



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS CRIMINAL DIVISION

MISC CRIMINAL APPLICATION E072 OF 2021

IN THE MATTER OF: ARTICLE 25 (a) OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF: ARTICLE 35 (1) (a)&(b) OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF: ARTICLE 48 OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF: THE ABDUCTION OF BENSON NJAU KAYAI, ADVOCATE

LAW SOCIETY OF KENYA.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION AND

THE INSPECTOR GENERAL.....1ST RESPONDENT

NATIONAL POLICE SERVICE.....2ND RESPONDENT

THE DIRECTOR COMMAND CONTROL

AND COMMUNICATION (IC3) CENTRE.....3RD RESPONDENT

THE DIRECTOR OF ROADS TRANSPORT

AND PUBLIC WORKS,

NAIROBI METROPOLITAN SERVICES.....4TH RESPONDENT

RULING

1. On 31st May 2021, the Court delivered a ruling in this matter on a notice of motion application dated; 1st March 2021, filed by LSK; (herein “the applicant). Thereafter, the 2nd to 4th Respondents informed the Court that, their replying affidavit, which had been filed in response to the application, had not been considered in the ruling, though filed before the ruling was delivered.

2. Pursuant thereto, the 2nd to 4th Respondents filed a notice of motion application dated; 3rd June 2021, under; Articles; 47, 50 and 159 of the Constitution of Kenya and sections; 1A, 1B and 3A of the Civil Procedure Act (Cap 21), Laws of Kenya. The application is supported by the grounds thereto and an affidavit sworn by the Legal Counsel, Elizabeth Mutsoli.

3. The 2nd to 4th Respondents are seeking for the following orders, as here below reproduced: -

a) That, the Honourable Court be pleased to grant a temporary order for stay of execution of the order in the ruling delivered on; 31st May 2021, in the Nairobi Milimani High Court Miscellaneous Criminal Application E072 of 2021, pending the hearing and determination of this application inter-parties;

b) That, the Honourable Court be pleased to set aside/vary the ruling entered against the 3rd 4th Respondents, on 31st May 2021;

c) That, the ruling was delivered without consideration of the 2nd to 4th Respondents Replying affidavit filed using the Judiciary's e-filing portal on 21st May, 2021;

d) Costs of the application be provided for.

4. In a nutshell, it is averred that, pursuant to the orders of the court issued on; 17th May 2021, the 2nd to 4th Respondents filed a replying affidavit via judiciary e-filing portal on; 21st May 2021, served the applicant and other respondents electronically and received acknowledgment of receipt of email.

5. On 27th May 2021, the 2nd to 4th Respondents, filed submissions and received the applicant's submissions on 28th May 2021. However, during the reading of the ruling on 31st May, 2021, the Court stated that, the 2nd to 4th Respondents had not filed a replying affidavit but it had been filed.

6. That, the Respondents will suffer great prejudice if "judgment" (I believe it should read "ruling") remains on record and is executed. Further, the Respondents will not suffer any prejudice if the application is allowed. Additionally, the mistake or omissions of the Judiciary e-filing should not be visited upon the Respondents. Thus, it is in the interest of justice that the replying affidavit be considered.

7. The application was served whereupon LSK responded by filing a replying affidavit sworn by; Mercy Wambua, its Secretary and Chief Executive officer. She deposed that, the 2nd to 4th Respondents' application, is made in bad faith, as the matter herein has been pending for the last four months, yet the whereabouts of the victim of crime one; Benson Njau Kayai is unknown.

8. Further, despite the several orders given by the court and the Respondent's admission that, they are in possession of the information sought for, there has been no compliance. In addition, the Respondents are in contempt of court orders and should not be given audience until they purge the contempt.

9. That, the application be dismissed, in the interest of the victim's family who are traumatized, Law Society of Kenya, membership and the general public.

10. However, Director of Public Prosecution, who are the 1st Respondent herein, did not file any formal response to the application, but intimated that, it was supporting the application.

11. The application was disposed of through written submissions wherein the 2nd to 4th Respondents submitted that, it is trite law, that, a party cannot be condemned unheard. Further, Articles 47 and 50 of the Constitution guarantees every person, a right to a fair hearing. That, the omission of the Respondent's documents is akin to; an error apparent on the face of the record and constitute valid for review of the ruling.

12. However, Law Society of Kenya, responded by submitting that, the counsel from the Attorney General's chambers filed a notice of appointment on; 13th April 2021, coming on record for the 2nd Respondent herein; despite possessing the 4th Respondent's copies of court orders. That, there is no Counsel on record for the 3rd and 4th Respondents.

13. Further, the same Counsel told the court on 17th May 2021, that she represents the 2nd to 4th Respondents, but still there is no response on record from the 4th Respondent. Similarly, the Office of the Director of Public Prosecutions is acting for the Investigating Officer who is not a party to this matter.

