



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Civ Appli 1618 of 2003

**IN THE MATTER OF: AN APPLICATION BY KAMLESH MANSUKHLAL DAMJI PATJNI
FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF: THE ANTI-CORRUPTION COMMISSION

CASE NO. 66 OF 2003

AND

**IN THE MATTER OF: THE PROHIBITION OF THE CHIEF MAGISTRATE OR ANY
MAGISTRATE OF THE ANTI-CORRUPTION COURT**

KAMLESH MANSUKHLAL DAMJI PATJNI.....RESPONDENT

-VERSUS-

THE REPUBLIC

Through

THE HON. ATTORNEY-GENERAL.....1ST APPLICANT

THE CHIEF MAGISTRATE, KENYA ANTI-CORRUPTION COURT.....2ND APPLICANT

RULING

Mr. Pattni, on 24th December, 2003 filed a Chamber Summons application, dated 23rd December, 2003. This application, which was made under Order LIII rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act (Cap. 21), rule 3 of the High Court Vacation (Procedure and Practice) Rules, and the inherent powers of the Court and all enabling provisions of the law, was accompanied with a Certificate of Urgency also dated 23rd December and filed on 24th December, 2003. It was a rather long, five paragraph Certificate of Urgency which itself carried contentious statements of law. The Chamber

Summons application was much shorter. It sought as follows:

- (i) that the application be certified as urgent and be heard during the Court vacation;
- (ii) that the Applicant be given leave to apply for Judicial Review, seeking the Orders as set out in the Applicant's statutory statement, in respect of the Applicant's prosecution in Kenya Anti-Corruption Court Case No. 66 of 2003;
- (iii) that the grant of leave do operate as a stay of the proceedings or any further proceedings in Kenya Anti-Corruption Court Case No. 66 of 2003 or any other matter(s) related thereto until the final determination of the Judicial Review proceedings.

Mr. Kilonzo, who represented Mr. Pattni at the hearing which was *ex parte*, on 24th December, 2003 stated as follows:

- (i) Mr. Pattni had been charged for an alleged corruption offence at the Anti-Corruption Court, on 11th November, 2003;
- (ii) the case had been mentioned several times, and hearing dates on the criminal charge had been set down for 11th and 12th February, 2004, with a mention date set down for 22nd January, 2004 immediately after the High Court vacation;
- (iii) the Applicant was raising serious constitutional issues, such as the legality of the trial Court; and the Applicant being prosecuted by the office of Director of Public Prosecutions;
- (iv) the matter was therefore urgent; and within 21 days the application could be filed and served.

Mr. Kilonzo submitted, regarding the application for leave, that the purpose of the leave stage was to filter out frivolous applications; and if leave is merited, then it is granted. This was in aid of Mr. Pattni's application which was presented as a serious one meriting approval.

Mr. Kilonzo cited a number of authorities as supporting his application. These included ANTHONY RIITHO MWANGI v. ATTORNEY-GENERAL, Crim. Appl. No. 701/2001; VINCENT KIBIEGO SAINA v. ATTORNEY-GENERAL, H.C. Misc. Appl. 839/99; REPUBLIC v. ATTORNEY-GENERAL ex parte NGENY, High Ct. Misc. Appl. 406/2001; ATTORNEY-GENERAL v. NYABERI; Misc. Civil Appeal No. 1151/99; DAVID TIROP v. ATTORNEY-GENERAL, Misc. Appl. No. 1201/2001.

On the basis of the information before the Court and of the submissions of Mr. Kilonzo, the Court made the following Orders:

- (i) the application was certified as urgent;
- (ii) the prayer regarding the Court's Vacation Rules was granted;
- (iii) Mr. Pattni was granted leave to bring a Judicial Review application;
- (iv) The stay order was granted; but subject to the following condition: "This matter be listed for *inter partes* hearing within the next 14 days, before the Vacation Judge."

Now the last condition set out above was never realized and has, to-date, not been fulfilled, mainly because of the strategy which has been played out by Mr. Pattni and in the manner in which he must have instructed his counsel to act. Mr. Pattni's strategy has raised a severe impediment to the normal functioning of the prosecutorial process in the Magistrate's Court entrusted with the trial of cases of corruption. Insofar as Mr. Pattni has not ended up prosecuting his Judicial Review case in the High Court, and in particular considering that he has claimed cover of the stay Order against subordinate Court

proceedings issued *ex parte* on 24th December, 2003 the trial process in the Magistrate's Court has been brought to a standstill.

