



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

CONSTITUTIONAL PETITION NO. 1 OF 2019

IN THE MATTER OF: ARTICLE 1, 2(4), 10, 21, 22, 23, 27, 28, 35, 47, 48, 49, 50, 157, 159, 258 & 259 OF THE CONSTITUTION OF KENYA, 2010.

AND

IN THE MATTER OF: THE 1ST RESPONDEN'S DECISION TO CHARGE THE PETITIONER IN MOMBASA CHIEF MAGISTRATE'S COURT ANTI-CORRUPTION CASE NO. 17 OF 2018. TO THE PETITIONER.

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 29, 48, & 50 OF THE CONSTITUTION OF KENYA, 2010 AND THE ADVOCATES ACT-CAP 16 LAWS OF KENYA.

AND

IN THE MATTER OF: THE PENAL CODE-CAP 63 LAWS OF KENYA AND THE ADVOCATES ACT-CAP 16 LAWS OF KENYA.

AND

IN THE MATTER OF: THE POLICE ACT, NATIONAL POLICE SERVICE ACT & THE DIRECTOR OF PROSECUTIONS ACT.

BETWEEN

JOSEPH KARANJA KANYI T/A KANYI J. & CO. ADVOCATES.....PETITIONER

VERSUS

- 1. THE DIRECTOR OF PUBLIC PROSECUTIONS**
- 2. EHICS AND ANTI-CORRUPTION COMMISSION**
- 3. THE CHIEF MAGISTRATES' COURT, MOMBASA**

AND

- 1.KIKAMBALA DEVELOPMENT COMPANY LIMITED**
- 2. JANE NJERI KARANJA**
- 3. FREDRICK OTIENO OYUGI**
- 4. MAURICE MILIMU AMAHWA**
- 5. EPHRAIM MAINA RWINGO**

6. SELINE CONSULTANTA LIMITED

7. JOAN ZAWADI KAREMA

8. RENSON THOYA JUMAHARRY JOHN PAUL ARIGI

9. YOR KAVUTSI MUDAVADI

10. ALIAS JOY K. ASIEMA

11. KENYA PORTS AUTHORITY RETIREMENT BENEFIT SCHEME....INTERESTED PARTIES

RULING

The Application

1. By a Notice of Motion dated 14/1/19 the 2nd Respondent prays for the following orders:

(a) That this Honourable Court be pleased to transfer this petition 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 for purposes of taking directions on the hearing and determination of the Petitioner's petition dated 08/01/2019.

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

2. The application is premised on the grounds that on 09/12/2016 the Hon. 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; that civil proceedings between the 2nd Respondent and the Petitioner in **Nairobi ACEC Suit Number 16 of 2017-EACC vs. Joseph Karanja T/A Karanja and Company Advocates & 10 Others** has been filed and is pending determination at the Anti-Corruption and Economic Crimes Division in Nairobi; that unless the orders sought by the Applicant are granted, material aspects of the issues raised in the Petition stand *res subjudice* in light of **Nairobi ACEC Suit Number 16 of 2017-EACC vs. Joseph Karanja T/A Karanja and Company Advocates & 10 Others**; that it is in the interest of justice and consistency in the administration of justice and expediency that any and all issues in the said Petitioner's Petition touching on **Nairobi ACEC Suit Number 16 of 2017** be heard and determined in the Anti-Corruption and Economic Crimes Division in Nairobi where the matter is pending determination; that it is in the interest of administration of substantive justice and fairness that the orders prayed for herein ought to be granted.

3. The application is supported by affidavit sworn on 14.01.19 by Francis O. Makori who is the learned Counsel herein for the 2nd Respondent, and a Supplementary Affidavit sworn on 21.1.19.

4. The application is supported by the 1st and 3rd Respondents. The 3rd Respondent did not however, file any affidavit in support of the application, but the 1st Respondent filed a Supporting Affidavit sworn by Mercy Gateru.

5. The 11th Interested Party did not participate in the application. Their counsel Mr. Ngoya submitted that the 11th Interested Party's main interest is to get a refund of their money and they were not interested in the petition or the application.

