REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO 224 OF 2004

KOIGI WAMWERE .... APPLICANT

VERSUS

ATTORNEY GENERAL .... RESPONDENT

RULING

The applicant herein is Hon Koigi Wamwere, the Member of Parliament for Subukia Constituency. In the application dated 1st March 2004 he seeks leave to apply for an order of *mandamus* to compel the Commissioner of Prisons, Edwin Nyaseda to: -

i) To issue a statement assuring the applicant in particular and Kenyans in general that the video-tapes, documents and bank statements recently seized by the police from Kamlesh Pattni's residence, offices and business premises are in safe custody and will not be destroyed, edited, damaged or in any other manner tampered with.

ii) To release to the public the names of persons previously or currently holding public or professional offices implicated in the Kamlesh Pattni bribery scandal.

iii) To hand over the videotapes and documentary dossier to the Goldenberg Inquiry investigators for safe custody and further action.

The applicant as is required by order 53 rule 3 gave notice to the Registrar but did not attach a Verifying Affidavit or statements to that notice. I would have dismissed the application at that point. (See *Lawrence Nginyo Kariuki vs County Council of Kiambu & Another* Misc Appl No 1446/ 1994). Invoking powers granted by the proviso thereto, I however excused failure to do so on grounds that the matter was urgent and of great public importance, matters that I shall shortly return to.

Facts in Support

In the Supporting Affidavit sworn on 1st March 2004, the applicant sets out the reasons why in this view, he is entitled to the orders sought.

Firstly, he does not say that he himself has any interest in the matter either as Koigi Wa Wamwere, the individual or as a Member of Parliament. He says at paragraph 2 of the Affidavit that "in this suit I am acting at the behest and on the direct instructions of more than fifty thousand registered voters who are permanent residents of........ Subukia Constituency".

Secondly, he says that on 22nd February 2004, police officers under the command of Mr Edwin Nyaseda, the respondent entered and searched houses, offices and business premises belonging to or connected with one Kamlesh Pattni, a person under probe in the "Goldenberg Commission of Inquiry". Apparently and this is a matter of public knowledge, certain tapes implicating public officials in bribery were recovered during the searches. The applicant's sole source of information is a bundle of newspaper cuttings annexed and marked "KWW1".

Thirdly, the applicant says that he has been "reliably informed that certain persons" who have been implicated are making desperate attempts to have the tapes and other documents destroyed. This information has caused apprehension to his constituents hence the need to apply for orders of *mandamus* aforesaid, and necessarily he now seeks leave before doing so.

Leave in Judical Proceeding

I am alive to the fact that this matter has attracted a great deal of public attention. I am also aware that it is bound to attract more attention in and out of the Goldenberg Commission of Inquiry. However, in determining this application, I am going to be bound only by the dictates of law and procedure and the facts and issues placed before me by the applicant.

The said applicant seeks leave to institute orders of *mandamus* as I have previously stated. What he must show if I was to grant him such leave is:

i) His interest in the matter, which interest must translate into a specific legal right.

ii) That in the performance of his public duty, the respondent has refused to perform that duty which has amounted to an infringement of the legal right that the applicant has, and which he must show in (i) above.

iii) That therefore, this Court should step in and grant leave for the applicant to seek the remedy of *mandamus*.

These matters are important so that busy bodies, publicity seekers and generally persons who litigate do not do so for purposes other than enforcement of some discernible legal right.

I am consicious of the fact that public interest litigation is on the increase and courts must allow some flexibility in rules so that matters of public interest can be determined to the benefit of both the law and the public

itself. However, as rules and precedents presently allow judes to determine matters of this nature essentially on sufficient interest and not on abstractions and presumed or assumed facts, judges are forced to restrict themselved in certain situations even as gatekeepers, they open the judicial gates to the deserving and to them only. I shall be guided by this principle as I determine this matter.

Applicant's Interest

The matter before me relates to a fairly simple matter. Should the respondent be compelled to:

i) issue a statement of assurance to the public regarding the videotapes aforesaid?

ii) should he release certain names of persons purportedly captured in those tapes to the public?

iii) hand-over the tapes aforesaid to investigators at the Goldenberg Commission of Inquiry?

At the leave stage, the applicant ought to show his personal interest in the suit. In the instant suit, he has properly named himself "Hon Koigi Wa Wamwere". He later says that in fact he is acting on instructions of his constituents. Clearly, he has not interest save that of a messenger. Even then he does not say that he

is representing his constituents in the proceedings. If that is true, he would have said so. He did also say that when they elected him to represent them in Parliament, they also wanted him to represent them in all litigation including one such as the one before me. These matters cannot be presumed or a party should assume that the Court would make a finding one way or another without properly canvassing the point. I cannot understand why even after considerable prodding on my part, counsel for the applicant did not see the need to establish a link between his client, his client's instructors (the constituents) and the explosive tapes as well as the respondent's duty to do all of the three things that I have enumerated above.

