



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI- CORRUPTION AND ECONOMIC CRIMES DIVISION
ACEC MISC. APPLICATION NO. E014 OF 2021

DIRECTOR OF PUBLIC PROSECUTION.....APPLICANT

VERSUS

H.E. HON. MBUVI GIDION SONKO..... RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION.....1ST INTERESTED PARTY

THE ATTORNEY GENERAL2ND INTERESTED PARTY

CHIEF MAGISTRATE, ANTI-CORRUPTION DIVISION..3RD INTERESTED PARTY

ANTHONY OTIENO OMBOK.....4TH INTERESTED PARTY

ROG SECURITY LIMITED5TH INTERESTED PARTY

RULING

1. The Respondent herein, the Impeached Governor of Nairobi County Government, has been charged and is undergoing trial before the 3rd Interested Party in Criminal Case No. 1 of 2019, which trial has led to several applications and petitions being filed by the Respondent, to either this Division of the High Court and/or to the Constitutional & Human Rights Division.

2. For the purposes of this ruling, the applicant has moved this court by way of a Notice of Motion seeking the following orders: -

a) That this Honourable Court be pleased to issue an order calling for and placing the following matters before it to satisfy itself as to the duplicity and similarity of the prayers sought therein:- **Misc. Application No. E94 OF 2021 MIKE SONKO MBUVI GIDEON KIOKO v DPP; MISC. APPLICATION NO. E008 OF 2021 MIKE SONKO MBUVI GIDION KIOKO v DPP; PETITION NO. E004 OF 2021 MIKE MBUVI SONKO v DPP AND OTHERS; PETITION NO. E101 OF 2021 MIKE MBUVI SONKO v DPP AND PETITION NO E093 OF 2021** and to give such directions to preserve the integrity of the process of Court .

b) That the Honourable Court be pleased to issue conservatory orders staying the hearing and determination of the above suits pending the hearing of this application.

c) That the Honourable Court be pleased to find and order that the following applications as filed are frivolous vexatious a duplication and otherwise an abuse of the court process.

d) That the Honourable Court be pleased to strike out Misc. Application No. E094 of 2021, E008 of 2021, Petition No. E004 of 2021, petition No. E101 of 2021 and Petition No. E093 of 2021.

e) In the alternative the court does direct that all the cases be consolidated and heard as one.

3. The application was supported by an affidavit sworn by JUDY THUGURI in which she stated that on 9th December, 2019, the respondent was charged along with others before the Chief Magistrate in Anti-corruption cases No. 31 of 2019 and 32 of 2019 and the trial court consolidated

the two cases for purposes of pre-trial directions.

4. That the witness protection Agency moved the court for protection of some witnesses in Misc. No. 1 of 2021 which order was duly granted.

5. On 27th January, 2020 the charge sheet in 31 of 2019 was substituted thereby creating Anti-Corruption Case No. 1 of 2021 which was fixed for hearing after a comprehensive pre-trial on 14th July, 2020, after which the respondent filed the applications and petitions stated herein in an attempt to scuttle the trial process in the said case.

6. It was stated further that the respondent thereafter filed the following matters before various courts:-

A) Petition No. 34 of 2019 Mike Mbuvi Sonko vs EACC and others.

B) Petition No. 36 of 2019 Hardy Enterprises and others vs EACC and Others.

C) Petition No. 38 of 2019 Mike Mbuvi Sonko vs EACC and others.

D) Misc. Criminal Application No. 23 of 2020 Mike Mbuvi Sonko V EACC and another.

E) Court of Appeal Criminal Appeal No. E005 of 2020 KIOKO MIKE MBUVI SONKO v DPP.

F) Misc. application No. E24 of 2020 formerly Machakos E006 of 2020.

G) Misc. Application No. E94 of 2021.

H) Misc. application No. E008 of 2021.

I) Misc. application No. E004 of 2021.

J) Petition No. E101 of 2021.

K) Petition No. E005 of 2021.

7. It was contended that the said cases were an abuse of the process of court as the respondent had filed suit after suit seeking to hoodwink and arm twist the court into staying the matter in the lower courts and inevitably duplicating orders sought.

8. It was stated that the matters involved similar parties on the same subject matter and it was evident that the respondent had no intention of seeking actual justice but only to seek favourable orders of stopping the trial as stated by the respondent's counsel in the supporting affidavit to petition No. 24 of 2020.

