



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 99 OF 2012

IN THE MATTER OF: ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: AN APPLICATION BY THE HON. KELVIN KWENA LUNANI FOR
LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: THE CRIMINAL PROCEDURE CODE CAP 75

AND

IN THE MATTER OF: THE NATIONAL POLICE SERVICE ACT (ACT 11A OF 2011)

AND

IN THE MATTER OF: MOMBASA HIGH COURT CIVIL SUIT NO. 125 OF 2012 HON. KELVIN
KWENA LUNANI VS. THE MOMBASA HOSPITAL ASSOCIATION

AND

IN THE MATTER OF: MOMBASA CHIEF MAGISTRATE'S CRIMINAL CASE NO. 2521 OF 2012
REPUBLIC VS. KELVIN KWENA LUNANI

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (2010)

BETWEEN

THE REPUBLIC.....APPLICANT

VERSUS

1. THE DIVISIONAL CRIMINAL INVESTIGATION OFFICER, MSA
2. THE DIRECTORATE OF CRIMINAL INVESTIGATIONS

3. THE NATIONAL POLICE SERVICE COMMISSION

4. THE DIRECTOR OF PUBLIC PROSECUTION..RESPONDENTS

AND

1. VINCENT WANJALA

2. ESS-SECURITY SERVICES

3. THE MOMBASA HOSPITAL ASSOCIATION.....INTERESTED PARTIES

HON. KELVIN KWENA LUNANI.....EX-PARTE

RULING

1. In his Notice of Motion dated and filed on 31st December, 2012, Hon. Kelvin Kwena Lunani (*ex parte* Applicant) sought:-

“(1) An order of certiorari to remove into this court and to quash the decision made by the Mombasa Divisional Criminal Investigation Officer contained in a charge sheet dated August 2012 whereby the DCIO Mombasa purported to arraign in court and charge the *ex parte* Applicant with a criminal offence in Mombasa Chief Magistrate’s Court Criminal Case No. 2521 of 2012 (Republic vs. Hon. Kelvin Kwena Lunani).

(2) An order of prohibition directed to the Respondents to prohibit them or any one of them from any further prosecution of the *Ex parte* Applicant in the cause of Mombasa CMC Cr. Case No. 2521 of 2012 (Republic vs.. Hon. Kelvin Kwena Lunani and/or initiating or commencing any other criminal proceedings based on the same set of facts until.

(a) the hearing and determination of Mombasa High Court Civil Case No. 125 of 2012, (Hon. Kelvin Kwena Lunani vs. The Mombasa Hospital Association) now pending formal proof before this court;

(b) the *ex parte* Applicant has been given an opportunity to be heard and a statement before the Investigating Officer on the question whether he should be charged with the criminal offence as alleged against him by the First and Second Interested Parties or at all;

(3) An order for costs of the Application be granted to him.”

2. The Application was based upon the argumentative statement of Facts, the equally scanty Affidavit Verifying the Facts (not Verifying Affidavit) and the grounds set out in the Chamber Summons (for leave to commence Judicial Review proceedings for the orders of certiorari and prohibition) dated and filed on 13th December, 2012.

THE RESPONSE BY THE RESPONDENTS AND INTERESTED PARTIES

3. None of the Respondents, the Divisional Criminal Investigation Officer Mombasa, the Director of Criminal Investigations, the National Police Service Commission nor the Director of Public Prosecutions filed any papers despite being served with the Notice of Motion aforesaid, thus tempting counsel for the *ex parte* Applicant to venture to say that the application should be allowed because it is not opposed by the Respondents. Of the Interested Parties, it is only the Mombasa Hospital Association (the Third Interested Party) which filed submissions in this matter.

THE ISSUES

4. Two issues are raised by *ex parte* Applicant as to why criminal proceedings should not be maintained against him. **Firstly**, the Applicant claims that he was not given a chance to write or record a statement with the office of the Divisional Criminal Investigations Officer (DCIO), Mombasa, and that is against the rules of natural justice.

5. **Secondly**, the Applicant does not wish to be prosecuted until the civil case he has instituted against the Interested Party is determined.

6. **The third** issue is the role of the Third Interested Party in Judicial Review proceedings.

