



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**CIVIL SUIT NO 1111 OF 2003**

**KENYA ANTI-CORRUPTION COMMISSION .....PLAINTIFF**

**VERSUS**

**KAMLESH MD PATTNI & OTHERS..... DEFENDANTS**

**RULING**

On 20th November, 2003 the parties to this suit appeared before the Honourable the Chief Justice, for mention and directions.

Appearance before the Chief Justice came in the wake of *ex parte* hearings by the Honourable Lady Justice K H Rawal, whose two rulings of 7<sup>th</sup> November, 2003 and 12th November, 2003 respectively may be recapitulated as follows:-

Prior to her first Ruling of 7th November, 2003, the Honourable Lady Justice Rawal had made certain orders *ex parte* on 30th October, 2003 in response to an application made under order XXXVI, rule 12 and order XL, rules 1-4 of the Civil Procedure Rules and section 56 of the Anti- Corruption and Economic Crimes Act, 2003 by the plaintiff.

These orders were as follows:

(a) that Mr Hezekiah Wangombe Gichohi be appointed a receiver/ manager of the defendants No 2, 6 – 17 until the main suit is heard and determined.

(b) that defendant No 3 be forthwith removed from office of receiver/manager of defendants No 2, 6 – 17;

(c) that defendants No 1 and 4, the management of the Duty Free Shops at Nairobi and Mombasa International Airports, be removed from possession of the assets of defendants No 2,4, 6 – 17;

(d) That Mr Hezekiah Wangombe Gichohi do have power of management of the business of defendants

No 2, 4, 6–17; to bring and defend suits, protect and preserve the assets including collecting rents and profits until the suit is heard and determined;

(e) That the orders made be enforced with the assistance of the court bailiff and/or the OCS, Nairobi Central Police Station.

Thereafter, there were applications made on behalf of some of the parties, seeking a stay of the *ex parte* orders of 30th October, 2003. These were addressed in Honourable Lady Justice Rawal's interim ruling of 7<sup>th</sup> November, 2003.

The salient points in this interim ruling are as follows:-

(i) An application by Chamber Summons was seeking several interim orders pending the determination of the suit brought by Originating Summons;

(ii) The learned judge recognized that some of the *ex parte* orders she had made on 30th October, 2003 adversely affected defendants No.13 (Marshalls East Africa), 16 (Delphis Bank), 9 (Block Hotels Ltd.), 10(United Touring Co Ltd).

(iii) It was averred in the Affidavit of M L Somen, for defendant No 13 (Marshalls East Africa), that this party was not under receivership, and was quoted on the Nairobi Stock Exchange.

(iv) It was brought to the attention of the Court that defendant No 1 (Mr Pattni) had filed HCC No 879 of 2001 against defendant No 13 (Marshalls East Africa), and that this suit was pending in court.

In the meantime, these two defendants have entered into a comprehensive consent order pending final determination of the suit.

The effect of the consent order is a stay of any dealing with its shareholding and dividends. Counsel for defendant No 13, Mr Ramesh Manek, has given an undertaking to inform the plaintiff forthwith of any change in the scope or status of the consent order.

The judge ordered that the order dated 30th October, 2003 be stayed in the case of defendant No 13, pending further orders.

(v) defendant No 16 (Delphis Bank Ltd.) also filed an application, on 4<sup>th</sup> November, 2003 – by Notice of motion supported by the affidavit of Girish Vaghji Shah. It is asserted that Delphis Bank Ltd. had been placed under story management by the Central Bank of Kenya, but had now recovered; and Delphis Bank is no longer under receivership. The Bank has 1209 shareholders, and defendant No 17 (Driscoll Investments Ltd.) has only 3,125 out of 1,263,451 shares.

The learned Judge ordered that the *ex parte* order of 30th October, 2003 be stayed in relation to defendant No 16 (Delphis Bank Ltd), pending further orders.

(vi) An application was also made by Kenya Commercial Bank (KCB) and Christopher Mwangi Chege, as interested parties – dated 4th October, 2003. A Supporting Affidavit, sworn by Gervasio Murara – averring that defendants No 9 (Block Hotels Ltd) and 10 (United Touring Co) do owe substantial sums of money to KCB and, in exercise of its rights as a debenture holder, it appointed Christopher Mwangi Chege as receiver/ manager of defendants No 9 and 10, on 2nd October, 2003.