The Response

6. The application is opposed by the 1st, 2nd, 5th and 6th Interested Parties by affidavit sworn by their counsel Mr. Fred Adhoch on 30.1.19. Their case is that the constitutionality of the Gazette Notice No.10263 dated 09.12.16 issued by the Chief Justice on the said Practice Directions was challenged by the Law Society of Kenya vide **Nairobi High Court Constitutional Petition No. 534 of 2016 - Peter Wanyama Mayonge vs. Chief Justice of the Republic of Kenya & 5 others**. Pursuant to that challenge the Hon. The Chief Justice entered into a consent giving himself powers to open other sub registries outside Nairobi as he deemed fit. Consequent to this the Hon. The Chief Justice vide Gazette Notice No.2297 of 20.7.18 issued fresh directions amending the previous directions and in clause 3 thereof gave himself powers to establish additional Registries. This was followed up with another gazette Notice No.2810 dated 10.8.18 establishing a sub registry in Mombasa.

7. These Interested Parties aver that it is apparent that this petition which was filed on 9.1.19 (long after the said gazette Notice) is properly before this Court.

8. The 1st, 2nd, 5th and 6th Interested Parties aver that the Nairobi Anti-Corruption and Economic Crimes Division case number 16/17 was filed in Nairobi by the Ethics and Anti-Corruption Commission in the year 2017 when the 2016 Practice Directions were in force, while the criminal case which forms the subject matter of the petition namely Mombasa Chief Magistrate's Court No. 13/17 was filed by the 1st Respondent in Mombasa after the 2016 Practice Directions had been amended by the Hon. The Chief Justice.

9. The Interested Parties aver that the Chief Magistrate's Court Mombasa is administratively under this Court's supervisory jurisdiction and not the Nairobi High Court; that the Petitioner and all other 11 Interested Parties are all based in Mombasa. All the Respondents have offices in Mombasa. The balance of convenience, cost implications and expeditious disposal of the matter considerations are all clearly in favour of

the matter being done in Mombasa and not Nairobi and that from the charge sheet, some co-accused persons are facing offences under the penal code to wit, Breach of Trust (Count 2). Those offences are not included in the said Chief Justice Practice Note and that therefore both the Nairobi and Mombasa High Courts would have concurrent administrative jurisdictions Practice Note notwithstanding.

10. The 7th, 8th, 9th and 10th Interested Parties also opposed the application. They filed Grounds of Opposition on 4.2.19 stating that the application is premised on an erroneous appreciation of the source of jurisdiction for courts and tribunals in Kenya's legal system. They aver that the application proposes to elevate the Hon. The Chief Justice's Practice directions above statute and the constitution in conferment of jurisdiction to courts in Kenya. They aver that the application and its foundations are a threat to and a violation of Article 48 of the constitution hence null and void. These Interested Parties aver that the application erroneously supposes that the Anti-Corruption and Economic Crimes Division in Nairobi is a court distinct and separate both in establishment and jurisdiction to the High Court of Kenya sitting in any other part of the country. They aver that the application is calculated to delay the expeditious hearing and determination of this petition and is an abuse of the due process of Court.

11. The 3rd Interested Party also opposed the application. He filed a Replying Affidavit sworn by himself on 5.2.19. His case is that this Court has jurisdiction to hear and determine the petition. The subject of the Petition is a property which is situated within the geographical jurisdiction of this Court. The 2nd Respondent has offices in Mombasa. The Anti-Corruption Case No. 13 of 2018 is pending before the Chief Magistrate's Court in Mombasa; and all the Interested Parties are based in Mombasa and even the potential witnesses are all based in Mombasa. The 3rd Interested Party further avers that the Hon. The Chief Justice had amended the said Gazette Notice and so this petition can and should be heard in Mombasa and that the Application is indeed forum shopping;

