



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

CONSTITUTIONAL PETITION NO. 38 OF 2019

HADIJA MLAO MLINGO.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

ETHICS AND ANTI CORRUPTION COMMISSION.....2ND RESPONDENT

THE CHIEF MAGISTRATES COURT, MOMBASA.....3RD RESPONDENT

THE DEPUTY REGISTRAR CRIMINAL

DIVISION, MOMBASA.....4TH RESPONDENT

-AND-

WILBERFORCE MALANGA WAMBULWA.....1ST INTERESTED PARTY

MWINYI NASSORO MAPENDELEO.....2ND INTERESTED PARTY

FESTUS NYIRO NGUMA.....3RD INTERESTED PARTY

KAHINDI KINGI EDWARD.....4TH INTERESTED PARTY

ABDU MOHAMED BEGE.....5TH INTERESTED PARTY

AMANI ALI MAKASI.....6TH INTERESTED PARTY

RULING

1. The Petitioner, Hadija Mlao Mlingo filed the Present Petition dated 11th April, 2019 challenging the initiation, maintenance and prosecution of criminal proceedings against her in Mombasa Chief Magistrate's Court Anti-Corruption Case No. 10 of 2011. She alleges that the 2nd Respondent through its internal memo stated that the Petitioner ought to be a prosecution witness and that the opinion should be shared by 1st Respondent for concurrence. It is further averred that the 1st Respondent further recommended in a brief dated 17/5/2016, that the charges leveled against the Petitioner be terminated so that she can be treated like a prosecution witness. On that basis, the Petitioner avers that she ought not to be part of the criminal proceedings which are still pending before the court. The Petitioner asserts that as a result of the criminal case and the continued prosecution, she (the Petitioner) is being paid half salary since 2011 and her reputation has been tarnished. She also avers that the continued prosecution is in breach of her Constitutional right to fair hearing, right to equality and the freedom from discrimination.

2. The Petitioner seeks a declaration that the Charges in Mombasa Chief Magistrate's Court Anti-Corruption Case No. 10 of 2011 have no legal or factual background and the maintenance and prosecution of the said charges against the Petitioner are oppressive, malicious and abuse of the court process.

3. The Petition is opposed by the 2nd Respondent vide the Replying Affidavit sworn and filed in court on 11/06/2019.

4. Simultaneously with the Replying affidavit, the 2nd Respondent filed an application by way of a Notice of Motion dated 10/06/2019, expressed to be brought under Rule 19 of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules 2013** seeking the following orders:

a. **“That this Honourable Court be pleased to transfer the Petitioner’s petition dated 11/04/2019 to the Anti-Corruption and Economic Crimes Division established in the High Court of Kenya; pursuant to the Chief Justice Practice Directions dated 9th December, 2016 as amended on 9th July, 2018, for purposes of taking directions on the hearing of the Petitioner’s Petition dated 11/04/2019.**

b. **THAT the cost of this application be provided for.”**

5. The application is premised on the grounds set out therein and the Supporting Affidavit sworn on 10/6/2019 by Francis O. Makori; the advocate on record for the 2nd Respondent.

6. Hadija Mlao Mlingo, the Respondent/Petitioner opposed the application through grounds of opposition dated 3/10/2019 and filed in court on the even date.

7. The 1st to 6th Interested Parties/Respondents, the Director of Public Prosecutions (DPP), the Chief Magistrate’s Court and the Deputy Registrar did not file any response to the application. However, during the hearing Mr. Makori who appeared for the 2nd Respondent/Applicant indicated that he was also holding brief for Mr. Fedha for the DPP.

8. The applicants’ case is that the Chief Justice made the Practice Directions for the Anti-Corruption and Economic Crimes Division of the High Court published in the Kenya Gazette, Special Issue, Vol. CXVIII on 9/12/2016 (the Practice Directions) pursuant to Section 5 of the Judicial Service Act, 2011 and Section 16 of the High Court (Organization and Administration) Act, 2015. It is averred that the Petitioner presented her petition on in the Constitutional and Judicial Review Division on 07.05.2019 instead of the Anti-Corruption and Economic Crimes Division.