In an interim ruling of 29th October, 2003 the High Court at the Milimani Commercial Courts directed that Mr Christopher Mwangi Chege will continue to be responsible for running defendants No 9 and 10. The learned judge stayed the order of 30th October, 2003 in relation to defendants No 9 and 10 until further orders.

The learned Judge made a longer ruling which focused on an application by Chamber Summons falling under the Originating Summons, both filed on 30th October, 2003. The Originating Summons was filed by the Kenya

Anti-Corruption Commission, established under the Anti-Corruption and Economic Crimes Act, 2003.

The claim in the Originating Summons is that the first defendant, Kamlesh Pattni, acquired varied

interests in properties and shareholdings in the several defendant parties, through money acquired corruptly.

In the aftermath of the making of the earlier set of interim *ex parte* orders, all the remaining parties have also filed applications seeking *ex parte* orders. This clutter of applications presented a case management problem, and it became necessary for the learned judge to address certain legal issues in her Ruling, which is based on *ex parte* hearings. The learned judge considered it wise to deal with threshold issues raised by all the *ex parte* applications. She notes that these applications had as their reference point section 56(4) of the Anti-Corruption and Economic Crimes Act, 2003, and certain relevant procedural laws, such as Section 3A of the Civil Procedure Act.

The learned judge has extracted six core elements of legal significance in the *ex parte* applications. These may be re-stated here:

1. Whether the filing of the suit by Originating Summons raises any problem in law;
2. Whether the Chamber Summons filed under the scheme of the Originating Summons raises any legal problem;
3. Whether any difficulties in respect of (1) and (2) above would taint the Court's jurisdiction in relation to orders made;
4. The validity of a Chamber Summons application without a Supporting Affidavit;
5. Does the plaintiff lack *locus standi*?
6. Are the orders sought in excess of the Court's powers?

The learned Judge noted that the positions of counsel in the above matters have tended to be in diametric opposition; but, she was able to point in the correct policy direction that should underlie the Court's initiative in resolution.

In her words (p 5):

".....the matter..... is to be tested for the first time in our legal history and which is enunciated from the Act, which is enacted for the ..... investigation and punishment of corruption, economic crime and related offence."

The significance of this point will be that, as the Court gives direction on the management and determination of this complex case, the public interest, which expresses itself in the governing legislative policy, will have to be taken into account, and this may serve to resolve the many technical complications that are all-apparent from the numerous applications the learned judge had to address.

The conclusion to be drawn from the detailed ruling of the Honourable

Lady Justice Rawal is that the legal issues addressed, which, of course, arose from *ex parte* submissions of counsel, were somewhat ahead of the progress of litigation. The learned judge was confronted with plurality of

*ex parte* applications each focused on the litigious interests of individual parties standing on their own. Naturally, diametrically opposed legal arguments were advanced whose effect was to challenge the very concept of litigation based on allegations and perceptions of corruption. So the Judge directed the whole matter to go to the Hon Chief Justice to have more than one legal mind to address what counsel seek in this matter.

The Honourable Chief Justice, thus, held a mention session on 20<sup>th</sup> November, 2003, for the purpose of

setting the stage for progress in dispute settlement, on a matter of great public importance. His first step was to constitute the two-judge bench which sat on 8th December, 2003. Now following is the outcome of the hearing of 8th December, 2003, and the directions which this court gives for the hearing and disposal of the case. Dr Kamau Kuria for the plaintiff made a presentation on the current state of the litigation. It is clear from his account that there is one suit, initiated by Originating Summons, and that within it there is an Interlocutory Application, which is now the item of agenda of priority for the plaintiff.

However, the flow of litigation cannot proceed because of three factors:

(a) there are many interlocutory, *ex parte* applications from different parties;

(b) there are applications challenging the ruling of the Honourable Lady Justice Rawal in respect of points of law;

(c) a much more momentous interruption to the career of the suit is the fundamental rights claims now being made under the Constitution.

Straight away, category (b) above can, for the most part, be disposed of.

It is not time for the Court to start addressing the complex legal issues that were brought before Honourable Lady Justice Rawal through interlocutory, *ex parte* applications. For one thing, hearings in court will now be (as ought to be the case) largely *inter partes*; and it is during those hearings that the complex legal issues will be addressed. It should be quite clear that when Lady Justice Rawal delved into specific legal issues, the matter was at that stage largely academic; and indeed she did state quite clearly that she was only defining certain trial thresholds.