12. The Petitioner also opposed the application. He filed a Replying Affidavit sworn by himself on 22.2.19. The Petitioner admitted that the Chief Justice did, vide Kenya Gazette Notice No.10263 dated 9.12.16 make practice directions whose effect in a nutshell were that all new cases relating to corruption and Economic Crimes Division were to be filed in the principal registry of the division at Nairobi. Thereafter the constitutionality of the said Practice direction was subjected to serious litigation vide **Nairobi High Court Constitutional Petition No. 534 of 2016 - Peter Wanyama Mayonge vs. Chief Justice of the Republic of Kenya & 5** others aforesaid wherein a consent was recorded amending Rule 2 of the Practice Direction and allowing the Chief Justice to establish sub registries outside Nairobi. The Petitioner avers that the express provision of the said consent orders in Nairobi petition number 534 of 2016 were that Rule No.2 of Gazette Notice number 10263 dated 9.12.16 which required all new cases relating to corruption and Economic Crimes to be filed in the principal registry of the Division at Nairobi for hearing and determination stood amended vide an order of a court of competent jurisdiction on 29.9.17. Further the Hon. The Chief Justice did vide Kenya Gazette Notice Number 8058 dated 10.8.18 established in Mombasa, a sub registry of the Anti-Corruption and Economic Crimes Division. This was done 'in the interest of effective case management' and to effect 'expeditious disposal of cases in the Anti-Corruption and Economic Crimes Division of the High Court'. The Petitioner avers that the instant petition arises from proceedings commenced by respondents in Mombasa Chief Magistrate's Court Anti-Corruption Case Number 13 of 2018, while it is common knowledge that Nairobi ACEC Suit Number 16 of 2017 was filed in Nairobi before gazette Notice number 8058 was ever published. The Petitioner avers that in any event he has made full disclosure of the existence of **Nairobi ACEC Suit Number 16 of 2017** in its pleadings.

The Submissions

13. Parties filed submissions which were highlighted in Court.

Applicant's Submissions

14. Mr. Makori learned counsel for the 2nd Respondent in his submission noted firstly that the Chief Justice as the head of the Judiciary has the constitutional and statutory mandate and authority to create the Anti-Corruption and Economic Crimes Division and to issue his considered applicable Practice Directions for all the divisions of the High Court. This is pursuant to Article 161(2)(a) of the Constitution of Kenya, 2010 as read together with Section 5 of the Judicial Service Act, 2011; sections 11, 16 and 27 of the High Court (Organization and Administrative) Act, 2015. Pursuant to the foregoing the Chief Justice made the said Practice Directions. The Directions guarantee expeditious disposal of Petitions on claims of infringement or threatened infringement of constitutional rights relating to corruption and/or economic crimes. Counsel submitted that the current petition raises issues of infringement or threatened infringement of constitutional rights relating to corruption and/or economic crimes. Therefore, the petition has been deliberately and unduly presented before this Court by the Petitioner in utter breach of the Chief Justice Practice Directions dated 9.12.16 as amended on 9.7.18. Mr. Makori submitted that since the petition squarely falls within the mandate of the Anti-Corruption and Economic Crimes Division of the High Court of Kenya, the same should be transferred to the said Division for determination pursuant to the said Practice Directions. Counsel referred the Court to the Court of Appeal decision in **Speaker of the National Assembly vs. James Njenga Karume [1992] eKLR at page 3**, where it was held that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

15. Mr. Makori agreed that on 25.7.18 vide Gazette Notice No. 8057, the Hon. The Chief Justice established a Sub-registry of the Anti-Corruption and Economic Crimes Division of the High Court of Kenya at Mombasa to take effect from the 30.7.18. However, Counsel submitted that the gazetted establishment of the said Sub-Registry in Mombasa has not been operationalized and to this end, the 2nd Respondent/Applicant shares the Petitioner's predicament of not physically locating and finding the Anti-Corruption and Economic Crimes Division sub-registry in Mombasa. Counsel submitted that this Court is not a Sub-Registry of the Principal Registry in the Anti-Corruption and Economic Crimes Division of the High Court of Kenya, and so the present petition can only be heard and determined in the Anti-Corruption and Economic Crimes Division of the High Court of Kenya.

