



**Hassan & another v Director of Public Prosecutions & 5 others (Constitutional Petition 122 of 2020) [2024] KEHC 12098 (KLR) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12098 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION 122 OF 2020**

**OA SEWE, J**

**OCTOBER 3, 2024**

**IN THE MATTER OF ARTICLES 10, 19, 20, 21, 22, 23, 27, 28, 29, 31(1),  
40, 45(1), 47, 49, 50, 157(11), 238(1) & (2), 239(3), 244(C) & (D), 245(4),  
249, 258(1) AND 259 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

**AND**

**2.**

**IN THE MATTER OF THE OFFICE OF THE DIRECTOR  
OF PUBLIC PROSECUTIONS ACT NO. 2 OF 2013**

**AND**

**IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT, 2011**

**AND**

**3.**

**IN THE MATTER OF ITEMS RECOVERED FROM THE HOUSE  
OF BAKTASH AKASHA ABDALLA ON 9TH NOVEMBER 2014**

**BETWEEN**

**NAJMA JUMA HASSAN ..... 1<sup>ST</sup> PETITIONER**

**FATMA AKASHA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> RESPONDENT**

**DIRECTOR CRIMINAL INVESTIGATIONS ..... 3<sup>RD</sup> RESPONDENT**



IN CHARGE NARCOTICS UNIT ..... 4<sup>TH</sup> RESPONDENT  
COAST REGION POLICE COMMANDER ..... 5<sup>TH</sup> RESPONDENT  
COAST REGION REGIONAL CRIMINAL INVESTIGATION  
OFFICER ..... 6<sup>TH</sup> RESPONDENT

## RULING

- (1) The two petitioners filed their Notice of Motion dated 24<sup>th</sup> May 2024 seeking the release of certain items recovered from the house of one Baktash Akasha Abdalla on or about the 9<sup>th</sup> November 2014. The brief background to the application is that the 1<sup>st</sup> petitioner is the wife of the said Baktash Akasha Abdalla while the 2<sup>nd</sup> petitioner is the 1<sup>st</sup> petitioner’s mother in law. They averred that, on the night of 9<sup>th</sup> November 2014 while they were at home on Plot No. 5075 in Nyali within Mombasa County, police officers conducted a raid in the premises and seized several items. The 1<sup>st</sup> petitioner explained that her husband was arrested and subsequently extradited to the United States and is now serving a 25-year jail term imposed by the District Court, Southern District of New York for drug related offences.
- (2) The 1<sup>st</sup> petitioner further averred that later, some of the seized items were returned to the family save for the items inventoried in Annexure “NJH-3. The 1<sup>st</sup> petitioner explained that the respondents maintained that the rest of the items would be used as exhibits in the extradition proceedings and were therefore liable to forfeiture. She further stated that the said items were never used as exhibits in the extradition proceedings. On the basis of the foregoing assertions, the petitioners prayed that the items aforementioned be released to them.
- (3) The petitioners relied on the Judgment dated 8<sup>th</sup> November 2023 delivered by Hon. Ogola, J. by which the respondents were given 60 days to initiate forfeiture proceedings, failing which the petitioners would be at liberty to make an application for release of the all the items and properties listed in Annexure “NJH-3”. They deposed that, as of 24<sup>th</sup> May 2024 when their application was filed, no forfeiture proceedings had been initiated. Consequently, they prayed that the said items be released to them forthwith.
- (4) The application proceeded ex parte and was fixed for ruling on 3<sup>rd</sup> July 2024. Thereafter the 1<sup>st</sup> respondent moved the Court vide two applications dated 20<sup>th</sup> June 2024 (the 1<sup>st</sup> application) and 21<sup>st</sup> June 2024 (the 2<sup>nd</sup> application). The 1<sup>st</sup> application seeks that the decision of Hon. Ogola J. dated 8<sup>th</sup> November 2023 be reviewed and set aside; while the 2<sup>nd</sup> application seeks stay of the ruling to pave way for the rehearing and determination of the petitioners’ application dated 24<sup>th</sup> May 2024. It is significant that, in the 2<sup>nd</sup> application, the 1<sup>st</sup> respondent prayed, not only for enlargement of time to file a replying affidavit in respect of the petitioners’ application dated 24<sup>th</sup> May 2024 but also that the Replying Affidavit marked “MA” be deemed as duly filed as a response to that application.
- (5) In effect, the 1<sup>st</sup> respondent sought the reopening of the proceedings in connection with the petitioners’ application dated 24<sup>th</sup> May 2024, including the setting aside of the ex parte proceedings held on 20<sup>th</sup> June 2024. The application was anchored on Articles 50 and 159 of the *Constitution* as well as Sections