9. It is the Applicant’s case that the Petition herein should be heard and determined by the High Court in the Anti-Corruption and Economic Crimes Division for the interest of Justice and consistency.

10. The Respondent/Petitioner opposed the application through grounds of opposition as reproduced hereunder:

a. That the application is an abuse of the Court process and a waste of the Court’s time.

b. That this Honourable Court has jurisdiction to hear and determine the Petition herein.

c. That the proceedings subject to this Petition are being heard in the Chief Magistrate’s Court Mombasa hence it is in the interest of Justice that the Petition herein be heard in Mombasa.

d. That by gazette notice No. 10263 of 9/12/2016 the Practice directions for the Anti-corruption and Economic Crimes Division of the High Court were amended by the order of the high court in Constitutional Petition Number 534 of 2016 to provide for sub registries outside Nairobi.

e. That the overriding objective of the Practice Directions of the Ant-corruption and Economic Crimes Division of the High Court and the Constitution of Kenya, 2010 is to have expeditious and accessible dispensation of Justice to all parties.

f. That transferring the Petition herein to Nairobi will be against the principles of Justice and in breach of the Constitution.

g. That it is in the interest of justice that the application be dismissed with Costs.

11. The Respondent/Petitioner’s position is that the Practice Directions relied on by the Applicants were consequently amended vide Gazette Notice No. 10263 which allowed the Chief Justice to establish sub-registries and Mombasa is one of the sub-registries hence the Petition is rightfully before this Court. The Respondent’s counsel further averred that the said directives were challenged and declared unconstitutional in Petition No. 534 of 2016 and in Miscellaneous Application No. 56 of 2019 **Shakeel Ahmed Khan vs. Republic**.

12. On the Respondent/Petitioner’s case that the directives were challenged and declared unconstitutional, the Applicant contends that the directives were only amended pursuant to the order of the court in Petition No. 534 of 2016 as per gazette notice No. 7262. Further that the directives are in force and have not been revoked. Finally, the Applicant is of the view that the transfer of this matter will contribute to expeditious disposal of the Petition.

The Determination

13. I have considered the application before the Court and grounds of opposition filed by the Petitioner in opposition thereof. I have also considered the oral submissions made by counsel. I note that the instant application is made on the strength of the Practice directions. Direction 6 of the Practice Directions lists the matters that shall be heard by the ACEC Division. These include *inter alia*:

(c) *Cases relating to corruption and economic crimes filed under the following Acts:*

(i) *Ant-Corruption and Economic Crimes Act, Cap 65...*

14. It is not disputed that the Petitioner was charged with various specific corruption offences under the Anti-corruption and Economic Crimes Act. The matter therefore relates to corruption and economic crimes. Direction 2 of the Practice Directions requires that all cases such as the present one involving corruption and economic crimes shall be filed in Nairobi:

All new cases relating to corruption and economic crimes shall be filed in the Principal Registry of the Division at Nairobi for hearing and determination.

15. It is noteworthy that the 2018 Practice Directions amended the 2016 Practice Directions vide Kenya Gazette Notice No. 7262 of 2018. Direction 3 thereof provides:

“The Chief Justice may establish additional Sub-registries outside Nairobi.”

16. The Respondent/Petitioner contends that Mombasa was one of the intended sub-registries. Regrettably, as it stands, no sub-registry appears to have been established in Mombasa. The 2nd Respondent/Applicant argues that the directives are still in force and the matter ought to be transferred to ACEC Division in Nairobi for consistency and expeditious disposal thereof. The Respondent/Petitioner on the other hand is of the view the directives were challenged and declared unconstitutional in Petition 534/2016.