Quite naturally, this is a matter of grave concern to the State Law Office in its discharge of the prosecutorial function of the Republic. And this is the background to the application in respect of which I am making this Ruling today.

A Notice of Motion application by the Attorney-General was dated 20th February, 2004 and filed on the same date. It was brought under Orders LIII rule 1(4) L rule 17, Section 3A of the Civil Procedure Act, Sections 60, 65(1) and 123(2) of the Constitution of Kenya, and other enabling provisions of the law. This application came under Certificate of Urgency, dated 20th February, 2004 and filed on the same date.

The prayers of the Attorney-General's Notice of Motion are as follows:

- (i) that the Court be pleased to set aside the *ex parte* Orders made on 24th December, 2003 granting Mr. Pattni leave to apply for Judicial Review Orders in the nature of Certiorari and Prohibition, and that such leave do operate as a stay of the proceedings in the Nairobi Chief Magistrate's Anti-Corruption Court Case No. 66 of 2003 until the determination of the substantive application;
- (ii) that in the alternative, the Court be pleased to order that the hearing of Mr. Pattni's Notice of Motion application dated 6th January, 2004 scheduled for 3rd March, 2004 be brought forward and disposed of on dates convenient to the Court;
- (iii) that the Court be pleased to make any other Order that it deems, in the circumstances of the matter;
- (iv) that Mr. Pattni to bear the costs of this application.

Thirteen grounds are set out in support of the Attorney-General's Notice of Motion application. Their essence can be set out as follows:

- (a) that Mr. Pattni obtained the *ex parte* Orders of 24th December, 2003 by deliberately withholding material information, and misleading the Court that Criminal Case No. 66 of 2003 in the Chief Magistrate's Anti-Corruption Court would have commenced before the application for Judicial Review would have been heard, while it was within his knowledge that the case was scheduled for hearing on 11th and 12th February, 2004;
- (b) that Mr. Pattni obtained the said Orders by deliberately failing to attach the witness statements and copies of the exhibits that had already been served on his counsel;
- (c) that Mr. Pattni has misused the said Orders to delay the hearing of the main application and consequently the criminal case against him, by failing to comply with the Order requiring him to file the main application and having it heard *inter partes* within fourteen days from the date of the said Orders;
- (d) that Mr. Pattni deliberately and/or mischievously failed to serve the Order staying the proceedings in the criminal case in question, with the apparent purpose of surprising the prosecution during the hearing of the criminal case on 11th February, 2004;
- (e) that the Order of 24th December, 2003 was conditional on Mr. Pattni serving the Respondent within 14 days and having the same listed for *inter partes* hearing within the same period, and thus it has now lapsed;
- (f) that Mr. Pattni obtained the Orders by deliberately misleading the Court that there was urgency in the matter, only for him to take a distant hearing date, after obtaining the Orders;

- (g) that Mr. Pattni acted in bad faith by withholding critical information from the Court and obtaining *ex parte* Orders during the first day of the Christmas Vacation, 2003;
- (h) that Mr. Pattni's conduct amounts to an abuse of Court process, and the Court should restore its dignity by vacating the Orders of 24th December, 2003;
- (i) that, being empowered by Section 26(3) of the Constitution, the Attorney-General is empowered to direct any authority to effect investigations into alleged crime before arraignment in Court, and hence the purported complaint on constitutional grounds, with regard to the criminal process in the Anti-Corruption Court, has no basis in law;
- (j) that the attribution of unconstitutionality to the Anti-Corruption and Economic Crimes Act (No. 3 of 2003), the Kenya Anti-Corruption Commission and the Chief Magistrate's Anti-Corruption Court, by Mr. Pattni is misguided as no Orders in that behalf can be obtained by way of Judicial Review.

