



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 8 OF 2011

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF: THREATENED FUNDAMENTAL RIGHTS PROVIDED FOR UNDER
ARTICLE 22 OF THE CONSTITUTION**

AND

**IN THE MATTER OF: ARTICLES 22(i), (3) (D), 23(1), (30 47, 50(4) AND 165 OF THE
CONSTITUTION OF KENYA AND RULES 11-13 OF THE CONSTITUTION OF KENYA
(SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES,
2006**

AND

**IN THE MATTER OF: THE LOCAL GOVERNMENT ACT SECTIONS 147 AND 148 OF CAP
265 LAWS OF KENYA**

AND

**IN THE MATTER OF: PUBLIC PROCUREMENT DISPOSAL ACT SECTION 74 OF ACT NO.
3 OF 2005**

AND

IN THE MATTER OF: ANTI-CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003

BETWEEN

**TUBMAN OTIENO (Suing in his own capacity as well as an officer of the
Municipal Council of Mombasa).....PETITIONER**

AND

1. KENYA ANTI-CORRUPTION COMMISSION

2. THE HONOURABLE ATTORNEY-GENERAL

3. DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENTS

JUDGMENT

1. In an Amended Petition dated 21st February, 2011 and filed on 22nd February, 2011 the Petitioner herein sought the following orders -

(a) Pending the hearing and determination of this petition for orders of declaratory reliefs, there be made a conservatory order in terms of Article 23(3)(c) of the Constitution as read with Rule 20 of the Supervisory Jurisdiction Rules of this court, to bar and or restrain the Respondents, their officers, servants and or agents from arresting and or causing to be arrested the Town Clerk (one Tubman Otieno) of the Municipal Council of Mombasa or any other officer of the said Council, and or from charging and prosecuting him (or any other officer) in respect of any criminal charge, and or prosecuting and or causing him to be criminally prosecuted either as aforesaid or in any manner whatsoever, or until any further orders of this court.

(b) This Honourable court do give any such other order, for the protection and further preservation of the Applicant's fundamental rights and freedoms under the Constitution in addition to prayers made in (a) above as it may deem just and convenient to grant.

(c) The Honourable court do declare that the threatened arrest and impending trial of the Petitioner is an infringement and/or violation of his rights and freedoms protected by the Constitution, that is to say, liberty and choice at place of work.

(d) The Petitioner is entitled to fair administrative action which is lawful, reasonable and procedurally fair as expressed by Section 47 of the Constitution of Kenya.

2. The Amended Petition was premised upon the various averments made in the body of the Petition and basically that whatever offences he was being investigated for or committed are lawful acts which he committed or did in the course of the performance of his duty, pursuant to the provisions of the Local Government Act (Cap 265, Laws of Kenya, (now repealed)) and Sections 74, and 75 of the Public Procurement and Disposal Act, 2005 (No. 3 of 2005).

3. The Petitioner also found grievance by the Respondent's refusal to listen to him and understand his version of the facts relating to the procurement transactions for which he was being threatened with prosecution, and was being prosecuted, and not being heard by the Respondent the complainant, as is required under Section 27 and 28 of the First Respondent's statutes. The Petitioner therefore claimed that his rights under Articles 22, 23, 47 and 50 of the Constitution are being violated by the Respondents. The Petitioner sought and was granted a conservatory order on 23rd February, 2011 pursuant to an application by way of a Notice of Motion dated and filed on 17th February, 2011. Since the grant of the said order the Petitioner has not prosecuted his Petition until prompted by the First Respondent.

4. The Petitioner claims that the institution of criminal law process will embarrass/prejudice him and the court should take note of the concurrent proceedings in the criminal court, and High Court; being Mombasa HCCA No. 73 of 2011 and Mombasa HCCA No. 6 of 2011 and an Appeal through Court of Appeal No. 26 of 2011.

5. The Petitioner further complained that procurement was a process and not the decision of the Petitioner alone but that of the full Council, where all councilors and committee members who attended and reached a unanimous decision to "*source from a single provider*". The Petitioner contends that preferring the charges against him alone out of all the members of the Council who were present was a discrimination against him and is a violation of the law, whereas he is entitled to equal treatment before the law, if the threatened arrest and prosecution is carried out. The Petitioner therefore sought the orders first above set out.

