



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS CIVIL CAUSE NO. 100 OF 1999

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

CHIEF JUSTICE THE HON.ZACCHAEUS CHESONI.....RESPONDENT

EX-PARTE LAW SOCIETY OF KENYA

RULING

This Court was moved by the applicant, (Republic) *ex-parte* the Law Society of Kenya, by Notice of Motion under order LIII of the Civil Procedure Rules, the Law Reform Act (cap 26) and all enabling powers and provisions of law seeking an order of *mandamus* directed to the Chief Justice; The Hon Mr Justice Zacchaeus Chesoni (as he was then) requiring him to represent to the President of the Republic of Kenya that the question of removing Hon Justice Richard Kuloba ought to be investigated so as to facilitate the appointment by the President of a tribunal to enquire into the allegation of misbehaviour made against the said judge to wit that he had received a bribe of Kshs 5 million from one Kamlesh Pattni so as to give a decision favourable to Kamlesh Pattni in Nai HCCC No 418 of 1998 (*Kamlesh Pattni –vs – Nassir Ibrahim Ali*) in which Kamlesh Pattni was a party, and the report on the facts thereof, and recommend to the President whether Hon Mr Justice Richard Kuloba ought to be removed.

The applicant further asked for costs of the application to be provided for.

The background to this application was that on the 5th of January 1999, one Nassir Ibrahim Ali the defendant in NRB HCCC No 418 of 1998 made allegations contained in an affidavit filed in the said suit to the effect that Hon Mr Justice Richard Kuloba who was hearing the case had been given a bribe of Kshs 5 million by Mr Kamlesh Pattni, the plaintiff in the case, so as to give a decision in the latter's favour. On 6 January, 1999, the Hon Mr Justice Kuloba made orders in the said Suit No 418 of 1998 in which orders he set down the said suit for hearing before himself on 13th of January, 1999 regarding the matter of the alleged bribery. Before he could hear the allegation, the Hon Chief Justice, Mr Justice Zacchaeus Chesoni (as he was then) called for the court file in HCCC 418/98 and on the 8th of January, 1999 made an order in which he required the Hon Attorney General in the exercise of the powers conferred upon him (the Attorney General) under s 26(4) of the Constitution to carry out investigations to establish evidence of:

“(a) the alleged corruption;

(b) perjury contrary to section 108 of the Penal Code;

(c) conspiracy to defeat justice contrary to section 117 of the Penal Code; and any other offence investigation may disclose; and to take immediate action under the law . "

In the making the said order, the Hon Chief Justice had this to say:

"I have had the advantage of listening to the submissions by the two learned counsel, Mr Rabelo for the plaintiff and Mr Oduol for the defendant. I have carefully considered the counsel's submissions. In the result the application by the plaintiff for stay of execution shall be heard *denovo* by Mbaluto, J 11th January, 1999 at 9 am.

On the 15th of January 1999, the Hon Chief Justice made a further ruling on the matter, HCCC No 418 of 1999 having heard the then Director of Public Prosecutions, Mr B Chunga (now the Chief Justice), representing the Hon Attorney General and counsel for the defendant (Mr Oduol). In his ruling, the learned Chief Justice had this to say:

"With respect, I agree with the learned Director of Public Prosecutions that the Attorney General has nothing to do with, the civil battle between the parties and had the parties not introduced matters in the application for the learned judge to disqualify himself which raised matters of grave criminal nature, the Attorney General would not have been even mentioned.

As to whether the Attorney is a party to the civil case the answer is simple. He is not and that is why he does not want to get entangled in it. He has been brought into the matter by the Court which has no investigating arm of its own and has referred the matter to him to investigate its criminal aspect under the powers he enjoys under the Constitution. Consequently I disallow Mr Oduol's request for adjournment."

For the avoidance of doubt, this is not a proper case to decide whether the Court is an authority or person. The Director Public Prosecutor has correctly cited the Constitution and the Attorney General is not being ordered but the matter is referred to him, for him in exercise of the powers conferred by section 26(4) of the Constitution to take appropriate action as to:

a) the alleged corruption;

b) perjury contrary to section 108 of the Penal Code;

c) conspiracy to defeat the cause of justice contrary to section 117 of the Penal Code; and any other offence the investigation may disclose.

Dated and read to the parties at Nairobi this 15th day of January, 1999.

Z R Chesoni

Chief Justice"

I am satisfied that in making the above order and ruling, the Hon Chief Justice was not exercising his administrative duty as the head of the judiciary but he was exercising his judicial functions as a Chief Justice.

That is why he was able to listen to the submissions made before him by counsel for the parties, Mr Rabelo and Mr Oduol; and again by the learned Director Public Prosecution on behalf of the Attorney General and Mr Oduol for the defendant. Such ruling and order made by the Hon Chief Justice in his judicial capacity cannot be said to have been made by an inferior court or authority to which this Court has powers to direct otherwise. Sitting in a matter as a judicial officer, as was the case here, I am satisfied that the Hon Chief Justice could not be lawfully subjected to any kind of litigation pursuant to the provisions of section 6 of the Judicature Act (cap 8, Laws of Kenya). I am therefore satisfied that this

application is incompetent in law.

I would go further and say that at the time the Chief Justice was handling the above case, HCCC No 418 of 1999, I am satisfied that the question of removal of the Hon Justice Richard Kuloba had not arisen to warrant his Lordship referring the matter under section 62(5) of the Constitution to H.E the President as contended by the Law Society of Kenya. There was, I believe, no sufficient material placed before the Chief Justice upon which he could so act, and that is why, it was necessary in his view, to simply refer the matter to the Attorney General in exercise of the powers conferred by section 26 (4) of the Constitution. Moreover, the affidavit by Nassir Ali which sparked off such reference, needed further inquiry whether it constituted perjury or was part of a conspiracy to defeat the cause of justice under the Penal Code.

Having considered all the matters that were urged before me at depth by counsel for the parties, I am satisfied that in the circumstances of this case, *mandamus* does not lie due to the fact that the decision made by the respondent, Chief Justice Zacchaeus Chesoni, was a judicial decision which could have been appealed against by any party affected thereby, but cannot, with respect, be challenged under the provisions of order LIII of the Civil Procedure Rules and the Law Reform Act as is the case in this application since it was not made by an interior body or authority.

The decision to which I have arrived at is that this application by the Law Society of Kenya is incompetent in law and the same is hereby dismissed with costs.

It is so ordered.

Dated and Delivered at Nairobi this 11th day of April 2000.

S.O.OGUK

JUDGE