Legal Notice No 133 of 2001, rule 10 stipulates as follows:

“(a) Where violation of fundamental rights and freedoms is alleged in any proceedings pending in the High Court, application for determination of the question shall be made by Notice of Motion in the matter and in that case the provisions of order L of the Civil

Procedure Rules shall, as far as practicable, apply.

(b) Pending the determination of such question all further proceedings shall be stayed.”

It follows that the present suit, in terms of progress towards determination and disposal, must be stayed, to create room for the constitutional applications.

While the foregoing point is agreed, counsel took different positions regarding the mode of disposal of the fundamental rights claims. Has the Chief Justice already determined that the present two-judge bench should proceed with the matter? Or, is it the correct and regular procedure that this two-judge bench should, in its ruling, refer this matter back to the Chief Justice so that he may set up a constitutional bench? And what is to be the fate of a preliminary objection to the constitutional rights applications which had been filed by the plaintiff? Mr Kalove who represented the first and second defendants (both of whom have filed constitutional references) remarked that, by the time the Honourable Chief Justice conducted a mention of this matter, on 20<sup>th</sup> November, 2003, no constitutional matter had been filed, and his concern would have been only the large number of applications which stood in the way of an efficient trial. Mr Kalove submitted that the emergence of the constitutional applications now dictated that the matter be brought before the Chief Justice once again, for the setting up of a constitutional bench. This position was supported by Mr Kilonzo who also submitted that it should be the responsibility of the constitutional bench to deal with the Preliminary Objection filed by the plaintiff, since this objection was essentially concerned with constitutional issues. In further support of this position, Mr Ochieng Oduol, representing defendants No 5 – 11, 14 – 17 argued that he setting up of a constitutional bench and the issuance of further directions were critical, as they would pave the way for the filing and service of

essential documentation. This position was also supported by Mr Kamara who represented defendant No 13, and by Mr Arwa who represented the interested party. Dr. Kamau Kuria for the plaintiff, took a different stand. He considered that the Honourable Chief Justice had already given the trial directions, including the appointment of a two-judge bench which has the competence to determine all relevant questions including the constitutional ones. He argued that the jurisdiction of the High Court is clearly described in section 60 of the Constitution, and the Bench as constituted could deal with all matters relevant to the suit and its attendant applications. He further submitted that under the current legal position, once the Chief Justice has named a bench and entrusted to it a certain judicial responsibility, there is no provision for reference-back and the Bench must take its own decisions and proceed with its tasks.

After anxious consideration of the documents on file, the rulings of Honourable Lady Justice Rawal, and the very detailed submissions of counsel, we now come to a number of general points, findings and directions.

These may be set out in point form as follows:

1. The suit in this case, being brought within the framework of the Anti-Corruption and Economic Crimes Act, 2003, is an attempt to address issues of legislative policy which are, no doubt, of considerable public interest.
2. It follows that a commitment to conduct the litigation in a businesslike manner, and in accordance with the law, should be the primary feature of the present suit and any legitimate application falling within its ambit.
3. As most of the Interlocutory Applications filed within the framework of the present suit are quite similar, so far as practicable they should be taken together in the course of the prosecution of the main suit.
4. Those applications that raise constitutional rights issues, similarly, address the same or very similar questions, and on this account they should be taken together, heard and disposed of before a duly constituted constitutional bench. Defendants No 1, 2 and 4 have filed applications founded on breach or likely breach of constitutional rights, and such applications should be disposed of in but one process of hearing.
5. We would refer the question of the setting up of a constitutional bench to the Honourable Chief Justice for action as he may deem appropriate.
6. For expeditious disposal of the constitutional matters, we would advise that directions be given to parties to file and serve any necessary prayer documents or affidavits within defined periods of time, with hearing dates given.
7. As soon as the constitutional issues are disposed of, and in so far as they will not take away the legal foundations of the present suit, the suit should commence without delay and proceed on a disciplined programme of hearings.
8. Issues of law and procedure such as those which were canvassed in *ex parte* Interlocutory Applications, for instance, the choice between a plaint and an Originating Summons to commence proceedings, the mode of filing Chamber Summons, etc., should be taken up only at a later stage, within the framework of the proceedings of the main suit.

Dated and delivered at Nairobi this 22<sup>nd</sup> day of December, 2003

**J.W. MWERA**

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**JUDGE**

**J.B. OJWANG**

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**Ag JUDGE**