



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CONSTITUTIONAL PETITION NO.5 OF 2018

IN THE MATTER OF: ARTICLES 2 (1) (2), 3(1), 20,21,22,23,24,17(1) (2), 29, 39(2) 40, 47,49,59,156,258 AND 35(1 (A) OF THE CONSTITUTION OF KENYA 2010.

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 3, 10(1), 10(2), 19, 20, 21(1), 24, 25(C), 27(1) AND (2), 29, 47(1), 50(1), 50(2) (A,B, C, J, K), 79, 249 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE HOMA BAY CHIEF MAGISTRATE’S COURT
EACC CASE NO.1 OF 2018 - EACC –VS- BOB KEPHAS OTIENO AND 6 OTHERS

BETWEEN

BOB KEPHAS OTIENO.....APPLICANT

VERSUS

THE ETHICS & ANTI-CORRUPTION COMMISSION.....1ST RESPONDENT

THE DIRECTORATE OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

HOMA BAY COUNTY ASSEMBLY.....1ST INTERESTED PARTY

RULING

[1] BOB KEPHAS OTIENO, by a petition filed herein on 3rd September 2018 sought from this court injunctive and declaratory orders against the **Ethics and Anti-Corruption Commission** (first respondent), the **Directorate of Criminal Investigations** (second respondent), the **Office of the Director of Public Prosecutions** (third respondent) and the **Homa Bay County Assembly** (interested party), as

more clearly specified in **Paragraph F** of the Petition.

In **Sub Section (e)** of the paragraph, the petitioner seeks a declaration that **Section 62** of the **Anti-Corruption and Economic Crimes Act** is unconstitutional to the extent that it provides for mandatory and automatic suspension of public officers facing criminal charges thus contravening **Article 50** of the **Constitution**.

[2] A Notice of Motion dated 3rd September 2018, was contemporaneously filed with the petition seeking conservatory and

injunctive orders of stay in respect of EACC Criminal Case No.1 of 2018 at the Magistrate's Court in Homa Bay pending the hearing and determination of the petition.

Other orders sought were in relation to the re-arresting of the petitioner and his suspension as the Clerk of the County Assembly of Homa Bay.

Both the petition and the notice of motion are pending determination.

[3] In the meantime, the first respondent vide a Notice of Motion dated 21st September 2018, seeks a transfer of this petition to the Anti-Corruption and Economic Crime, Division of the High Court of Kenya.

The grounds in support of the application are contained in the body of the notice of motion and fortified by the averments in the supporting affidavit dated 21st September 2018, deponed by the first respondent's counsel, **ROSSLYNE MURUGI**.

[4] The application was followed by a notice of preliminary objection to the petition and the notice of motion both dated 3rd September 2018 filed herein on the 24th September 2018 by the third respondent (3rd respondent).

The gist of the objection is that pursuant to the practice directions of the Chief Justice for the Anti-Corruption and Economic Crimes Division in Gazette Notice No.7262 of 20th July 2018, this court lacks the necessary jurisdiction to hear/entertain or determine the said petition and notice of motion.

[5] On 25th September 2018, this court gave directions that the preliminary objection be argued in priority to the rest of the applications pending in this matter and that the hearing proceeds by way of written submissions.

In that regard, all the respondents filed their submissions but not the petitioner/applicant thereby implying that he was not opposed to the objection and the matter being transferred to the Anti-corruption and Economic Crimes Division of the High Court at Nairobi or any of its sub-registries in specified areas.

Nonetheless, the discretion to allow or disallow the preliminary objection lies with this court and since it relates to the jurisdiction of this court to handle this matter, it would be necessary for the court to make its determination on it whether or not the petitioner/applicant opposes it.

[6] In the celebrated case of **M/V LILLIAN'S –VS- CALTEX OIL (K) LTD (1989) KLR 1**, it was stated by the Court of Appeal that jurisdiction is everything and without it a court has no power to make one more step. It must down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

In **AIR ALFARAS LIMITED –VS- PAYTHEON AIR CRAFT CREDIT CORPORATION & ANOTHER [2000] KLR 62**, it was held that any issue regarding jurisdiction ought to be considered

first so that in the event of the court coming to the conclusion that it has no jurisdiction, the intellectual

exercise of going into the merits of the application would be futile.

[7] So germane is the question of jurisdiction in any matter before a court that the Court of Appeal in the case of **KAKUTA MAIMAI HAMISI –VS- PERIS TUBIKO & OTHERS (2013) e KLR**, had to state as follows:-

“So central and determinative is the question of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned.