16. Mr. Makori submitted that unless the orders sought by the Applicant are granted, material aspects of the issues raised in the Petition stands *res sub judice*. Mr. Makori submitted that it is in the interest of justice and consistency in the administration of justice to comply with provisions of the said Chief Justice Practice Directions aforesaid by ensuring that the Petitioner's petition dated 8.1.19 and all incidental applications thereto be heard and determined expeditiously in accordance with provisions of Article **159(2)(b) of the Constitution of Kenya, 2010** alongside all applicable laws, regulations and practice directions so as to facilitate administration of justice without delay. The 2nd

Respondent submitted that it not only has a right to access justice under **Article 48 of the Constitution**, but also a right to fair hearing that is expeditious within the confines of **Article 159(2)(b) of the Constitution**. In support of this line of submission, the Applicant relied on the legal principle established by the Court in **Ethics and Anti-Corruption & Another vs. William Baraka Mtengo & 4 others [2017] eKLR**, at paragraphs 32 and 33.

17. Mr. Makori further submitted that pursuant to **Section 27 of the High Court (Organization and Administrative) Act**, the principal judge of the Anti-Corruption and Economic Crimes Division should be given an opportunity to perform her judicial function as mandated under **Article 165(3)(b) and (d) of the Constitution of Kenya, 2010**. Counsel submitted that the purpose of the establishment of Anti-Corruption and Economic Crimes Division should not be defeated.

The 1st Respondent's Submissions

18. **Ms. Mutela** learned counsel for the 1st Respondent in support of the application submitted that the issues raised in the petition are not *res judicata* as stated in this application. The matters are clearly distinct. Counsel identified three issues for determination in this application, being whether this Court has jurisdiction to hear this matter, which she answered in the affirmative. However, counsel submitted that where specific mechanism have been put in place the said mechanism should be followed. In this case the Chief Justice Practice Directions should be followed. The said Practice Directions do not override the jurisdiction of this Court but provide an effective way of hearing the Anti-Corruption cases. Counsel submitted that the petition filed before this Court is not of a peculiar nature to warrant a departure from Practice Directions of the Chief Justice.

19. Mr. Ngoya for 11th Interested Party submitted that they do not wish to take an active position in the current application. Counsel submitted that the Scheme is not party to the Anti-Corruption case. Neither is it party to the criminal case in the CM's Court in Mombasa. Their main interest is to get a refund of money paid out in alleged purchase or sale. They are comfortable in whichever forum the matter is heard.

20. **Mr. Adhoch** learned counsel for 1st, 2nd, 5th & 6th Interested Parties submitted that the Petitioners are in this Court to enforce their constitutional rights and they seek an interpretation of charges facing them in criminal court in Mombasa Magistrate's Court. The High Court sitting in Mombasa is the right Court to determine the constitutionality of the criminal charges in the lower court, because it has the supervisory jurisdiction over the magistrate's court. This is administrative authority given by the constitution. So this is the right Court.

21. Secondly, Counsel submitted that under Article 165(3) this Court has original inherent jurisdiction to determine issues of intended or threatened violation of constitutional rights. The Petitioners are correctly before this Court in seeking interpretation why they have been charged in the lower court with a criminal case when in fact there is a similar civil case going on in Nairobi.

22. On Practice Direction by the Hon. The Chief Justice, Counsel submitted that the Chief Justice established the Sub-Registry of Anti-Corruption and Economic Crimes Division of the High Court in Mombasa with effect from 30.7.18. The said Sub-Registry already exists in Mombasa and this petition cannot therefore be transferred to Nairobi.

23. Mr. Adhoch submitted further that not all the alleged offences raised in the criminal matter No. 13 of 2018 relate to Anti-Corruption crimes. Some of the counts are Penal Code offences which should be tried in the nearest court available.

24. Mr. Mogaka for 3rd and 4th Interested Parties submitted that vide Gazette Notice No. 8058 of 10.8.18. Chief Justice established Sub-Registry of the Anti-corruption and Economic Crimes Division in Mombasa. That Sub-Registry is not a collection point for files for forwarding to Nairobi. The said Gazette Notice should be read together with Article 6(3) of the constitution where there are devolved services. Secondly counsel submitted that the three cases mentioned in this matter are different. The one in Nairobi is a civil matter seeking recovery of money. The second one is a criminal case in Mombasa while in this one they are seeking a constitutional interpretation of the said charges in the criminal court.

