



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

THE CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTION PETITION NO. 155 OF 2019

IN THE MATTER OF: ARTICLES 2(1) & (5), 22, 23, 165(3),

159 AND 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS

AND FREEDOMS UNDER ARTICLES 2(1) & (5), 3, 10, 25(C), 27, 29, 47(1), 50, 79,

157(11), 159 AND 245 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: SECTIONS 53, 55 AND 57 OF THE ADVOCATES ACT CAP 16 LAWS OF KENYA

BETWEEN

GEORGE MUGOYE MBEYA.....PETITIONER

VERSUS

1. ETHICS AND ANTI CORRUPTION COMMISSION

2. THE DIRECTOR OF PUBLIC PROSECUTIONS

3. THE CHIEF MAGISTRATES' COURT, MOMBASA.....RESPONDENTS

RULING

The Application

1. There are two applications before the Court. The first application is a Notice of Motion dated 30.9.19 filed by the Petitioner simultaneously with the petition herein on 30.9.19. The application prays for a conservatory order to be issued restraining the Respondents from continuing with the criminal prosecution of the Petitioner in respect of any offences related to the dispute in **Siaya Election Petition No. 1 of 2017, the affairs of Christopher Odhiambo Karani in Mombasa ACC No. 7 of 2019 Republic vs. Christopher Odhiambo Karani, George Owino Oguna and Mohamed Adan Mohamed** pending, at this stage, the hearing and determination of this petition.

2. The application is premised on the grounds set out therein, and is supported by affidavit sworn by the Petitioner on 28.9.19.

3. In brief, the Applicant's case is that the Petitioner, an Advocate of the High Court of Kenya, has been wrongfully and maliciously charged in criminal proceedings in Mombasa ACC No. 7 of 2019 that is scheduled for hearing on the 14th, 15th and 17th October 2019 respectively to prosecute the Petitioner in respect of complaints and offences related to matters in which the Petitioner acted for his client in his professional capacity as Advocate. The Petitioner avers that the institution and continuation of prosecution of the Petitioner by the Respondents on

complaints in respect of his instructions to act for Christopher Odhiambo Karani in his professional capacity as Advocate and the subject matter of Siaya Election Petition No. 1 of 2017 is a violation of the Petitioners' right to a fair trial in contravention of Sections 55, 56 and 57 of the Advocates Act. The Petitioner alleges that his arrest, detention and consequential institution of charges against him were actuated by malice and extraneous considerations not known to the Petitioner. The Petitioner avers that the institution of these criminal charges is contrary to the constitution as follows:

- i. Article 3 obligates every person to respect, uphold and defend the constitution.
- ii. Article 10 (2) (a) guarantees the Rule of Law as one of the National values and principles that binds all state officers, public officers and persons whenever they apply or interpret the Constitution.
- iii. Article 10 (2) (c) guarantees good governance, transparency and accountability as National values and principles that bind all state officers, public Officers and persons whenever they apply or interpret the Constitution.

4. The Petitioner avers that the criminal prosecution is a contravention of his fundamental rights to a fair trial, fair administrative action and amounts to an abuse of the legal process. The said charges would set a dangerous precedent to the call of the Petitioner as a professional and officer of the Court. The Petitioner states that there is real and present danger that unless halted by this Court, the respondents will continue to carry out unconstitutional acts and hence set in motion foundations of blatant disregard for the constitution. The Petitioner urges this Court as custodian of the Constitution to uphold the twin principles of constitutionalism and the rule of law by halting any further blatant unconstitutional acts of the Respondents; and that it is in the interest of justice that the continuation prosecution of the Petitioner be restrained pending the hearing and determination of the Petition challenging his criminal prosecution.