In further support of the Attorney-General's Notice of Motion application is an affidavit sworn by Mr. Stephen Sunguti on 20th February, 2004 and filed on the same date. The main thrust of this affidavit may be set out as follows:

- (a) the deponent is a Senior Superintendent of Police and is attached to the Kenya Anti-Corruption Commission and has been the investigating officer in the Anti-Corruption Court Criminal Case No. 66 of 2003 – Republic v. Kamlesh Mansukhlal Pattni;
- (b) Mr. Pattni had appeared in Court on 11th November, 2003 and pleaded not guilty; and the case has since then been mentioned twice;
- (c) that when the matter came up for hearing on 11th February, 2004 Mr. Bernard Kalove, counsel for Pattni informed the Court that the accused had on 24th December, 2003 applied for and obtained orders staying the proceedings of the criminal case;
- (d) that Mr. Kalove on that occasion informed the Court that the Order in question had been served on the office of the Attorney-General on 7th of January, 2004 and produced a purported affidavit of service by one Nzuki Musyoki; but the clerical officers who receive documents on behalf of the Attorney-General, Andrew Muriithi Mwangi and Charles Natabona have sworn affidavits denying having received service of the Orders in question;
- (e) that the prosecution in Criminal Case No. 66 of 2003 is grounded on overwhelming evidence;
- (f) that the prosecution of Mr. Pattni in Criminal Case No. 66 of 2003 is neither capricious, unfair, oppressive nor in bad faith, as there is sufficient evidence;
- (g) that the prosecution of Mr. Pattni was arrived at after thorough investigation and the Attorney-General's exercise of his powers under Section 26(3) of the Constitution and was not motivated by ill feelings or malice.

To the Attorney-General's Notice of Motion with prayers regarding the *ex parte* Orders obtained by Mr. Pattni on 24th December, 2003, Mr. Pattni on 1st March, 2004 filed Grounds of Opposition. Some of the points carried by the Grounds of Opposition are as follows:

- (i) that there was no non-disclosure of any material facts before the Court on 24th December, 2003;
- (ii) that Mr. Pattni complied with all the conditions and Orders made by the Court on 24th December, 2003;
- (iii) that the Attorney-General's application is made for the purpose of scandalizing counsel for Mr.

Pattni, and also to intimidate the Court;

- (iv) that the hearing date for Mr. Pattni's substantive Notice of Motion was given by the Court Registry and the Applicant himself carries no responsibility in this regard;
- (v) that the Orders of 24th December, 2003 were properly served on the Attorney-General's office;
- (vi) that the lifting of the Order of stay in respect of Criminal Case No. ACC 66/2003 will only serve to defeat the purpose of the Judicial Review proceedings commenced by Mr. Pattni.

I have already remarked that I do not consider the condition attached to the Order of stay in relation to ACC 66 of 2003, given *ex parte* on 24th December, 2003 to have been complied with. I have stated that Mr. Pattni appears to have wielded that Order as an instrument of protection for himself, against the proceedings of the subordinate Courts, and at the same time as a holding-ground while seeking arrangements in the High Court that suited him best, even if these arrangements compromised other calls of public interest. This perception will become clearer in a moment.

On 20th February, 2004 Mrs Ondieki representing the Attorney-General before the Duty Judge, the Honourable Mr. Justice Lenaola, requested an early date for the hearing of the Attorney-General's Notice of Motion application of 20th February, 2004. She convinced the Duty Judge, who made Orders certifying the matter as urgent, and listed it for hearing on 3rd March, 2004. The parties then appeared before me on 3rd March, 2004; and my expectation was that, due to be heard was the Attorney-General's Notice of Motion dated 20th February, 2004. But Mr. Kilonzo, who represented Mr. Pattni, stated that it would no longer be possible to hear the Attorney-General's application, since Mr. Pattni has already filed yet another application, this time under the fundamental rights provisions of the Constitution. And Mr. Pattni's application, dated 2nd March, 2003 and filed on the same day (just the day before the scheduled hearing of 3rd March, 2003), was set in a sizeable tome of 467 pages. This Notice of Motion cited Sections 3, 26, 60, 61, 65(1) and (2), 70(a), 74, 77(a), 81, 82 and 84(1), (2) and (6) of the Constitution, Rules 6, 8, 9 and 11 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the individual) Practice and Procedure Rules, 2001, the Doctrines and Rules of Natural Justice and the Inherent Powers of the Court and all enabling Provisions of the Law, as its basis of validity; and Mr. Pattni was now asking the Court to merely transmit the voluminous document to the Chief Justice to give directions for a hearing. Mr. Kilonzo stated that because of Mr. Pattni's astuteness in adopting this new strategy, it followed that all other proceedings were now stayed; and this Court's only remaining duty was to pass on matters to the Chief Justice. The Honourable the Chief Justice, Mr. Kilonzo submitted, now had the duty to establish a panel of Judges to hear and determine Mr. Pattni's constitutional claims. Mr. Kilonzo stated that since this was an application under Section 84, "there must be a stay of proceedings."