17. However, for clarity purposes in **Nairobi High Court Constitutional Petition No. 534 of 2016 Peter Wanyama Manyonge vs. Chief Justice of the Republic of Kenya & 5 others** the 2016 Practice directions were challenged as unconstitutional only for the requirement that all matters be filed in Nairobi. They were not declared unconstitutional. The Court pursuant to a consent recorded by the parties directed that Rule No.2 of the Practice Directions dated 09/12/2016 vide Gazette Notice No. 10263 be amended to allow the Chief Justice to establish sub registries outside Nairobi. Consequently, the 2016 Practice Directions were indeed amended vide Kenya Gazette Notice No. 7262 of 2018 being the 2018 Practice Directions.

18. My considered view is that this Court has unlimited original jurisdiction in criminal and civil matters by virtue of powers conferred to the High Court under the provisions of Article 165(3) of the Constitution of Kenya, 2010.

19. In the case of **Ethics and Anti-Corruption Commission & another vs. William Baraka Mtengo & 4 others [2017] eKLR** the court had the occasion to consider the argument that the Practice Directions have taken away the jurisdiction of the High Court and observed as follows:

“The Respondent contends that the said Practice Directions have taken away the jurisdiction of this Court and that the Chief Justice has no power to take away jurisdiction from the High Court. I entirely agree with the Respondent that the Chief Justice has no authority whatsoever to take away jurisdiction from any court or to confer jurisdiction to any court.”

20. Further in the case of **Shakeel Ahmed Khan & another vs. Republic & 4 others [2019] eKLR** the Court in agreement with **the William Baraka Mtengo** case (supra) observed that:

“The Chief Justice as head of the Judiciary has power under Section 16 of the High Court (Organization and Administration) Act to establish sub-registries of the ACEC Division and indeed full ACEC divisions outside Nairobi. The failure to do so has in my view the net effect of stripping the High Court in stations outside Nairobi of the jurisdiction conferred upon it by the Constitution.”

21. I totally agree. However, I will appraise Direction 4 of the Practice Directions. It lays down the overriding objective of the Practice Directions which is the just, expeditious, proportionate and accessible adjudication of disputes related to corruption and economic crimes. This leads to the conclusion that the Practice Directions, were among other things, intended to aid the efficient and timely disposal of the matters identified therein. To that extend, I agree with the Respondent/Petitioner that the overriding objective of the Practice Directions of the Anti-Corruption and Economic Crimes Division of the High Court and the Constitution of Kenya, 2010 is to have expeditious and accessible dispensation of justice to all parties.

22. Whereas the Constitution at Article 48 requires that justice be accessible, the same Constitution at Article 159(2)(b) demands that justice shall not be delayed. Time and again this court has held the proposition that the right to access justice ought to be balanced with the need to ensure that justice should not be delayed. As earlier noted, the subject of the Petition herein is the continued prosecution of the Petitioner in Mombasa Chief Magistrate’s Court Anti-Corruption Case No. 10 of 2011. To now direct that the matter be transferred to the Anti-Corruption and Economic Crimes Division in Nairobi would in my view delay the hearing of the same. Likewise, the intention of the Practice Directions to facilitate the efficient and timely disposal of the matter would be defeated. If the sub registries or divisions are not established outside Nairobi, the Practice directions will not only fly in the face of the Constitutional imperative that Justice shall not be delayed, but will also increase the cost of justice.

23. For the reasons stated in this Ruling, allowing this application will militate against the overriding objective of the very practice directions of the just, expeditious, proportionate and accessible adjudication of disputes related to corruption and economic crimes. The upshot of the foregoing is that I disallow the 2nd Respondent/Applicant’s Application dated 10/06/2019. Parties shall fix a hearing date for the petition at registry on priority basis.

24. There shall be no orders on costs.

That is the Ruling of the Court.

Dated, Signed, and Delivered at Mombasa this 6th day of May, 2020.

E. K. OGOLA

JUDGE

In the presence of:

No appearance for parties

Mr. Kaunda Court Assistant