The Response

5. The application is opposed by all the Respondents.

The 1st Respondent's Case

6. The 1st Respondent filed Grounds of Opposition on 2.10.19 and a Replying Affidavit sworn by Pius Ndiwa on 8.10.19.

7. The 1st Respondent's case is that the Petitioner's application dated 30.9.19 is misguided and misconceived. That the Petitioner's application and petition is an utter abuse of the Court process to the extent that the Petitioner seeks to unduly frustrate and stifle the expeditious hearing and determination of **Mombasa Chief Magistrate's Court Anti-Corruption Case No. 7 of 2019 Republic vs. Christopher Odhiambo Karani, George Owino Oguna, Mohamud Adan Mohamed and George Mugoye Mbeya**. The 1st Respondent states that the Petitioner's application is grounded on generalities, conjectures and suppositions in respect to when and how the 1st Respondent has contravened the Petitioner's constitutional rights as alleged in the petition, and that the petition does not *prima facie* disclose the specific and sufficient details of how and when the 1st Respondent violated the Petitioner's constitutional rights, and in particular under which provisions of the Constitution. The 1st Respondent avers that the constitutional principle of the rule of law under Article 10 of the Constitution enjoins the Petitioner to respect the operations of the criminal justice system and the due process before the Magistrates Court in Mombasa Chief Magistrate's Court Anti-Corruption Case No. 7 of 2019 – Republic vs. Christopher Odhiambo Karani, George Owino Oguna, Mohamud Adan Mohamed and George Mugoye Mbeya.

8. The 1st Respondent states that the provisions of the Advocates Act including Sections 53, 55 and 57 of the Act, do not bar the Respondents from undertaking criminal proceedings aforesaid and that the petition and application contravene the legal principle of the rule of law envisaged under the provisions of Article 10(1) as read together with (2) of the Constitution. The 1st Respondent avers that the Petitioner will suffer no prejudice if the criminal process aforesaid is allowed to freely run its course unhindered.

The 2nd Respondent's Case

9. The 2nd Respondent opposed the application through Grounds of Opposition filed on 8.10.19. The 2nd Respondent's case is that the orders sought by the Applicant/Petitioner are an abuse of Court process and frowns on the constitutional mandate of the Respondents. The 2nd Respondent has powers under Article 157 of the constitution to order investigate, charge and prosecute any criminal offence. That the Courts cannot stop the 2nd Respondent from charging with a criminal offence the Applicant where there is clear evidence of an offence and the orders sought vide this petition precisely seek to do so. There is no material evidence presented by the Petitioner to demonstrate that the Respondents have violated the constitutional rights of the Applicant. Neither has the Applicant disclosed the specific details of how and when his rights have been violated by the 2nd Respondent. The 2nd Respondent states that the orders sought if granted would ground prosecution of a matter of great public interest. Any action so far taken by any of the Respondents does not contravene the Constitution or any other law and therefore the Petition/Application is brought without merit, is calculated to interfere with enforcement of Criminal justice system and the protection of the collective right of the people of Kenya. The 2nd Respondent avers that the orders sought have far reaching consequences on the powers of the 1st and 2nd Respondents under the constitution and this Court is not clothed with supervisory powers to direct 2nd Respondent on the nature of evidence available to prefer charges against the Applicant.

The 3rd Respondent's Case

10. The 3rd Respondent filed a reply to the application, opposing the same and stating that the Petitioner has failed to state clearly and with precision which of his right is under threat of violation and/or has been violated by the 3rd Respondent. That there is no allegation of either bias or incompetence on the part of the 3rd Respondent which has the Constitutional and Statutory mandate to hear and determine the

criminal matters before it. The 3rd Respondent avers that it is established under Article 169 of the Constitution and is mandated by Section 6 of the Magistrate's Court Act to exercise such jurisdiction and powers in proceedings of a criminal nature conferred on it by the Criminal Procedure Code or any other written law. The 3rd Respondent is therefore exercising its jurisdictions as conferred by the Constitution and Statute and has not usurped the role of the Complaints Commission. The 3rd Respondent states that the Constitution Guarantees the Petitioner the right to fair hearing under Article 50 of the Constitution and no allegation has been made that the 3rd Respondent is not fair.