Worse for the applicant's case, some weak arguments were advanced from the Bar regarding his own fear that he could be named, maliciously, as one appearing in the tapes. I did not see and I don't now see what counsel called "the gutter press" had to do with the matter before me. Speculation cannot be the basis for seeking judicial orders.

I was quite prepared to take the route of my brother Khamoni J and relax my guard as regards the test to apply when confronted with an application of this nature. He said in *Republic vs Minister for Information and Broadcasting and Ahmed Jibril Ex-parte East African Television Network Ltd (EATN),* Misc Civil Application No 403 of 1998.

"........ Each legal person is capable of suing and being sued in a court of law independently of all the rest. Under order 53 of the Civil Procedure Rules therefore, all that a legal person needs is his involvement in proceedings or his being affected by proceeding from which that legal person is aggrieved in matters where he has sufficient interest."

All that the applicant needed to show was an involvement in the proceedings complained of or some specific sufficient interest either personal to him or both personal and public.

In the instant case, I find words like "I am acting at the behest of" and on "the direct instructions of my constituents" so general and so capable of such varied and wide interpretations that I cannot possible see them as creating a sufficient interest. Least of all where the applicant does not at all say that he has himself a specific interest, has been injured or a certain right has been infringed by the respondent.

Respondent's Public Duty

It has not been alleged that the respondent, the Commissioner of Police or the Attorney General or both of them have done what they ought not to have done or not done what they ought to have done.

I have scoured the application to see any wrongdoing on the part of the respondent. Regrettably, I see none. In fact the Commissioner of Police's actions end at the raid which apparently, of his own motion, he undertook. The applicant is not saying that there was something wrong with the raid on Kamlesh Pattni's concerns. In fact the only wrongdoing on the part of anybody in this application is found in paragraph 8 of the supporting affidavit. Regrettably the information therein is as scanty as is contained in the rest of application.

The applicant in that paragraph says that "he is reliably informed", by unnamed persons, that "certain persons", again unnamed, want to destroy the tapes. He is not saying that the respondent himself wants to destroy the tapes. This suit is with regard to actions of the respondent and not any other person or persons, more so when they are unnamed.

It is the expectation of order 18 rule 3 of the Civil Procedures Rules that an affidavit should be restricted to matters known to the affiant and where it is based on information, the sources and grounds thereof should be stated. The applicants's affidavit again is wanting in that regard.

A bundle of newspaper cuttings is annexed to the affidavit and it is said that the same merely shows the "*modus operandi* of the ambush and a glimpse of what was recovered'. I do not know the evidential value of such a statement as newspaper reports, to my mind, are not authoritative and courts cannot rely on them as the basis for determining a matter.

Having so said, I note for example that the Attorney General has been sued on behalf of the Commissioner of Police. No notice has been given in accordance with section 13A (1) of the Government Proceedings Act which enjoins any party suing the Attorney General to give thirty day (30) notice of intention so to do. No explanation for this procedural anomaly has been given.

Neither the Attorney General nor the Commissioner of Police were asked prior to these proceedings to do the three things they are not being asked to do. Had such demand been made and one or both refused to comply, then I may have reconsidered my thinking on this matter.

As it is, I see no need for a party to seek leave that a public officer should be compelled to do something when there is no evidence of refusal or at the very least apparent refusal on the part of the public officer to do the thing. Even if such refusal had been shown, it must also be shown to be unlawful. Sadly, in this case neither was shown.

Conclusion

It is now clear that I am disinclined towards granting leave in this matter

Before I make final orders however, I must say something about this application generally.

Perhaps urgency was what drove the applicant to draw this application which I frankly found not be well thought out. (see page 1 paragraph 2 above). As I said earlier, necessary steps were side-stepped or jumped, to bring forth the matter. A matter of this nature which draws heavily on public support and expectation should have been carefully scrutinized before being shown to the watchful eye of this Court. The risk is precisely what has befallen this application: an otherwise merited matter is shut out because of a casual approach based on a badly drafted affidavit in support and a shaky statement of facts. I would have expected, with respect, much more from the applicant and counsel. Courts cannot at this stage, when the judiciary is undergoing fundamental changes, be expected to give insightful and eye opening decisions when parties are busy bringing still-born matters for determination.

In any event, I have to do what I am mandated by law, its procedure and practice to do, and with great reluctance, I hereby dismiss the application dated 1st March 2004.

Costs shall be in the cause. Orders accordingly.

Dated and Delivered at Nairobi this 3rd day of March 2004.

I.LENAOLA

<u>AG. JUDGE</u>