6. Though the Respondent took out a Preliminary Objection first dated 4th March, 2011 and filed on 8th March, 2011, that Preliminary Objection was on 15th July, 2011 ruled incompetent as it did not specify what preliminary objection was on a point of law. It was abandoned and replaced by another Preliminary Objection dated and filed on 1st August, 2011 pursuant to order of court issued on 15th July, 2011. That objection too was abandoned following a failure on the Respondents part to submit on the question raised by the court in its Ruling of 27th February, 2013, whether a subordinate court still had power to make references under rules 25 and 26 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedom of the Individual) High Court Practice and Procedure Rules, 2006 (**the Gicheru Rule**), if they related to questions of alleged contravention of the constitutional rights and freedoms of the Petitioner that arise from a criminal proceeding before a subordinate court.

7. I agree with the Judge's finding that Article 22 of the Constitution of Kenya, 2010, does not have an equivalent of Section 84(3) of the previous edition of the Constitution, and consequently subordinate courts do not have power to make references under Section 84(3) of the repealed Constitution. The question which therefore remains for determination herein is whether the Petition establishes any grounds for the grant of any of the orders sought.

8. In his counsel's written submission the Petitioner pleads that he is protected from prosecution by virtue of Article 236 of the Constitution which states that a public office shall not be –

(a) victimised or discriminated against for having performed the functions of office in accordance with this constitution or any other law or

(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.

9. Counsel reiterated the averments in the Petition that the decision to procure the particular services was that of the council as a whole, and not the Petitioner, and the prosecution of the Petitioner is selective and discriminatory, and that this court should allow the Petition, and grant the orders sought.

The Respondent's Case

10. The Petition was opposed. In the Replying Affidavit of Abdulhamid Farooque Low, the First Respondent's Investigating Officer, avers that there were good grounds for charging the Petitioner, and that the Petitioner had refused and/or neglected to prosecute the Petition herein since he was granted conservatory orders over four years ago now. The deponent also avers that the Petitioner had acted well before obtaining the necessary approvals under the Public Procurement and Disposal Act, 2005, and that the Petitioner's actions disclosed the commission of an offence, as advised by the prosecution, the Office of the Attorney-General at the time. In addition to the said Replying Affidavit the First Respondent also filed on 17th July, 2014 written submissions dated 16th July, 2014.

11. Though the First Respondent raised the question of the competence of the Petition in that it should have been framed as a reference by the trial court to this court pursuant to rules 25 and 26 of the Gicheru Rules, I have already found that the charges were instituted after the commencement of the Constitution of Kenya 2010, and the right of an accused person to approach the High Court no longer depended upon a reference by the trial court under rules 25 and 26 of the **Gicheru Rules**. Article 22 of the new Constitution gave an accused person direct access to the High Court in respect of a claim that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. To that extent therefore the Petition herein was and is competent. The issue or question is whether the decision to prosecute the Petitioner is fair under Article 47 of the Constitution, and the ancillary question is whether the Petitioner will receive a fair trial.

12. The decision to prosecute the Petitioner was taken in accordance with Article 157(b)(c) of the Constitution, which empowers the Director of Public Prosecutions to –

“institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.”

13. Article 47 of the Constitution guarantees every person a right to an **administrative action**, that is expeditious, efficient, lawful, reasonable and procedurally fair. An investigative agency, as the First Respondent is required to carry out its investigations, in a manner that is both expeditious, efficient, lawful and procedurally fair. That is what its statute, the Anti-Corruption and Economic Crimes Act 2003, requires to do in carrying out its mandate for the prevention, investigation and punishment of corruption, economic crime and related offences, and for matters incidental and connected therewith.

14. On the other hand Article 50 of the Constitution guarantees every person a fair trial and in particular, the presumption of innocence unless the contrary is proved. There are no grounds to show that the decision by the Director of Public Prosecutions to charge the Petitioner was either laden with caprice or malice. The Petitioner is ringed with constitutional armour and protection under Article 50 of the Constitution. I looked hard, but would not find any ground suggesting that the Petitioner’s constitutional rights to a fair trial have been infringed in the course of the investigations or the trial.

15. For those reasons, I find no merit in the Petition herein, and the same is dismissed, with a direction that this being public interest litigation, costs fall on each party.

16. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 7th day of June, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Ms. Abdulrahman for Petitioner

Miss Lutta for 1st Respondent

Mr. Ayodo for 2nd Respondent

Mr. Silas Kaunda Court Assistant