The 2nd Application

11. However, before the Petitioner's application could be heard, the 1st Respondent filed a Notice of Motion dated 2.10.19 (the 2nd Application) praying:

(a) That this Honourable Court be pleased to transfer the Petitioner's petition dated 30/09/2019 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 and determination of the Petitioner's petition dated 30th September, 2019.

(b) That the cost of this application be provided for.

12. The application is supported by affidavit sworn by Francis Makori on 2.10.19. The Applicant's case is that on 9.12.16 the Chief Justice made Practice Directions pursuant to 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 the said Practice Directions were amended on 9.7.18. That contrary to the mandatory provisions of said Practice Directions, the Petitioner filed the present petition in the Constitutional and Judicial Review Division on 30.9.19 instead of filing it in the Anti-Corruption and Economic Crimes Division and that the 1st Respondent has a right to be heard expeditiously. It is averred that it is in the interest of justice and consistency in the administration of justice and expediency that the Petitioner's petition be heard and determined by the High Court in the Anti-Corruption and Economic Crimes Division, and that it is in the interest of administration of substantive justice and fairness that the orders prayed for herein ought to be granted.

The application is supported by all the Respondents, but is opposed by the Petitioner.

The Petitioner's Case

13. The Petitioner opposes the application through Grounds of Opposition dated 8.10.19. The Petitioner's case is that the Petitioner was charged with four (4) offences under the Penal Code, in the charge sheet registered on 25.7.19 in Mombasa Anti-corruption Criminal Case No 7 of 2019. The Petitioner states that he does not face any charge under the Anti-Corruption and Economic Crimes Act No 3 of 2003. The 1st and 2nd Respondents opted to arraign and charge the Petitioner before the Chief Magistrate's Court in Mombasa, notwithstanding the fact that he ought and could have been arraigned before the Chief Magistrate's Court in Nairobi or Mombasa, by virtue of the provisions of Sections 66 and 67 of the Criminal Procedure Code Cap 75 of the Laws of Kenya. The Petitioner avers that the subject matter of the criminal charges against the Petitioner in Mombasa ACC Case No. 7 of 2019 does not fall within the purview of the practice directions of the Anti-corruption and Economic Crimes Division of the High Court issued by the Chief Justice vide Gazette Notice No 10263 on 9.12.16. The Petitioner avers that in the Petition filed herein, the Petitioner has challenged the propriety of the institution of the criminal charges against him before the Anti-corruption Criminal Court in Mombasa ACC No. 7 of 2019. There is no justifiable or any lawful reason as to why the Petition should be transferred out of the jurisdiction of this Court in the manner intended in the 1st Respondent's Notice of Motion dated 2.10.19.

Consolidation and Hearing

14. The two applications were consolidated and heard together.

15. Parties made oral submissions in Court which I have carefully considered. **Mr. Havi** learned counsel for the Petitioner, submitted that the Petitioner is an advocate of the High Court, and has been lumped and charged together with his client in the aforesaid criminal case. Counsel submitted that the witness statements relied on in the said criminal prosecution show that there were no complaints against the Petitioner to warrant the charges, and that the said charges are meant to malign and impugn the Petitioner in breach of his constitutional right to represent a client under the Advocates Act. Counsel submitted that under the principles on the role of lawyers, lawyers are not to be identified with their clients or their client's causes as a result of discharging their functions as lawyers. In response to this submission **Mr. Makori** learned counsel for the 1st Respondent submitted that there is no provision in the Advocate's Act which prohibits the prosecution of a lawyer together with his or her clients. However, Mr. Havi, countered that the prosecution of the Petitioner is an attempt to intimidate him as he performs his role as a lawyer, and that this Court should grant conservatory orders pending the determination of the petition.