14. As such, the Respondents are playing a game of musical chairs on binding constitutional orders". It was submitted that, the Honourable Court is empowered; under Section 5 of the Judicature Act (Cap 8) Laws of Kenya, to punish any party for non-compliance with its lawful orders.

15. Upon hearing the parties, the court sought to know from the Honourable Deputy Registrar as to when the subject replying affidavit was filed. The court was informed that the submissions of the 2nd to 4th Respondents were filed on 27th May, 2021. It was also established that, the subject replying affidavit was within the judiciary e-filing system at the time the ruling was delivered,

16. In view of the aforesaid, the court held that, it is in the interest of justice, to allow the application for review, which I hereby do. However, I have considered the subject replying affidavit and I find that, the 2nd to 4th Respondents' argue that, the National Police Service

is the principal law enforcement agent as stated under articles; 239 (1), 243, 244 and 245 of the Constitution of Kenya.

17. That, Article 245(1) underpins the independence of the Inspector General of Police, with regard to investigation of cases. That, the application is unconstitutional as it purports to invite the Honourable court; to exercise the mandate granted to the office of DPP. That, the Investigating officer has indicated that, the investigations are not complete.

18. That upon conclusion of the investigations, the file will be taken to DPP for perusal and direction, more so, regarding the decision to charge. Thus the application is contrary to known rules of investigations and offend the principle of chain of custody of evidence.

19. Finally, it was averred that, there is high possibility that, disturbing the evidence will undermine investigations and impede due process of law and/or endanger the life of the missing advocate and/or the likely, witnesses in terms of; section 6(b) and (c) of the Access to Information Act, No. 31 of 2016.

20. Having considered the content of the aforesaid affidavit, I find that, the respondents have not addressed the key issue herein, as to whether they are in possession of the information sought or not. Yet, the Investigating Officer No. 73654, CPL. Micheal Kerich, in a replying affidavit dated 8th April 2021, clearly deposed at paragraph 5, thereof that, the original footage that, the applicant is seeking for is with the 3rd respondent.

21. The 3rd respondent should have sworn an affidavit to confirm the same or recant it. It has not done so. Furthermore, although the 2nd to 4th Respondents aver that, the investigations are incomplete, there is no evidence that indeed, the investigations are ongoing. No indication as to whether, any witness has written a statement or even evidence of entry of a report to inform the investigations.

22. At the first instant, the court declined to give the LSK, an ex parte order, to allow the respondents a right of audience. What followed was an argument as to whether the 2nd to 4th Respondents should be represented by the ODPP or the AG Chambers.

23. The court ordered for supply of information sought. There was no compliance. A contempt application was filed. The court was slow in condemning the respondents on the contempt application and allowed them to comply. The respondents did not.

24. The question is; what is the substratum of the matter herein? Isn't it the tracing of the missing advocate? What would then serve the interest of justice in that case?

25. Indeed, the role of investigation and prosecution is bestowed on the office of the IG and ODPP but that mandate must be exercised in conformity with the provisions of Article 157 (11) which states that, in exercise of the powers under that article, the DPP shall have regard to; public interest, interest of administration of justice, and the need to prevent and avoid abuse of the legal process.

26. From the averments herein, the lawyer, Ben Njau Kayai, has been reported missing since 7th February, 2021, and six (6) months, and no suspects have been arrested, nor indication as to how long the investigations will take. The applicant LSK, is not a busy body. The missing lawyer is their member. The *locus standi* for enforcement of bill of rights has been expanded under article 22 of the Constitution of Kenya, and LSK qualifies thereunder sub article (2) (g).

27. LSK has averred that a similar request for information was made in Willie Kimani's case and was granted. The Respondents have not rebutted that. Further, there is no evidence that, LSK will divulge the information (if given) in a manner that, will prejudice investigation.

28. In view of the aforesaid, I find that, both the law enforcement agents and LSK are advancing the same cause to establish the whereabouts of the missing lawyer and in that case, it will be in the interest of justice and to the family of the victim to allow that application by LSK for supply of the information sought.

29. It should however, be clearly understood that, the court appreciates the need to uphold the independence of different arms of the Government but enforcement thereof within the parameters of the law.

30. In summation I order that, the respondents do comply with the orders given and supply the information requested for in the application pursuant to the provisions of; Article 35 of the Constitution of Kenya, within seven (7) days of this order, unless the police will have finished investigations and communicated the results to the applicant, LSK, and/or unless the orders are lawfully stayed.

31. In case of none compliance, the applicant LSK is at liberty to pursue its application for contempt.

It is so ordered.

DATED, DELIVERED VIRTUALLY AND SIGNED ON; THIS 2ND DAY OF JULY 2021.

GRACE L. NZIOKA

JUDGE

In the presence of:

MS Mercy Wambua for applicant

Ms Kimaru for the 1st Respondent

Ms Mutsoli for the 2nd, 3rd and 4th Respondent

Edwin Ombuna – Court Assistant