1A and 3A of the Civil Procedure Rules. Article 50 safeguards the right to fair hearing; and provides thus at Sub-Article (1):

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

- (6) Article 259 on the other hand provides, among other things, that justice be administered without undue regard to procedural technicalities and that the purpose and principles of this Constitution be protected and promoted. On the basis of those precepts, the 1<sup>st</sup> respondent pleaded that it is in the public interest for the proceedings in respect of the petitioner’s application to be reopened. Indeed, Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 recognizes that:

“Nothing in these rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

- (7) There is no gainsaying therefore that the Court has the discretion to set aside its orders, and as pointed out in *Shah v Mbogo* [1967] EA 116, the discretion is intended to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

- (8) Similarly, in CMC Holdings Limited v Nzioki [2004] 1 KLR 173 it was held that:

“In law, the discretion that a Court of law has, in deciding whether or not to set aside an ex-parte order...was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would...not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error...”

- (9) Hence, the question to pose is whether sufficient cause has been shown by the 1<sup>st</sup> respondent to warrant the re-opening of the proceedings in respect of the petitioners’ Notice of Motion dated 24<sup>th</sup> May 2024. As was acknowledged by the Court of Appeal of Tanzania in *The Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman Bunju Village Government & Others* in Civil Appeal No. 147 of 2006 what constitutes sufficient cause ought to be given a liberal construction in order to advance substantial justice. Here is what the Court had to say:

“It is difficult to attempt to define the meaning of the words ‘sufficient cause’. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant”

10. The explanation offered by the 1<sup>st</sup> respondent for non-attendance on 20<sup>th</sup> June 2024 was that there was miscommunication between the advocates appearing for the respondents in the matter. The 1<sup>st</sup> respondent’s explanation was not refuted by the petitioners as no response was filed to the subject application. Moreover, there was non-attendance by or for the petitioners on 9<sup>th</sup> July 2024 when the 1<sup>st</sup> respondent’s applications came up for hearing. Accordingly, the explanation given by the 1<sup>st</sup> respondent for non-attendance on 20<sup>th</sup> June 2024 is entirely uncontroverted and is, in my careful consideration, plausible.



- (11) I am guided in this respect by the decision of the Court of Appeal in *Philip Chemwolo & Another v Augustine Kubende* [1982-88] KAR 103 that unless and until the court has pronounced a judgment upon the merits or by consent, it has the discretion to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure. Hon. Apaloo, JA said:

“I think a distinguished equity judge has said:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.”

I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

- (12) Given the nature and purport of the two applications, it is only prudent and procedural that this ruling be confined to the 2<sup>nd</sup> application to enable the 1<sup>st</sup> respondent participate in the petitioners’ application dated 24<sup>th</sup> May 2024. I say so because, the 1<sup>st</sup> respondent has expressed a desire to respond to the said application and has proposed, in the draft affidavit, to convince the Court as to why the subject items should not be released as prayed by the petitioners.
- (13) It is in the light of the foregoing that I find merit in the 1<sup>st</sup> respondent’s 2<sup>nd</sup> application dated 21<sup>st</sup> June 2024. The same is hereby allowed and orders issued as follows:
- (a) That the proceedings and orders made herein on 20<sup>th</sup> June 2024 be and are hereby set aside.
  - (b) That leave be and is hereby given to the 1<sup>st</sup> respondent to file a response to the petitioner’s application dated 24<sup>th</sup> May 2024. The same to be filed and served within 7 days from the date hereof.
  - (c) That corresponding leave be and is hereby given to the petitioners to file and serve a Supplementary Affidavit, if need be, within 7 days from the date of service of the 1<sup>st</sup> respondent’s Replying Affidavit.
  - (d) The 1<sup>st</sup> respondent’s 1<sup>st</sup> application dated 20<sup>th</sup> June 2024 be kept in abeyance pending further orders of the Court upon disposal of the petitioners’ application.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 3<sup>RD</sup> DAY OF OCTOBER 2024**

**OLGA SEWE**

**JUDGE**