9. The 1st Interested party supported the application herein by way of grounds of in support and stated that in a span of two weeks the respondent had filed five petitions whose gravamen was the alleged bias by the trial court in ACC No. 1 of 2020, which in a ruling dated 4th March, 2021 dismissed the respondent's application for recusal.

10. That the respondent did not prefer an appeal therefrom but opted to file the petitions herein, which conduct was not only a mockery of judicial system but amount to gross abuse of the court process.

11. In response to the said application, the respondent file a replying affidavit in which he deposed that the procedure of conducting a miscellaneous applications and petitions were different and that the matters raises different points of law.

12. It was stated that Petition No. E101 of 2021 raises the issue of law and fact in regard to the appointment of special magistrates by the Chief Justice as being against the provisions of Article 2(4) of the Constitution and sought a declaration that Sections 3, 4 and 5 of the ACECA 2003 is null and void and all acts undertaken with the Authority provided under Section 3(1) and 5(2) of the Act are invalid.

13. It was contended that Constitutional Petition No.E005 of 2021 also raised different issues as regards bias by the Learned Prosecutor and therefore should be heard separately from E004 of 2021 which raises the issues of bias by the trial court, who allegedly proposed plea bargain when the same was not from the parties, clearly showing an already pre-determined the guilty status of the accused.

14. For record purposes, it must be stated that all the matters filed by the Respondent, in the Anti –Corruption and Economic Crimes Division, were placed before the court at the hearing of this application. The only file which was not placed before the Court was Constitutional Petition No. E101 of 2021 pending before the Constitutional & Human Rights Division.

SUBMISSIONS

15. On behalf of the applicant, it was submitted that the respondent filed two Miscellaneous Applications in the High Court Divisions No. 094 of 2021 and HCACEC MISC No. E008 of 2021 in which he sought that CRIMINAL CASE No. 1 of 2020 be transferred from the Chief

Magistrate Court presided over by Hon Ogoti to any other court of equal superior jurisdiction for hearing and determination.

16. It was submitted further that the respondent filed three petitions also seeking similar orders and/or prayers, to wit Petition No. 4 of 2021 and No. 5 of 2021 for a declaration that the continued conduct of the proceedings in ACC 1 of 2020 by the trial court was in violation of the petitioners right to fair hearing and therefore sought conservatory order of stay of proceedings, with Petition No. 4 seeking for a transfer of the said case to another magistrate, while in Petition No. 5, he sought for an order quashing the entire proceedings in ACC No. 1 of 2020 and an order of permanent restraint against the respondents.

17. It was submitted that in Petition No. E101 of 2021 the petition sought a declaration that sections 3, 4 and 5 of ACECA were null and void with regard to Article 2(4) of the constitution and a declaration that the appointment of a special Magistrate by the Chief Justice, violated the petitioners right to fair trial under Articles 50 (2) (d) and 25(2) (c).

18. It was submitted that the issues raised in all the matters filed by the respondent were similar and therefore ought to be struck off as an abuse of the court process as was stated in the cases of **SATYA BHAMA GADHI v DPP & 3 OTHERS [2018] eKLR AND REPUBLIC v PAUL KIHARA KARIUKI & 2 OTHERS EX PARTE LAW SOCIETY OF KENYA [2020] eKLR**.

19. It was stated that the Honourable Court in the exercise of its inherent jurisdiction, must protect itself from abuse and to ensure that its processes are not abused. It was stated that the reliefs sought by the Respondent in the five applications and petitions were similar and arises out of the application for recusal by the trial court, which has not been challenged by way of either an appeal or revision as was stated in the case of **MOHAMED KHAMIS v ZARUM INVESTMENT LTD [2020] eKLR**.

20. It was submitted that the Honourable court should not allow its process to be abused by persons having clandestine motives as was stated in the case of **ATTORNEY GENERAL v MESHACK OCHIENG T/ A MECKO ENTERPRISES [2019] eKLR**. It was submitted that the duties of a lawyer to the court was to act with integrity and professionalism while maintaining his or her overarching responsibility to ensure civil conduct.

21. It was stated that the counsel for the respondent had failed and neglected to uphold his duty to court and instead sacrifice the sanctity of the judicial process to the alter of the client's interest. It was submitted that by filing different application and petition seeking the same order in different courts of concurrent jurisdiction, falls within the preview of abuse of the court process.