25. Mr. Mogaka submitted that expenses of having this matter going to Nairobi would be greater for the Respondents than for the Applicant. This would be against the tenets for fair trial.

26. Mr. Ongoya learned Counsel for 7th – 10th Interested Parties opposed the application and adopted the foregoing submissions in opposition. Counsel submitted that the application is made in error of understanding of both common sense and the law. Counsel submitted that the petition before the Court was prompted by the decision of DPP at the instruction of EACC to charge the Petitioner and the 1st to 10th Interested Parties before the 3rd Respondent. In executing that decision the DPP chose Mombasa the locus of that charge. A look at prayers in the petition shows that the reason for complaint revolves around that decision to charge in Mombasa. It is them who brought the parties to Mombasa. Is it reasonable that to challenge that decision one has to travel 500 kilometers to Nairobi? Counsel submitted that common sense says no.

27. On the law, counsel submitted that this Court is governed by law. The petition is about the abuse of the criminal justice system in Mombasa. Section 12 of H.O.A. Act No. 27 of 2015 answers this question fully and definitively. Under Section 12(1) (a) (3) – the Chief Justice shall facilitate access to justice by establishing at least one High court station per County. This was to demystify Nairobi as the source of everything. The High Court station that supervises the magistrates court in Mombasa is the High Court based in Mombasa. If there is a conflict between the Chief Justice gazette directions and above Section 12, Section 12 shall prevail. It follows then that this Court is the correct forum. Even in terms of facilitating expeditious access to justice, filing this case here is the most sensible thing to do. If it is filed in Nairobi, this will increase the cost of access to justice, and offends Article 48 of the constitution. Mr. Ongoya submitted that there are only two circumstances under which this Court can transfer the matter to Nairobi: when this Court has no jurisdiction, and if it is administratively the more convenient thing to do. Counsel submitted that both options do not apply in the matter before the court.

28. As for Practice Directions of the Hon. The Chief Justice, Counsel submitted that these directions do not establish a Court. They establish a Division of a Court, not a special Court e.g. ELC or Children's Court. These Courts exercise special jurisdiction. A division is only for administrative order. So transferring this matter to Nairobi only creates disorder. However, the Chief Justice has gone ahead to establish a Sub-Registry in Mombasa. Counsel submitted that given that Mombasa has a Sub-Registry, it would be absurd for this Court to transfer this matter to another Judge in Nairobi. Counsel further submitted that they cannot have parts of this matter heard in Nairobi and parts of it relating to the criminal matter be heard in Mombasa. Counsel urged the Court to dismiss the application.

29. Mr. Gikandi opposed the application stating that the Chief Justice established Sub-Registries outside Nairobi. In that regard the authorities relied on by the Applicant loose meaning because of that action of the Chief Justice to establish Sub-Registry in Mombasa. Mr. Gikandi found it rather odd that on the issue of convenience, the EACC filed the matter in Nairobi for recovery of money. Then they came to Mombasa to file a related criminal case. The Petitioner seeks interpretation of the criminal charges in Mombasa. Counsel submitted the Sub-Registry in Mombasa is not a collection point for cases to be put in a pick-up and taken to Nairobi in the central registry. This is the only way to give effect to Article 6 of the constitution. Counsel submitted that the application has no merit and should be dismissed with utmost contempt.

The Determination

30. I have carefully considered the application and the submissions. In my view there is only one issue to be determined, that is, whether or not this Court has the jurisdiction to hear and determine the present petition.

31. The petition herein is challenging the constitutionality of Mombasa Chief Magistrate's Court Anti-Corruption Case No. 13 of 2018. It is not in doubt that the issue of criminal prosecution arose long after the institution of Nairobi ACEC No. 16 of 2017. It is therefore illogical, on the face of it, to argue that a challenge to Mombasa CM ACC No. 13 of 2018 can be *res subjudice* Nairobi AECC No. 16 of 2017.