7. I will begin with the third issue, the role of the Interested Party because Judicial Review is concerned with the decision-making process in the exercise of statutory or administrative power or authority. Because such decisions may have conferred an interest upon a party who was not the decision-maker, and that the ultimate decision of the Judicial Review Court may directly affect the interest of such third party, judicial review rules (Order 53 rule 3(2)) require that such persons be served with the Judicial Review process as they may be affected by the ultimate decision of the court. That, I believe is the reason why the Third Respondent is enjoined in these proceedings.

8. Indeed as A Nassir, the Administrative Director of the Third Interested Party says, in his Replying Affidavit, that the Application as against the Third Respondent is bad in law, lacks merit, and that it is made in bad faith, there is in fact no application against the Third Interested Party. It is enjoined here to be aware that as the Defendant in Mombasa CMCC No. 2356 of 2012, the decision of the Judicial Review court may affect it. But how it would affect the Third Interested Party is not clear, as the complainant is not even the third Interested Party, but an individual who had or may have had an altercation with the Applicant within the Third Party's premises. If this were a civil action, I would agree with the Third Interested Party that there is no cause of action against it.

9. Turning to the germane issues raised by the Application, I will begin by considering the second ground because it is the lighter one to answer. Section 193A of the Criminal Procedure Code, (Cap 75, Laws of Kenya) provides:-

“193A Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of criminal proceedings.”

10. It is clear from that provision that in the absence of any extenuating circumstances the *ex parte* Applicant cannot be allowed, and this court will not allow him, in the pendency of any civil suit by or against him arising out of the same set of facts, to stay or prohibit his prosecution. The application therefore fails on that ground.

11. The **first** ground raises fair trial questions as to the rights of an accused person, under Article 50(2) of the Constitution, the right to be presumed innocent until the contrary is proved (Article 50(2)(a), the right to be informed of the charge, with sufficient detail to answer it (Article 50(2) (b)), and a host of other rights to fair hearing prescribed under the said Article 50, including the right to adduce and challenge evidence, and the right to refuse to give self-incriminating evidence.

12. The duty of the Police is to investigate a matter once a complaint is made to them. If after investigations the facts disclose an offence, they may or may not charge the perpetrator of the offence. Once the perpetrator or suspect is identified, he is invariably asked to record his version of events which led to the commission of the offence or matter complained about. It is unclear in this instance whether or not the Applicant was summoned by the office of the First Respondent to record a statement of his version of the events. The non-invitation to record, or the non-recording of his own statement is not however a bar to the prosecution of an accused. He cannot claim that his right to fair hearing has been denied or that the rules of natural justice have been breached. The principles of the rule of natural justice are two sides of the same coin. No man or woman may be condemned unheard, and bear the other party or side.

13. These principles are will secured under Article 50 of the Constitution, on the rules of fair hearing. The Applicant is aware he has been charged, and the reasons are given in the particulars of the charge, as assault causing grievous harm contrary to Section 251 of the Penal Code (Cap 63, Laws of Kenya). He is aware and has particulars of the charge, what awaits him is the prosecution evidence and his answer if the court finds he has a case to answer.

14. Counsel submits that there is no procedure in Kenya for trial in **absentia** of the accused person. With respect, that is not a correct statement of law. Section 194 of the Criminal Procedure Code may lead to the exclusion of an accused person, if he fails to attend court, in addition to issue of a Warrant of Arrest. Article 50(2) of the Constitution of Kenya 2010 guarantees every accused person the right to a fair trial, which includes under Article 50(2) (d) and (f) the right to:-

(1) a public trial before a court established under the Constitution;

(2) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed.

15. Though the presence of the accused is a constitutional requirement, the Constitution also envisages situations where an accused person either through conduct unbecoming or abuse by obtuse or reluctance to attend court, and in those situations, the court could either issue a Warrant of Arrest, or could also proceed with the hearing, and ultimately determine the case in the absence of the accused.

16. In this case the Petitioner will have an option, to attend court or face a Warrant of Arrest and possible detention to ensure quick determination of the case against him. The excuse or plea of trial in **absentia** will not aid the Petitioner.

17. For those reasons, I find and hold that no right of the Petitioner has been denied, violated or threatened with such denial, or violation. In the circumstances I find no merit in the Applicant's Notice of Motion dated and filed on 31st December, 2012 is dismissed with a direction as to no order as to costs.

Dated, Signed and Delivered in Mombasa this 4th day of June, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Miss Kerubo holding brief Mr. Kiti for Applicant

Miss Lutta holding brief Masila for Respondents

Court Assistant Kaunda