Mr. Murgor, the Director of Public Prosecutions, submitted that what was now unfolding before the Court was a classic case of abuse of the Court process, and was bound to make the proceedings of the Court lose respect. He observed that there had been a similar if not identical application by Pattni, on 24th December, 2003, in Civil Case No. 1261 of 2003, filed on 3rd December, 2003, just three weeks before Pattni's application which led to the *ex parte* Orders of 24th December, 2003. That case, Civil Case No. 1261 of 2003, had been used to attempt to halt the progress of the Anti-Corruption Court Case No. 66 of 2003; and following an objection to this strategy by Mrs. Ondieki of the Attorney-General's Chamber, the learned Magistrate had rejected Mr. Pattni's claims. Mr. Pattni then withdrew that constitutional reference. Mr. Murgor saw the same strategy now being pressed into service by Mr. Pattni, confronted as he is with the Attorney-General's Notice of Motion application for the setting aside of the Order of stay obtained *ex parte* on 24th December, 2003. Mr. Murgor submitted that the full tenor and effect of Mr. Pattni's claim was that, merely because it had occurred to Pattni that he will make an application, therefore, necessarily, the Court's hands are now signally tied.

At this point I had to make a Ruling, and this was the content:

“I have carefully listened to counsel, both the Director of Public Prosecutions representing the Attorney-General, and Mr. Kilonzo representing Mr. Pattni. The submissions have been on preliminary questions relating to which application shall first be heard. I have formed the clear impression that the first application to be heard is the Notice of Motion application dated 20th February, 2004 by which the Office of the Attorney-General seeks to have set aside the Orders of this Court made *ex parte* on 24th December, 2003. The later applications, including those by Mr. Pattni, turn on those Orders. Therefore, those Orders must be examined first; and it is on this basis that the very possibility of pursuing constitutional rights issues would be founded.”

I have remarked earlier that Mr. Pattni appears to have intended to hold up the process of criminal justice in the subordinate Courts even as he made moves and deals that suited him alone at the High Court. More evidence for this perception now comes out. The moment I delivered my Ruling set out above, Mr. Kilonzo applied for leave to appeal against my decision. So I did make a second Ruling, as follows:

“Mr. Kilonzo has sought leave to appeal to the Court of Appeal on this matter; but as I am convinced that the trajectory which is opened by such an appeal will create an unfortunate syndrome in which certain questions never end up being litigated to conclusion, I refuse a stay of the operation of the decision here made; and I decline to give such leave. Mr. Kilonzo may, however, obtain such leave from the Court of Appeal itself.

“As clearly indicated in this Ruling, all applications now pending are in respect of the Order made by this Court on 24th December, 2003. It is right, I believe, that the Attorney-General’s application challenging that Order be heard first, as a basis for identifying any further issues for litigation – including constitutional ones.”

I then made an Order that the Notice of Motion application by the Attorney-General dated 20th February, 2004 and filed on the same date be listed for hearing on Wednesday, 10th March, 2004 at 2.30 p.m.

Come that appointed hearing date, the Director of Public Prosecutions, Mr. Murgor, together with two senior counsel from the Attorney-General’s Chambers, Mrs. Ondieki and Ms. Gakobo were present in Court; but for Mr. Pattni, an Advocate, Ms. Ndegwa, appeared to give an apology for Mr. Kilonzo who was taken ill. It became difficult for the Court to fully understand how Mr. Pattni was represented in Court; as the formal letter of apology came from Kalove & Co. Advocates, with whom Ms. Ndegwa worked. But the information available to the Court was that Mr. Kilonzo worked in a different firm, most likely that of Mr. Rebello. Mr. Murgor had raised a point as to why the true representative of the firm on record, Kalove & Co. Advocates was unwilling to proceed with the case and was applying for an adjournment, pleading the absence of an Advocate who did not work with the Advocate’s firm on record for Mr. Pattni. It was noted in particular that the Advocate who has been appearing for Mr. Pattni in the Magistrate’s Court Case No. 66/2003 has been Mr. Kalove himself. Ms. Ndegwa’s application was that although Mr. Kilonzo did not work with M/s. Kalove & Co. Advocates, nevertheless he had been instructed to have the conduct of the matter for Mr. Pattni.