It is a threshold question and best taken at inception.

It is definitive and determinative and prompt pronouncement on it once it appears to be in issue is a desideration imposed on courts out of decent respect for economy and efficiency, and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that

will end in barren cul de sac.

Courts like nature, must not sit in rain”.

[8] In this case, the jurisdiction of this court to handle any aspect of this matter is clearly challenged by the third respondent in its preliminary objection dated 21st September 2018 on the basic ground that pursuant to the practice directions of the Chief Justice for the Anti-Corruption & Economic Crimes Division in Gazette Notice No.7262 of the 20th July 2018, this court lacks jurisdiction to hear and determine the main petition and the notice of motion all dated 3rd September, 2018.

[9] The first and second respondents support the objection on the basis of the grounds contained in their written submissions.

In its submissions, the third respondent, readily accepts that this court being a High Court established under **Article 165** of the **Constitution** is clothed with unlimited original jurisdiction to hear and determine this petition but contends that under **Article 22 (3)** of the **Constitution**, the Chief Justice has a constitutional mandate to make rules for court proceedings in the enforcement of the bill of rights and that such rules comprises of the practice directions of the Chief Justice for the Anti-Corruption & Economic Crimes Division in Gazette Notice No.7262 of 20th July 2018, thereby raising the question whether the practice rules issued by the Chief Justice under **Article 22 (3)** of the **Constitution** fetter the unlimited jurisdiction of the High Court.

[10] Indeed, the third respondent correctly answered its own question by submitting that the constitution equally vests unlimited jurisdiction to all the high court judges, as such, the issuance of practice directions by the Chief Justice is not meant to fetter the jurisdiction of the high court on enforcement of the bill of rights but in the spirit of ensuring that justice is expedited. That, the rules are aimed at promoting efficiency and timely disposal of matters touching on corruption and economic crimes.

The third respondent relied on the decision in **MISC. CIVIL APPEAL NO.62 OF 2016 – CHRISTOPHER ORINA KENYARIRI T/A KENYARIRI ASSOCIATES ADVOCATES –VS- SALAMA BEACH HOTEL LIMITED AND THREE OTHERS** and urged this court to order a transfer of this matter to the Anti-Corruption & Economic Crimes Division of the High Court in Nairobi for purposes of expeditious hearing and determination.

[11] The first respondent agreed with the third respondent but took the firm view that this court lacks the necessary jurisdiction to deal with this petition on account of the Gazette Notice No.7262 of the 20th July 2018. However, the first respondent submitted that the transfer of the matter to the Anti-Corruption & Economic crimes division of the High Court in Nairobi would be in the interest of effective case management and expeditious disposal of cases. That the Chief Justice (CJ) on the 11th December 2015 vide **Gazette Notice No.9123** established the **Anti-Corruption and Economic**

crimes Division of the High Court and in the exercise of powers under **Section 5** of the **Judicial Service Act No.1 of 2011** and **Section 16** of the **High Court Organization and Administration Act No.27 of 2015**, and in the interest of effective case management and expeditious disposal of cases, the Chief Justice made practice directions for the Anti-Corruption & Economic crimes Division of the High Court as published in **Gazette Notice No.10263 of 9th December 2016** and **Gazette Notice No.7262 of 20th July 2018**.

[12] Relying on **the Gazette Notice No.7262 of 20th July 2018**, the first respondent submitted that the investigations giving rise to this matter were carried out under the Anti-Corruption & Economic Crimes Act and falls among those listed in **Rule 6** of the gazette notice which provides for the scope and mandate of the Anti-Corruption & Economic Crimes Division of the High Court.

In support of its arguments, the first respondent placed reliance on the decisions in **KENYA UNIVERSITIES STAFF UNION –VS-**

THE UNIVERSITY COUNCIL OF MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY & OTHERS JR NO.702 OF 2017, BOB KEPHAS OTIENO & ANOTHER –vs- DPP & EACC HOMA BAY PETITION NO.6 OF 2017, EACC & ANOTHER –VS- WILLIAM BARAK MTENGO & 4 OTHERS (2017) e KLR and ONDIEK NYAIRO –VS- PAUL CHEPKWONY & 2 OTHERS (2017) e KLR.

