



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO. 235 OF 2014

SAMUEL SABUNI1ST PETITIONER

JACKSON MUNGAI2ND PETITIONER

SAMUEL M MURIUKI3RD PETITIONER

VERSUS

COURT MARTIAL.....1ST RESPONDENT

CABINET SECRETARY FOR DEFENCE2ND RESPONDENT

PRINCIPAL SECRETARY FOR DEFENCE.....3RD RESPONDENT

CHIEF OF DEFENCE FORCES4TH RESPONDENT

BRIGADIER K. O. DINDI5TH RESPONDENT

LT. COL. NJUGUNA6TH RESPONDENT

CAPTAIN S C YATOR7TH RESPONDENT

ATTORNEY GENERAL8TH RESPONDENT

LT. COL. YVONNE KERUBO KIRUI9TH RESPONDENT

RULING

At the time of filing their petition Samuel Sabuni (1st Petitioner), Jackson Mungai (2nd Petitioner) and Samuel M Muriuki (3rd Petitioner) also filed a chamber summons application dated 16th May, 2014 in which they seek orders as follows:

- 1. THAT this Application be certified urgent and service be dispensed with in the first instance.**
- 2. THAT the Prosecution of the 2nd and 3rd Respondents (sic) before the Court Martial be stayed pending the hearing and determination of this application.**
- 3. THAT the Prosecution of the 2nd and 3rd Respondents (sic) before the Court Martial be stayed pending the hearing and determination of this Petition.**

4. **THAT the Sentence of the 1st Petitioner be suspended and or stayed on reasonable terms pending the hearing and determination of this Petition.**
5. **THAT pending the hearing and determination of this Petition the Respondents (sic) be admitted to reasonable bail or bond terms.**
6. **THAT Costs of the Application be provided for.**

The application is supported by the grounds on its face namely:

- a. **That the fundamental Rights of the Petitioners have been infringed.**
- b. **The 1st Petitioner has been prosecuted by incompetent persons who do not have authority to prosecute.**
- c. **That the Convener of the Court Martial is not an employee of the judiciary yet the Court Martial falls under Judiciary.**
- d. **That there is need to comply with the law in the interest of Justice.**

Each petitioner also swore an affidavit in support of the application.

The Court Martial, the Cabinet Secretary for Defence, the Principal Secretary for Defence, the Chief of Defence Forces, Brigadier K. O. Dindi, Lt Colonel Njuguna, Captain S. C. Yator, the Attorney General and Lt. Yvonne Kerubo Kirui are the 1st to 9th respondents respectively. They all opposed the application.

At the hearing of the application, Mr. Odera Were for the applicants/petitioners submitted that the Court Martial having been created under Article 169 (1) (c) of the Constitution falls under the Judiciary. He asserted that the Court Martial was convened by the 9th respondent a member of Kenya Defence Forces (KDF) and this amounted to interference with the constitutional mandate of the Judiciary. He argued that the convening of the Court Martial by a member of the KDF breached the doctrine of separation of powers. He contended that an Act of Parliament cannot take away the powers given to the Judiciary by the Constitution. It is his argument that if the Judiciary allows other bodies to convene courts on their behalf then justice will be compromised. He submitted that there is no evidence that the Judiciary has delegated its powers and therefore **Section 163 of the Kenya Defence Forces Act, 2012 (KDF Act)** is unconstitutional. He urged this Court to find that the Court Martial can only be convened by the Chief Justice.

In the same vein, the petitioners contended that any court created by the Constitution is a sitting court and the Court Martial is no longer an ad hoc Court and the Chief Justice must gazette where the Court sits and a registry should be opened where parties can file documents and peruse the files. He submitted that the registry should be created by the Judiciary and not KDF.

The second argument in support of the application is that **Section 213(6) of the KDF Act** requires that the office of the Director of Military Prosecutions (DMP) shall be separate from that of the legal department in the Defence Forces or Ministry. He contended that the 5th respondent Brigadier K. O. Dindi held the office of the DMP and also headed KDF's legal department. He argued that the provision in the KDF Act separating the two offices was not inserted for cosmetic purposes. There must have been a mischief which was intended to be cured by the provision. He contended that the person making the decision to prosecute must be independent from the person prosecuting. Consequently, the applicants argue that so long as the 5th respondent is holding the two offices he is incompetent to practice in the Court Martial and has no capacity to delegate his duties to any person working under him.