It was necessary for me to make a Ruling, to guide the hearing process in accordance with the Ruling which I had earlier made on 3rd March, 2004. The following was my Ruling:

“The importance of the Attorney-General’s Notice of Motion application of 20th February, 2004 is that it is seeking to have orders of this Court made on 24th December, 2003 set aside, and the decision made will be critical to the conduct of the criminal process currently in progress in the Anti-Corruption Court. Quite obviously, the application is an important one, with a bearing on issues of public interest. It is stated as a ground in support of the application that the *ex parte* Order had been obtained through failure to disclose material facts.

“When the matter came up for hearing today, the Respondent who is the beneficiary of the *ex parte*

Order asked for adjournment, on the ground that counsel with the conduct of the matter was indisposed.

“....

“The technicalities of the instruction of different Advocates could very well lead to delay in disposing of the Attorney-General’s application. But, as a matter of public policy, such an eventuality should not be allowed. It is vital that the Notice of Motion application is disposed of with the greatest dispatch, to open the way for the conduct of essential criminal process litigation in other Courts.

“Consequently I hereby make the following Orders:

1. The Notice of Motion application dated 20th February, 2004 shall be listed for hearing on Friday 12th March, 2004 at 2.30 p.m.

2. All parties shall be ready for the hearing, and the hearing shall proceed without fail. ...” On 11th March, 2004, only a day before the date committed for the hearing, Mr. Pattni’s Advocate, Mr. Kalove, appeared *ex parte* before the Duty Judge with a massive volume, an application claiming priority over the Attorney-General’s Notice of Motion application of 20th February, 2004 which I had formally committed for hearing on 12th March, 2004. Most of Mr. Kalove’s presentation before the Duty Judge related to Mr. Pattni’s discomfort with the role of Mr. Murgor, the Director of Public Prosecutions, in criminal matters facing Mr. Pattni. Mr. Kalove construed these protestations as having a bearing on the constitutional rights of Mr. Pattni, and argued that, therefore, the voluminous application, rather than the Attorney-General’s application, ought to be the one to be heard. Mr. Kalove won an *ex parte* Order from the Duty Judge, expressed as follows:

“I hereby exercise my discretion and stay hearing of the application of 20th February, 2004 pending the hearing and determination of the present application.”

It is not at all clear that Mr. Kalove, who must have been fully informed of the proceedings before this Court, made disclosures to the Duty Judge regarding the several Rulings I had made and the clear findings expressed and settled before me, that the hearing of the Attorney-General’s Notice of Motion application was the very threshold at the doors of the judicial process, for ever reaching any other application be it constitutional or otherwise. I will discuss this point in more detail further on. At this point I must express serious doubts that Mr. Kalove had, within the short time he appeared before the Duty Judge, disclosed the details of the earlier hearings, or the significant interface between the Attorney-General’s Notice of Motion and the prospect of making constitutional applications, which I had endeavoured so much to articulate.

Come Friday, 12th March, 2004: Mr. Murgor, Mr. Ogeti and Ms. Gakobo from the Attorney-General’s office were in Court. For Mr. Pattni, Mr. Rebello and Mr. Kilonzo appeared.

The *ex parte* Order which Mr. Kalove had obtained from the Duty Judge turned out to be quite contentious. In his submissions, the Director of Public Prosecutions showed convincingly that Pattni and his counsel had so far managed to have their cake and eat it. Even as they had orders which held the hands of the criminal process machinery in the subordinate Courts, they had succeeded in conducting some kind of forum-shopping in the High Court, and more-or-less ensuring that no Orders were ever made that would stand as a burden upon them; therefore, they had perfected techniques of ensuring cases concerning Pattni were just never heard and determined; and this gave them a vital resource of time to live ever happily, while wearing down any threatening legal claims against Pattni in the lower Courts. A relevant point also raised by Mr. Murgor was that when a clear Order had been made on 3rd March, 2004 regarding the hearing of the Attorney-General’s Notice of Motion, Mr. Kilonzo for Pattni had sought leave to appeal to the Court of Appeal; but all the evidence suggested that no such appeal has been made. Mr. Murgor also noted that, in another matter, a Criminal Appeal by the Attorney-General, No. 25/99, involving Mr. Pattni and due to be heard on the same day, M/s. Kalove & Co. Advocates had that very morning served the Attorney-General with notice that Mr. Kalove had the previous evening fallen ill, and

so he would not be able to attend. This scenario would suggest, counsel submitted, with respect, with justification, that M/s. Kalove & Co. Advocates had embarked upon a course of making a mockery of the administration of justice.