[13] The first respondent contended that the Anti-Corruption Division of the High Court was created for effective case management and expeditious disposal of cases relating to corruption and economic crimes considering their nature and the public interest involved. That, this is in conformity with the constitution requirement that justice shall not be delayed as provided under **Article 159 (2) (b)** of the **Constitution**. That, it is in the public interest and in the interest of justice that the purpose of the establishment of the Anti-Corruption and Economic Crimes

Division of the High Court should not be defeated.

[14] This court has given due consideration to the preliminary objection and all the arguments in support thereof made by the respondents.

“Let ye all knowth” that jurisdiction is a matter regulated by the Constitution and Statute Law. This is a settled fact as was demonstrated by the Supreme Court of Kenya (SCOK) in **RE-THE MATTER OF THE INTERIM INDEPENDENT ELECTORAL COMMISSION SC CONSTITUTIONAL APPLICATION NO.2 OF 2011**.

The same court in **SAMWEL KAMAU MACHARIA & ANOTHER –VS- KENYA COMMERCIAL BANK AND TWO OTHERS SUPREME COURT CIVIL APPLICATION NO.2 OF 2011**, clearly set out the jurisdictional frontiers within which courts of law must operate by stating that:-

“A court’s jurisdiction flows from either the constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law”.

[15] There we have it, this court’s jurisdiction to deal with this petition and any application coming under it is clearly vested on it by **Article 165** of the **Constitution** and all applicable statutes.

The Anti-Corruption and Economic Crimes Division of the High Court in Nairobi is not a specialized court like the Environment and Land Court and the Employment and Labour relations court created under **Article 162** of the **Constitution** and the practice notices for its creation and operations did not create a superior court to any other High Court as implied by the first respondent when it submitted that this court has no jurisdiction in this matter by dint of Gazette Notice No.7262 of 20th July 2018.

We must learn from history and not forget that the creation of the Judicial Review and Constitutional Division of the High Court sometimes back brought confusion in the administration of justice and disharmony among the judges of the High Court when the division purported to hold itself as superior to other high courts. History always repeats itself if unchecked.

[16] Be that as it may, the purpose of practice directions and Court Rules is very well discussed in a paper entitled “**The Rules of Justice and the Justice of Rules – Appraisal of the Rules of Court in the dispensation of Justice in Nigeria**” found in the **Justice Journal – A journal of contemporary legal issue 2013 Vol 5 -119**, where it is observed that in English Law, a practice direction is a supplementary protocol to rules of Civil and Criminal Procedure in the courts – a device to regulate minor procedural matters. They give practical advice on how to interpret the Rules.

Practice directions are also to be obeyed just as the Rules of Court.

Practice directions have the force of law in the same way as Rules of Court. They direct the practice of the court in a particular area of procedure of the court. A practice direction could be described as a written explanation of how to proceed in a particular area of law, in a particular court.

[17] Rules of court and Practice directions are rules touching the administration of justice. They are established for attaining justice with ease, certainty and dispatch as was held by the Supreme Court of Nigeria in **UNIVERSITY OF LAGOS & ANOTHER –VS- AIGORO (1984) NSCC 745**.

Of great note is that, where there is a conflict between Rules of court and practice directions, the rules must of necessity prevail as the practice direction cannot amend the rules of court and by extension clear constitutional and statutory provisions.

It is therefore clear from all the foregoing that practice directions are essentially an administrative tool for effective and efficient administration of justice and are not intended to divest a high court’s constitutional and statutory jurisdiction to hear and determine a matter arising from corruption and economic crimes such as the present petition.

Consequently, the third respondent’s preliminary objection on account of the practice directions contained in Gazette Notice No.7262 of the 20th July 2018, is lacking in merit and is hereby overruled.

[18] In any event, the submissions by the third respondent strongly suggested that it was not disputing this court’s jurisdiction to deal with the petition but would rather have the petition transferred to the Anti-Corruption and Economic Crimes division of this court at Nairobi for a uniform and expeditious disposal of the same.

Practice Directions, being administrative tools for effective and efficient administration of justice, case management and expeditious disposal of cases and so that the main objective of Gazette Notice

No.7262 of 20th July 2018, is promoted and realized in relation to matters arising from corruption and economic crimes, this court deems it necessary to have this petition and all interlocutory applications made thereunder transferred to the Anti-Corruption & Economic Crimes Division of the High Court in Nairobi or any of its sub-registries in the appropriate regions. It is accordingly ordered.

J.R. KARANJAH

JUDGE

[Read and signed this 5th day of **March, 2019**].