned Counsel for the 1<sup>st</sup> – 6<sup>th</sup> Respondents. Counsel submitted that there was no way for the Court to verify the Applicant's claims for leave to file a further Affidavit as there was no application before the Court. The Applicant should not capitalize on those Replying Affidavits and rely upon them to seek leave to file further Affidavits. Counsel reiterated Mr. Obwayo's submission that if the court was inclined to grant an adjournment, then it should vacate the orders of stay upon which the Applicant was relying to waste valuable judicial time, and drag these proceedings indefinitely.

In response to these submissions by the Respondents' Counsel, Mwenesi referred us to paragraph 7 of the Statement of Facts which said -

***“7. The persons affected by the proceedings are likely to emerge once the proceedings are underway and the applicant has known what the Respondents' answer or answers to the case will be. It will then be known whether there are any other persons who have to be served or who should be joined whether as interested parties or otherwise”.***

On these ground alone, and on the grounds set out in paragraph 39 of the Affidavit of Mbuthi Gathenji, Mr. Mwenesei urged us to grant the Applicant an adjournment.

At the end of those submissions, we retired to enable us consider the various parties arguments. The following is our considered opinion on the various issues raised by Mr. Mwenesi the Applicant's learned Counsel, and submissions of Counsel for the Respondents parties.

### **1. Pleadings in Judicial Review never Close.**

Whereas there is indeed no provision under **Order LIII** for closure of pleadings in Judicial Review, we take the view without laying down a hard and fast rule that persons seeking to be heard in judicial proceedings, should not pop up, from any side – window at any time during the proceedings for judicial review. The cautionary ground 7 of the Statement of Facts must therefore be related to a limit in time and space following the filing of the Respondent's Replying Affidavit as there are **no defences** in an application such as the present motion herein. In our view, the right to reply or file a further Affidavit by the Applicant must be exercised within a reasonable time after service of the Replying Affidavit.

### **2. Amendment of Statement of Facts and further Affidavits.**

**Rule 4 (2) of the Order LIII** empowers this Court on hearing of the motion, to allow the applicant to amend his Statement of Facts and where the applicant intends to be allowed to amend his statement or file further affidavits, he shall give notice of his intention and or any proposed amendment of his statement. The notice of intention to amend the Statement of Facts must in our understanding be given in writing, and a draft or skeletal amendment be submitted as intention of what is to be amended. There was none in this case. We have therefore no basis for allowing the undisclosed intended amendment to the Statement of Facts.

### **3. Joinder of Interested Parties.**

Again **Order LIII rule 6** of the Civil Procedure Rules enjoins this court to hear any party in opposition to the motion and who appears to the Court to be a proper person notwithstanding that he has not been served with notice or summons, although such person may be made liable, in the discretion of the court, to costs.

Further rule 3 (2) of the said Order requires that the Notice of Motion shall be served upon all persons directly affected.

This is the Applicant's motion not of the Court. The applicant knows what persons if any are directly affected apart from the seven Respondents. It is not for the Court at this preliminary stage, to determine which person desires to be heard. No person has to our knowledge expressed a desire to be heard. We cannot therefore make any Orders in **Vacuo**

### **3. That an Order of Stay be issued in respect of latter proceedings which may affect the proceedings of the Tribunal**

Rule 8 of the Constitution of Kenya (Protection of ***Fundamental Rights and Freedoms of the Individual***) ***Practice and Procedural Rules 2001*** (LN 133 of 2001), provide that while reference to the High Court is pending, all proceedings in the subordinate court shall be stayed pending the determination

of the reference.

In our understanding stay of proceedings in a subordinate Court means or refers to proceedings which gave rise to the reference, and does not include sundry proceedings which may remotely refer to the matters in issue. We consequently, and absolutely refuse, the Applicant's attempt to gag any proceedings covering other matters which he may indirectly be concerned with

#### 5. Locus standi of the Attorney General in the Tribunal

While we express no opinion on the locus standi of the Attorney General in the Tribunal, we however observe that the Replying Affidavit of Margaret Nduku Nzioka, a Secretary of the Tribunal does not give the Attorney-General any status in the Tribunal which he does not already have, even though the said Margaret Nduku Nzioka is a Chief Parliamentary Counsel in the Attorney General's Chambers. She does not swear the Affidavit in that capacity. She swears and depones to the averments in her affidavit as an officer of the Tribunal, and not of the Attorney General's Chambers. Her Affidavit is no cause for any role of the Attorney General in the Tribunal, which as deponed by Mbuthi Gathenji in paragraphs 55 and 56 of his Replying Affidavit, must not only remain, but must be seen to be devoid of any influence from any quarter including the Attorney General. We hasten to add that the matters raised by Mbuthi Gathenji in these paragraphs are matters of law, not fact, and of which the Tribunal is fully competent to determine in all respects.

#### **6. Reply to the Affidavit of Stephen Kanyinke Ole Ntutu and Syvester Kunini Ole Ntutu**

Mr. Mbuthi Gathenji learned Assisting Counsel to the Tribunal (who is also the 7<sup>th</sup> Respondent) explained to the court that the Affidavits of the above-captioned persons were drawn at his instance as Assisting Counsel to the Tribunal, in answer to matters raised in the 318 paragraph Verifying Affidavit of the Applicant sworn on 29-09-2004, and which Affidavit did make references to the Affidavits of the Applicant, **Mwenesi**, and one **Johnson Tompoi Ole Saikah** sworn respectively on 29-09-2004, and 30-09-2004. Counsel told the court that these Affidavits were in support of his own Affidavit.

We however, observe that that these affidavits are drawn in a manner which suggests that the deponents are parties to the Motion herein. Unfortunately also as is the practice in these matters, the Affidavits ought to have been referred to, and annexed to the Affidavit of Mbuthi Gathenji. As currently drawn they to create the false impression or image that the deponents are parties – the affidavits are expressed as **“Replying Affidavit”**. The more appropriate expression would have been perhaps **“Affidavit in support of the Replying Affidavit of Mbuthi Gathenji or some such title, and not “Replying Affidavit”**.

We were asked by Mr. Obwayo, learned Counsel for the 1<sup>st</sup> – 6<sup>th</sup> Respondents to strike out these Affidavits, as being improperly on the record, and having been drawn by M/S Katwa & Co. Advocates, Counsel who are not on record for any of the parties. We will however not strike them out. Firstly we think that these Affidavits are in support of Mr. Mbuthi Gathenji's Affidavit, and ought to remain on record. Secondly, although they have been drawn by Counsel who is not on record in these proceedings, we think that this is a mere irregularity only which goes to form, and not to substance of this matter.

For these same reasons we will allow the Applicant to respond thereto, and do so within TEN (10) DAYS from the date of this Ruling. Although the Applicant fails in all other grounds adduced by Mr. Mwenesi, we allow the application for adjournment to enable the Applicant to responded if necessary, to any new grounds which may have been raised in the Affidavits of Stephen Ole Ntutu and Sylvester Ole Ntutu respectively.

As this adjournment has been caused partially by the Applicant, and partially by the 7<sup>th</sup> Respondent the costs of the adjournment for the 14<sup>th</sup> and 15<sup>th</sup> June 2005 should be borne equally by the Applicant and the 7<sup>th</sup> Respondent.

Those are our orders.

Dated and delivered at Nairobi this 14<sup>th</sup> day of June 2005.

**J. LESIIT**

**JUDGE**

**R. WENDO**

**JUDGE**

**ANYARA EMUKULE**

**JUDGE**