Mr. Rebello spoke in favour of Mr. Kalove and affirmed that he was unwell. He then began to speak about the constitutional application which Mr. Kalove had brought before the Duty Judge the previous day. He submitted that the said application had to be filed with urgency to bring in new material which has recently emerged, that reinforces Mr. Pattni's case.

I had to make a Ruling as follows:

“All the constitutional matters now being raised are clearly dependent on the *ex parte* Order that was made by this Court on 24th December, 2003.

“I Order that the Attorney-General's application on that Order be heard immediately on the merits, and a Ruling given, as the basis for entertaining any later applications.”

Mr. Murgor made a presentation of the Attorney-General's Notice of Motion application and made submissions on the supporting grounds and the supporting affidavit.

Mr. Murgor submitted that although the Court almost routinely grants leave in cases of applications for Judicial Review, this ought to be more exceptional where a request is made for the leave to operate as a stay of actions in progress. He observed, quite correctly, that the stay granted on 24th December, 2003 was conditional, upon an *inter partes* hearing of a substantive application taking place within the succeeding fourteen days; and that the Order was not open-ended. Mr. Murgor submitted that, right on the face of the record, there was no compliance with the Order as it was issued. Mr. Pattni did not prosecute his application within the 14-day period; but he was happy for a prolonged period thereafter to claim the shielding cover of that Order. It was submitted that this amounted to a deliberate abuse of the Court Order, and thus an abuse of the judicial process. Compliance with the terms of the Order would have dictated a separate application to the Court, for an extension, but this was not sought.

There is conflicting information regarding the service of the Court Order on the parties by Mr. Pattni. For the Attorney-General, it is stated that something quite irregular must have happened, to enable M/s. Kalove & Co. Advocates to come to possess documents purportedly served on the Attorney-General and showing receipt stamp-marks. I think it will not be possible to find the truth about the service of these documents; and this will not be the decisive point determining the outcome of this Ruling.

Mr. Murgor questioned the propriety of Mr. Pattni's application for Judicial Review, as some of the statements and claims touch on constitutional matters which should be resolved by a constitutional application instead. I think, on this point, there will be no rigid line separating issues of Judicial Review which address acts and decisions of public bodies, from all the provisions of the Constitution; as some of such acts of public authorities could very well touch on the discharge of constitutional obligations. This is not the point on which the outcome of this Ruling will turn.

Mr. Murgor submitted that the effect of the *ex parte* Order of 24th December, 2003 of impeding or delaying the prosecution of Mr. Pattni at the Anti-Corruption Court was unfortunate, as this was a matter extremely well investigated and well deserving of completion, as part of the State's regular task of criminal justice administration.

It is well known that the numerous interlocutory applications that come daily before the High Court, do not necessarily represent the cardinal issues that will deliver justice to the parties or indeed to the society at large; for the main issues of merit must always stand to be resolved on the basis of full evidence, given in the context of testimony, cross-examination and re-examination. This is true in civil cases as in criminal cases; the full trial in the criminal case, with all the evidence being adduced, is the only way of obtaining justice as between the accused and the society. The State, therefore, in order to protect the public interest, must vigorously pursue its goals of crime control and the prosecution of

suspects, where there is good and sufficient evidence. And on Pattni's case, it cannot at all be said that where the Attorney-General has sufficient evidence to sustain a prosecution, that this, for some unarticulated cause, should be waived or held in abeyance. Were such to be done, it would be contrary to the best interests and the welfare of the public.

Mr. Murgor questioned the good faith in Mr. Pattni's latest application, which seeks to supplant the Attorney-General's Notice of Motion and to prevent this Court from exercising its normal jurisdiction established under the Constitution. He questioned the *bona fides* in the attempt to elevate Pattni's claims to the high pedestal where they must have a special bench of Judges to hear them, purely on technicalities and to the prejudice of the public interest.