22. It was submitted that the five applications and petitions, the orders sought therein in various suits, that not only dealing with singular fashion would not only be a waste of judicial time and resources but also invoke the doctrine of resjudicata as was stated in the case of **KENYA COMMERCIAL BANK LTD v BENJOH AMALGAMATED LTD [2017] eKLR** and **LAW SOCIETY OF KENYA v CENTRE FOR HUMAN RIGHTS & DEMOCRACY & 12 OTHERS [2014] eKLR**.

23. On behalf of the 1st Interested Party it was submitted that the substratum of the petitions and applications were the ongoing proceedings in ACC NO 1 of 2020 wherein the respondent and others are facing several charges of corruption and economic crimes. It was stated that the respondent's applications and petitions raised two distinct complaints, bias by the trial court and a declaration that the special magistrates court to handle corruption matters was unconstitutional.

24. It was the Interested party contention that the applications were filed with the sole objective to stall or otherwise inordinately delay the hearing of the ACC No. 1 of 2020 as opposed to seeking justice and therefore the court should use its inherent jurisdiction to protect itself from abuse as was stated in the case of **ERICK WAMBUA MULI & ANOTHER v PRIME BANK LTD & 3 OTHERS [2017] eKLR**.

25. It was submitted that a litigant was not allowed to pursue two court processes of similar nature at the same time, as was stated in the case of **GRAHAM RIOBI SAGWE & OTHERS v FINA BANK LTD AND OTHERS** where the court stated that it is settled that a litigant had no right to pursue paripasua two processes which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both and that the pursuit of the second would be regarded as an abuse of the court or legal process .

26. It was submitted that by pursuing five suits seeking similar orders, on the same subject matter against the same parties, the respondent had grossly abused the court process for which he ought to be sanctioned. It was contended that the gravamen of the multiple petitions and applications by the respondent, being alleged bias by the trial court had been litigated before the trial court and a ruling thereon delivered, which the respondent had not proffered an appeal or review on.

27. It was therefore submitted that the said applications and petitions be struck out with cost for being frivolous vexatious and gross abuse of the court process or in the alternative be consolidated for hearing and disposal as they all arise as regards to the proceedings before ACC no 1 of 2020 and whose prayers differently coached, if allowed would have the resultant effect of having the said trial stayed and or to proceed before a different magistrate as was stated in the case of **SATYA BHAMA GADHI v DPP (supra)** and that the mere omission by the respondent of some parties or a party does not affect the application for consolidation.

28. On behalf of the respondent, it was submitted that all the suits filed by the respondent were not against the same parties and that the substratum of each one of them was different and the relief sought not similar. It was stated that the application was without merit as the applicant was aware of the injustice the respondent had been visited upon by the trial court.

29. It was stated that the principles for consolidation were that there must be similarity in law and fact running through the suits that are sought to be consolidated as stated in **REPUBLIC v PAUL KIHARA KARIUKI & TWO OTHERS EX PARTE LAW SOCIETY OF KENYA (supra)**.

30. It was contended that consolidation of suits should not be used to give advantage to one party against the other as was held in the case of **LAW SOCIETY OF KENYA v THE CENTRE FOR HUMAN RIGHTS AND DEMOCRACY**. It was stated that the court should not

strike out the suits before its applies its mind to them.

DETERMINATION

31. As submitted by the Respondent, the law on consolidation of suits is now well settled in Kenya. What the Court ought to consider while exercising the discretion to order for the same are the following:

- a) whether the suits involve a common question of law or fact
- b) whether the reliefs sought or claimed arise out of the same transaction
- c) whether it is convenient and efficient to pursue the same in a consolidated suit in filling of the overriding objectives
- d) whether consolidation would cause the plaintiff an undue advantage or prejudice.

32. This legal position was stated in the case of **REPUBLIC v PAUL KIHARA KARIUKI EX PARTE LAW SOCIETY OF KENYA [2020] eKLR** where the court set into detail the consideration when it comes to consolidation, in the following manner:-

“11. The principles of consolidation of suits are settled. They were best explained in Stumberg and another v Potgeiter^[1] as follows:-

“Where there are common questions of law or facts in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered.”

12. The Supreme Court Case of India in Prem Lala Nahata & v Chandi Prasad Sikaria^[2] had this to say: -

“...Consolidation is a process by which two or more causes or matters are by order of the Court combined or united and treated as one cause or matter. The main purpose of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the Court and it appears to the Court that some common questions of law or fact arises in both or all the suits or that the rights to relief claimed in the suits are in respect of or arise out of the same transaction or series of transactions; or that for some other reason it is desirable to make an order consolidating the suits”

13. In Law Society of Kenya v The Centre for Human Rights and Democracy,^[3] the Supreme Court of Kenya had this to say about consolidation of suits: -

“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it.” (Emphasis added)

14. From the above jurisprudence, a broad principle emerges relating to consolidation of suits. That is, where there are common questions of law or fact in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matter should be disposed at the same time, consolidation should be ordered. However, it is succinct position of law that precedential verdicts are to be followed where the facts of the case are almost identical in nature or the question of law involved is identical.