16. As to whether this petition should be transferred to Nairobi, Mr. Havi submitted that the Mombasa ACC No. 7 of 2019 is filed in Mombasa, and that the High Court in Mombasa has the supervisory powers over all subordinate courts in Mombasa and so the High Court in Mombasa has the jurisdiction to hear and determine the current petition. However, Mr. Makori on this issue submitted that the Anti-Corruption and Economic Crimes Court is best suited, for purposes of expeditious and efficient disposition of the petition herein. Counsel referred the Court to the Practice Directions issued by the Chief Justice for the regulation of the said Anti-Corruption and Economic Crimes Division of the High Court as Gazette Notice No. 10263 on 9.12.16. Counsel submitted that the issues raised in the petition here fall within the ambit of the said Gazette and so the matter ought to be transferred to the said Court. This position was supported by both **Mr. Fedha and Mr. Makuto** learned counsel for the 2nd and 3rd Respondents respectively.

17. On the issue of conservatory orders the counsel for the Respondents submitted that the Criminal Case Mombasa ACC No. 7 of 2019 is

scheduled for hearing in Mombasa for three consecutive days being 14th, 15th and 16th of October, 2019 and that witnesses have been bonded. If the hearing is stayed this will create unenviable situation because the co-accused in that case are not part of this petition. Further, it was submitted that the Petitioner does not stand to lose anything should the trial proceed as scheduled, and that in any event whenever the High Court terminates the trial the order will be complied with.

The Determination

18. I have carefully considered the two applications before the Court and submissions of counsel. The issue for the determination herein is whether conservatory orders can issue, and/or whether the petition should be transferred to the Anti-Corruption and Economic Crimes Division of the High Court in Nairobi.

19. To begin with, I understand the submissions of Mr. Makori learned counsel for the 1st Respondent not to be disputing the jurisdiction of this Court to entertain this petition. His argument, and the basis of his application, is that the Anti-Corruption and Economic Crimes Division in the High Court has been created to expeditiously hear and determine matters cited in the Chief Justice's Practice Directions issued vide the Gazette Notice No. 10263 on 9.12.16. Those directions arose out of a need to expedite cases touching on corruption and economic crimes. That Court is the first port of call for any such cases, especially those cases in which hearing have not commenced. Those directions do not take away the jurisdiction of this Court to exercise its supervisory powers over the proceedings in the subordinate courts in Mombasa. The directions are to facilitate faster and efficient disposal of matters before a Court specifically equipped with adequate staff and facilitates to enable the same. In that Court, it would be expected that such matters as the one before this Court would be determined in the shortest time possible, than would otherwise happen in the Constitutional or Judicial Review Division of the High Court which hear all manner of disputes. This therefore means that each case will be decided on its own merit taking into account *inter-a-lia* the following:

- Where the parties stay
- Urgency of the matter
- Access to justice (transportation of witnesses, counsel, and parties to Court in Nairobi)
- The public interest in the matter

20. I have considered the petition and the prayers sought therein against the requirements of the **Practice Directions for the Anti-Corruption and Economic Crimes Division of the High Court** issued by the Chief Justice and published as Gazette Notice No. 10263 on 9th December 2016. The Respondent has cited in particular Rule No. 5(a) and (d) which provide as follows:

“5. The following matters shall be heard by the Anti-corruption and Economic Crimes Division of the High Court:

a. Petitions and Judicial Review applications on claims of infringement or the threatened infringement of constitutional rights relating to corruption and/or economic crimes related matters;

...

d. cases relating to corruption and economic crimes filed under the following Acts:

...

iii. Anti-corruption Act, Cap.130A.

iv. Leadership and Integrity Act, Cap 182.

v. Public Procurement and Asset Disposal Act, No.33 of 2015.

vi. Public Officers Ethics Act, Cap 183.

vii. Public Finance Management Act, No.18 of 2012

Xiii. Or filed under any other enabling provisions of law.”

21. Rule No.7 requires that all cases relating to corruption and economic crimes should be transferred to the Anti-corruption and Economic Crimes Division. In this matter the Petitioner alleges constitutional violations which arise from allegations of corruption or corrupt practice. This fact therefore places the petition within the ambit of the said Practice Directions. For the Court to issue the orders prayed for in the petition it would need to enter into an inquiry into the alleged violations and interrogate the reports relied on by the Respondents to institute the said criminal matter against the petition, and to determine the alleged breaches, if any. As is evident from the Practice Directions issued by the Chief Justice regarding the mandate of the Anti-corruption and Economic Crimes Division, all matters “*relating to corruption and economic crimes*” filed under any of the Acts enumerated in Rule 5 fall within the mandate of the Division. It is clear to me that the petition before me is one such matter.