When Mr. Kilonzo pursued that line of submission, one would have thought he was reading certain supreme orders to the Court. He stated bluntly that this Court had no business entertaining a question in respect of which he has drawn a constitutional application, thanks to Legal Notice No. 133 which sets out the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001. My understanding is that Mr. Kilonzo, and probably some other Advocates, have perceived these rules as self-proving and, indeed, a Godsend; they buy time for you, so that you can ply your case through several different judicial entities; and they save you from the single Judge who, because of his great familiarity with the situation touching on each litigant, may prove too particular, and possibly somewhat burdensome, in his determination; they take you to a differently managed process, where generalities could work in your favour; and all you do is to say: "this is a constitutional matter."

That would be an abuse of the process of the Court; and I will, therefore, state what I understand the Regulations in question to mean.

If counsel filed any document bearing certain legal claims, under the rubric "Application under the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001", this by itself should not predetermine it to be a genuine constitutional application. By analogy, a suitor may believe he has a contract and can make a claim on it; but it is the Court that must pronounce the finding, on evidence or submission, that, indeed, a contract existed. It is the same for a tort, a trust, a customary rule, etc. I must state here that it is the same, too, for a constitutional claim. Therefore, if a party believes that a certain claim is constitutional, and that it attracts the application of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001 this matter ought to be placed before a Judge in Chambers, in a normal application; and it will be for the Judge to take the decision whether or not to place it before the Chief Justice for further hearing directions.

The Rules in question will need to be revised from time to time. As they stand now, however, they do make important provisions which suitors should comply with. Consider Rule No. 2; it thus provides:

"Where an accused person in a criminal case or a party to a civil suit in a subordinate Court alleges contravention of his fundamental rights or freedoms under Sections 70 to 83 inclusive of the Constitution in relation to himself, he shall apply informally to the presiding magistrate during the pendency of the proceedings before that Court to file a reference to the High Court to determine the question of the alleged violation."

It is not clear that Mr. Pattni complied with this provision. If he did, then he would not seek to stop the trial process in the Magistrate's Court, where the learned Magistrate takes a decision to proceed with the case. Only subsequently would he be able to apply to the High Court, during an appeal if he is convicted.

Mr. Murgor observed, correctly with respect, that Mr. Pattni's attempt to supplant the Attorney-General's Notice of Motion with his own alleged constitutional application was strange, as Mr. Pattni would have been expected to be keen to defend his position against the Attorney-General's challenge to the *ex parte* stay Order of 24th December, 2003. Mr. Pattni got the Order *ex parte*; its prescribed condition has lapsed; he still intends to use it; he seeks to avoid all challenge to it! Counsel submitted,

correctly I believe, that this was an abuse of the Court process.

Mr. Rebello took objection to a certain line of authorities which Mr. Murgor had used to reinforce his submissions. These were cases in which Mr. Pattni and his business interests had been intimately involved. Mr. Rebello submitted that those authorities were inappropriate as they tended to show trickery, but that this phenomenon need not be imported into the present matter. The cases in question revolved around Uhuru Highway Development Ltd V. Central Bank Of Kenya & Others, in Civil Application No. 140 of 1995; Civil Appeal No. 126 of 1995. I think these cases can be left out of consideration, so that the present matter is dealt with on its own merits.

Mr. Rebello cited a number of cases, on the basis of which he urged that the rights of the accused person, namely Mr. Pattni, be upheld and his constitutional claims heard, with the criminal case in the Anti-Corruption Court held in abeyance. He cited in particular the second case in STANLEY MUNGA GITHUNGURI, and ANNARITA KARIMI NJERU. He urged that the latter case stood for the principle that counsel could, in a situation such as that in which Mr. Pattni is, use any procedure to come before the High Court.

Mr. Rebello submitted that Mr. Pattni, in his Judicial Review application had raised vital issues of jurisdiction – such as the constitutional status of the Anti-Corruption Court. He maintained that the importance of these issues justified halting the criminal prosecution process against Mr. Pattni before the Magistrates. He challenged the status of the Kenya Anti-Corruption Commission, particularly on the claim that this Commission had no director, and was therefore operating unconstitutionally. But on this point, Mr. Murgor gave the information that the governing enactment does provide for a temporary Director. Mr. Rebello, however, submitted that parts of that Act are contrary to “our concept of justice”. He also argued that the office of Director of Public Prosecutions was not an office under the Constitution, and consequently the prosecution of Mr. Pattni by that office is unconstitutional.