15. The plea to consolidate the cases was raised in response to the courts invitation to the parties to address the existence of an identical suit filed by the Law Society of Kenya, Nairobi branch based on the same set of facts seeking similar orders as sought in this case. As the Supreme Court observed in the above cited case, consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it. If the instant cases are examined in the light of the above settled legal propositions, then it becomes clear that the plea for consolidation cannot stand judicial scrutiny in this case. The issues at hand are crystal clear, namely, whether this suit offends the question of sub judice and whether it is an abuse of court process. If the answers are in the affirmative, then consolidation would be impermissible because its application was never meant to cure or cover the doctrine of sub judice or abuse of court process. Put differently, a plea for consolidation is not permissible in circumstances whereby it is evident it is being used to evade the wrath of the sub judice rule as opposed to serving the settled principles of consolidation laid down in the above authorities.”

33. From this clear principles of the law, the court is now called upon to examine the cases filed by the respondent and which are before this court, to find out whether they fall with the scope as stated herein above.

34. In Anti-Corruption Petition No 4 of 2021 which was filed at the Constitutional and Human Rights Division as E094 of 2021 the petitioner is seeking an order that criminal case no ACC 1 of 2020 be transferred from the court presided by Hon. Ogoti CM to any other court of equal superior jurisdiction for hearing and determination on account of bias on the part of the trial court towards the applicant.

35. In Petition No. 5 of 2021 formerly E093 of 2021 filed at the Constitutional Division of the High Court, the respondent is alleging breach of his fundamental rights under the Bill of Rights and in particular the right to fair hearing under Article 50(1) (2) (a) by the conduct of the

special prosecutor with the assistance of the trial Magistrate Hon.Ogoti, over the trial in ACC No. 1 of 2020.

36. In MISC.CRIMINAL APPLICATION No. E008 of 2021 the respondent is seeking an order that ACC No. 1 of 2020 be transferred from the court presided over by Hon. Ogoti to any other court of equal superior jurisdiction for hearing and determination, on the ground that he has lodged a complaint against the trial court with the judicial service commission, which the trial court has acknowledged on account of how the same has treated the respondent in the course of the trial.

37. For record purposes, there is one other Petition pending before the Constitutional & Human Rights Division, which was not placed before the court, in which the respondent is challenging the constitutionality of the appointment of special Magistrates under the provision of Sections 2 and 3 of the ACECA by the Chief Justice, being Petition No. 101 of 2021.

38. It must be noted that the trial Magistrate in ACC No. 1 of 2020 is one such a special Magistrate, it therefore follows that the said petition also has its foundation in the trial of the respondent in ACC No. 1 of 2020

39. I would therefore agree with the submissions that the cases filed by the respondent as stated herein arise out of the same transaction and involve the same question of law and fact and are directed at the conduct of his trial before the Chief Magistrate in ACC No. 1 of 2020.

40. Since the petitions and applications raise the same issue and have the same substratum, and whereas the petitioner/applicant is entitled to his day in court for a just determination of the issues raised, for the speedy disposal of all the cases so far filed, I am of the considered view that an order for consolidation will best serve the course of justice in this matters. I therefore order that all the petitions and applications filed by the Respondent in respect of the subject matter arising out of the conduct of his trial in ACC No. 1 of 2020 be and are hereby consolidated to be heard together in Petition No. 5 of 2021 which involved all the parties in the disputes.

41. Having ordered for the consolidation of the cases, it follows that the issue of striking of the suits for being an abuse of the process of court does not now arise since the petition shall be dealt with on its merit and should the court reach the conclusion that they are an abuse of the court process, an appropriate order will be issued.

42. Cost of this application shall be in the cause and it is ordered.

43. For record purposes no order has been made with regard to Petition No. E101 of 2021 which was not placed before me.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3rd DAY OF JUNE, 2021

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Akula/Ms Nyamache/Thuguri for DPP

Mr. Kahingu with Dr. Khaminwa for the Respondent

Ms Wambugu/Ms Shamala for 1st interested party

Court assistant - Potishoi