32. The starting point is whether or not this Court has the jurisdiction to hear this petition. None of the parties, including the Applicant, has suggested that this Court did not have the jurisdiction to hear and determine the petition. Rather, the case for the Applicant is that the Anti-Corruption and Economic Crimes Division based in Nairobi is better equipped and staffed to hear and determine the petition expeditiously. If this is the case, and there is no contention that it is not, then the arguments for the transfer of this petition to the said Anti-Corruption and Economic Crimes Court in Nairobi must be based on some axiomatic considerations rather than the law. These considerations must then include the possibility that the petition may be heard and determined in record time should it be transferred to Nairobi. The other consideration must address the possibility that it would be much less costly for the Petitioner and his witnesses to be flown to Nairobi for the hearing of his petition. There are, no doubt many other axiomatic considerations. But limiting myself to those two, there is no doubt that the Anti-Corruption and Economic Crimes Division in Nairobi has what may seem to be available staff to hear and determine the petition in a record time. This would be a good enough reason to transfer this suit to that Court on account of expeditious disposition.

33. On the second reason, there is no doubt that the transfer of this petition to Nairobi will occasion serious financial constraints to the Petitioner in terms of attending hearings and mentions in Nairobi, not forgetting the possibility of the need to transport witnesses. This, if allowed, would impugne the Petitioner's right to a fair trial provided for under Article 48 of the constitution.

34. It should be noted, as submitted by all those who oppose the application, the petition before the Court was prompted by the decision of DPP at the instruction of EACC to charge the Petitioner and the 1st to 10th Interested Parties before the 3rd Respondent. In executing that decision the DPP chose Mombasa the locus of that charge. A look at prayers in the petition shows that the reason for complaint revolves around that decision to charge in Mombasa. It is the Respondent and the DPP who brought the parties to Mombasa. It is not reasonable that to challenge that decision one has to travel 500 kilometers to Nairobi. That is against both common sense and the tenets of fair hearing provided for in the constitution.

35. Thirdly, the petition is about alleged abuse of the criminal justice system in Mombasa. Section 12 of H.O.A. Act No. 27 of 2015 addresses this question fully and definitively. Section 12(1) (a) (3) states that the Chief Justice shall facilitate access to justice by establishing at least one High court station per County. This was to demystify Nairobi as the source of everything. The High Court station that supervises the magistrates court in Mombasa is the High Court based in Mombasa. If there is a conflict between the Chief Justice's gazette directions and above Section 12, Section 12 shall prevail. It follows then that this Court is the correct forum for the determination of this petition. Even in terms of facilitating expeditious access to justice, filing this petition in Mombasa is the most sensible thing to do. If it is filed in Nairobi this will increase the cost of access to justice, and offends Article 48 of the constitution.

36. Fourthly, the Hon. The Chief Justice has gone ahead to establish a Sub-Registry in Mombasa. This Sub-Registry is not just a collection point for cases to be loaded into a pick-up for hearing and determination in Nairobi. The Sub-Registry is a creation of the law and has legal backing. If it has not started its operations, it is the duty of this Court through this Ruling to speak loudly so that the Court may be fully equipped. Given that Mombasa has a Sub-Registry, it would be absurd for this Court to transfer this matter to another court in Nairobi. It would also appear strange that parts of this matter are heard in Nairobi and parts of it relating to the criminal matter are heard in Mombasa. The High Court in Mombasa is the lawful Court to exercise supervisory jurisdiction over the subordinate courts in Mombasa. The gazettelement of Mombasa Court as a Sub-Registry for the Anti-Corruption and Economic Crimes Division now clearly complements that role.

37. It is for the foregoing reasons that the application herein must fail. Costs shall be in the cause.

Dated, Signed and Delivered at Mombasa this 7th day of November, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Gikandi for Petitioner

Mr. Adhoch for 1st, 2nd, 5th and 6th Interested Parties

Mr. Kimuli for 7th- 10th Interested Parties

Ms. Onkoba holding brief Omunga for 3rd and 4th Interested Parties

Mr. Ngoye for 11th Interested Party

Mr. Wandera holding brief Makori for 2nd Respondent

Mr. Fedha for 1st Respondent

Mr. Kaunda Court Assistant