Mr. Rebello submitted that the grant of leave to file a Judicial Review application is a right, and that stay of proceedings, in that context, is granted as of right, particularly where issues of jurisdiction arise.

Responding to Mr. Rebello’s submissions, Mr. Murgor returned to the question of non-disclosure of important information by Mr. Pattni when he obtained *ex parte* Orders on 24th December, 2003. He submitted that litigation should not be seen as a luxury, and anyone suing in Court has a duty to tell the truth; while there is evidence that Mr. Pattni had not given truthful information.

Mr. Murgor considered the argument by Mr. Rebello on the status of Director of Public Prosecutions to have been baseless, as there was a subsidiary enactment which had established the office and it operates fully in a context of legality.

A number of factual positions have emerged which will lead to the final Orders of the Court. These are as follows:

- (a) Mr. Pattni considers that he should not be prosecuted in the Anti-Corruption Court Case No. 66/2003.
- (b) He does not appear to have had the patience to comply with Rules 2, 3 or 4 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001.
- (c) Mr. Pattni was seeking to use the route of Judicial Review to stop the trial process in the Anti-Corruption Court.
- (d) But somehow, Mr. Pattni seems to have changed his mind, and no longer wants to be heard by a single Judge in a Judicial Review case; rather he wants to have a larger bench constituted specifically to hear his matter. Of course, no reason has been given.

- (e) Mr. Pattni and his counsel apparently believe that they are the judges of what is a constitutional application under the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001, and that the moment they make such a claim, only the Chief Justice may address their case and then only for the very limited purpose of constituting a panel of Judges to hear the particular case.
- (f) Mr. Pattni, on 24th December, 2003 obtained *ex parte* Orders giving leave to file a Judicial Review application, and at the same time won stay of the Anti-Corruption Court Case No. 66/2003 pending the hearing and disposal of the Judicial Review application.
- (g) Although Mr. Pattni's application was required to be heard *inter partes* within two weeks, it has not been heard, and all evidence shows that he is no longer keen to have the matter heard.
- (h) Mr. Pattni has clearly used the stay Order he obtained on 24th December, 2003 abusively; he has been reluctant to defend that leave in open Court, and he has worked on a strategy that tends to expose the judicial process to ridicule, halting the trial in the Magistrate's Court, forum-shopping within the High Court, resisting the prosecution of the Attorney-General's application in respect of the stay Orders of 24th December, 2003.
- (i) Mr. Pattni has sought to impede the proper trial of issues touching on the *ex parte* Orders of 24th December, 2003 by a ceaseless flow of applications so inordinately prolix as to show a determined commitment to cloud the clear perception of the parties and the Courts, thus preventing conclusive disposal of the matters in issue; the strut of these motions indeed gives the archetype of overreaching.
- (j) Mr. Pattni has clearly engaged in a studied programme of creating confusion in the Court's case management, and this is an abuse of the Court process.

I will address the mischief quite apparent in the scenario described above by making the following Orders.

1. The *ex parte* Order made in favour of Mr. Pattni on 24th December, 2003 granting him stay on the Nairobi Chief Magistrate's Anti-Corruption Court Case No. 66 of 2003 until the determination of the substantive application, be and is hereby set aside.
2. The conduct of the Nairobi Chief Magistrate's Anti-Corruption Court Case No. 66 of 2003 shall proceed normally and, within the framework of that trial, Mr. Pattni will be accorded all protection as provided under the law.
3. In a proper case and if he so wishes, Mr. Pattni, in the course of his trial, may make any application as provided for under Rules 2, 3 and 4 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, Legal Notice No. 133 of 2001.
4. The Respondent in this application shall bear the costs of the Applicant in this application.

DATED and DELIVERED at Nairobi this 26th day of March, 2004.

J. B. OJWANGA, JUDGE

Coram: Ojwang, Ag. J.,

Court Clerk: Mwangi

For the Applicant: Mr. P. Murgor, Director of Public Prosecutions; Ms. Ondieki, Ms. Gakobo, Mr. Ogetii instructed by Attorney-General

For the Respondent: Mr. Rebello, Mr. Kilonzo, instructed by M/s. Kalove & Co. Advocates

Second Defendant unrepresented.