In the circumstances, I find that this matter falls within the mandate of the Anti-corruption and Economic Crimes Division. It is therefore hereby transferred to the said Division for hearing and determination.

22. Now, as to whether this Court can issue conservatory orders herein, it should be noted that the Petitioner seeks refuge against alleged constitutional violations involving fundamental rights and freedoms. This court has not heard the Petition to determine the veracity of these claims. However, from hearing the application herein for conservatory orders, it is apparent that the Petitioner is being lumped together in a criminal prosecution with his clients or some of his clients. I have also looked at the charges as framed against the Petitioner. As Mr. Makori rightfully observed, conservatory orders can issue only where the Applicant establishes a *prima facie* case, and demonstrates an imminent or real danger if the conservatory orders are not granted, and that public element should also be considered.

23. In my view, no rational human being would wish to be subjected to a properly founded prosecution, leave alone one which is disputed. An advocate is under the common law, and statute, protected from disclosing information given to him by his or her client in the course of the discharge of function as such advocate. The Petitioner, in this regard, raises prima facie case which deserves the conservatory orders pending the determination of the petition. The prejudice to be suffered by the Petitioner should the conservatory orders fail to issue was summed up succinctly by Justice Kasanga Mulwa in **Misc. Application No. 406 of 2001 Kipneg'eno Arap Ngeno vs. Republic:**

“In their application, the applicants are asking for orders to prohibit their prosecution in Criminal Case No. 808 before the Chief Magistrate. In their application, the applicants are raising issues, which touch on their fundamental rights. These are issues, which will need to be gone into in the main application, and the outcome could affect the proceedings in the criminal case in the lower court. In such a case it would be against all common sense not to grant a stay of the criminal proceedings to await the outcome of the application in the High Court. The grant of leave is recognition that the applicants have a case, which merits further examination by the court. I do not think there are any doubts in relation to the existence of a judicial discretion to stay criminal proceedings to do what the justice of case demands.”

24. I totally agree. This Court has the unfettered discretion to do justice. In this matter justice would require that the ACC No. 7 of 2019 be stopped, as it affects the Petitioner, until the petition is heard and determined. This Court further takes judicial notice that the Anti-Corruption and Economic Crimes Division of the High Court, being not too burdened, as submitted by Mr. Makori, will be able to determine the petition in a record time so that the fate of the said criminal case as against the Petitioner may become clear in good time.

25. In the upshot, the two applications before the Court are allowed as follows:

(i) A conservatory order be and is hereby issued restraining the Respondents from continuing with the criminal prosecution of the Petitioner in respect of any offences related to the dispute in Siaya Election Petition No. 1 of 2017, the affairs of Christopher Odhiambo Karani in Mombasa ACC No. 7 of 2019 Republic vs. Christopher Odhiambo Karan, George Owino Oguna, Mohamed Adan Mohamed and George Mugoye Mbeya pending the hearing and determination of the petition herein.

(ii) The Petitioner herein dated 30.9.19 is hereby transferred to the Anti-Corruption and Economic Crimes Division established in the High Court of Kenya pursuant to the Chief Justice Practice Directions dated 9.12.16 as amended on 9.7.18 for purposes of taking directions on the hearing and determination of the same.

(iii) The proceedings in Mombasa Chief Magistrate's Court Anti-Corruption Case No. 7 of 2019 may proceed nonetheless except that they will not proceed to the extent that they relate to the Petitioner.

(iv) Costs of the two applications shall remain in the cause.

Dated, Signed and Delivered at Mombasa this 14th day of October, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Ms. Kaguri holding brief Havi for Petitioner

Ms. Songole holding brief Makori for 1st Respondent

Mr. Fedha for 2nd Respondent

Mr. Fedha holding brief Makuto for 3rd Respondent

Mr. Kaunda Court Assistant