The third point in support of the application is alleged non-compliance with the law in regard to the proceedings before the Court Martial. Counsel for the petitioners submitted that there is no abstract from the commanders of the petitioners in the proceedings. According to him, the charges are supposed to be framed by the commanders but this was not done. He argued that the petitioners had been rushed to the Court Martial without being given an opportunity to elect whether to undergo summary trial or go to the Court Martial. It is said that the offences the petitioners are facing can be tried summarily and no reason

was given as to why they were taken to the Court Martial. It was submitted for the petitioners that failure to follow the clearly laid down procedure amounted to breach of their fundamental rights.

The fourth ground in support of the application is that there are no rules in place governing the conduct of proceedings before the Court Martial. Counsel for the petitioners asserted that **Section 310 of the KDF Act** provides that service orders, rules or regulations that were in place at the time of the commencement of the Act were to remain in place for not more than twelve months. The said Section states:

“310. (1) Notwithstanding section 309-

(a) any reference to the Armed Forces Act under any written law shall be construed as a reference to this Act.

(b) any regulations, directives, orders, or instructions or other administrative measures taken or issued under the Armed Forces Act in force immediately before the commencement of this Act, shall be deemed to have been made and issued under this Act.

(c) all Service orders, rules or regulations existing before the commencement of this Act shall be reviewed, amended or revised to conform to the provisions of the Constitution and this Act within twelve months after coming into force of this Act.

(2) Until the orders, regulations, rules, circulars, notices, proclamations, or other instrument made in exercise of a power conferred by a written law applicable and having the force of law are amended in accordance with this section, they shall apply and be construed with alterations, qualifications, and exceptions necessary to bring them in conformity with the Constitution and this Act.”

He argued that since twelve months had lapsed from the time of the enactment of the Act without any review of the service orders, rules and regulations then it meant that there were no rules and regulations in place for conducting trials before the Court Martial. He cited the example in the rules which provided that no objection can be made against a Judge Advocate and compared this with **Section 167 of KDF Act** which allowed for an objection to be made against any member of the Court including a Judge Advocate. He stated that this only goes to show that the rules and regulations governing the proceedings were indeed obsolete.

On another point, Mr. Odera Were for the petitioners argued that there was a breach of **Section 140(2) of KDF Act** which provides that if a person was held in custody for over eight days then a special report ought to be made. The said Section states:

"140. (1) The allegations against a person arrested under sections 137 or 141 shall be investigated without unnecessary delay, and as soon as practicable thereafter either proceedings shall be instituted to deal with the allegations or the person shall be released from arrest.

(2) Where a person who is subject to this Act remains in custody for eight days without being tried by a court martial or dealt with summarily—

(a) a special report on the necessity for further delay shall be made by the person's commanding officer to the Service Commander in the prescribed manner; and

(b) a similar report shall be made to the Service Commander in the prescribed manner every eight days until a court martial sits or the offence is dealt with summarily or the person is released from arrest;

(3) Where an accused person is on active service, subsection (2) shall not apply except so far as is reasonably practicable, having regard to the exigencies of active service.

(4) Notwithstanding the extensions granted under subsection (2), circumstances under subsection (3) or limitation of rights of an arrested person provided for under section 54, a person shall not, at any given time, whether in active service or not, be held in custody for a period exceeding forty two days in aggregate.

(5) Where the summary disciplinary proceeding have not commenced or the court martial has not been convened after the expiry of forty two days, the commanding officer shall hold the accused person under open arrest on such conditions as the commanding officer may determine.”

Mr. Were protested the respondents’ action of correcting the errors made after the petition had been filed. He complained that Lt. Colonel Yvonne Kerubo Kirui had sworn an affidavit averring that special reports had been submitted in respect of the periods for which the petitioners had been held for over eight days. He wondered why no such reports had been annexed to the affidavit. He also pointed out that after he complained about lack of case numbers the case numbers were subsequently provided.

In respect to the 1st petitioner who has already been convicted, Mr. Were argued that the respondents had admitted that he wrote letters asking to be discharged. He stated that there was evidence before the Court Martial that one of the witnesses had admitted receiving the 1st petitioner’s letters. He contended that the 1st petitioner was not examined by a doctor for purposes of re-engagement as required **by KDF Act**. He argued that the prosecution of the 1st petitioner was therefore malicious.

Counsel for the petitioners urged this Court to concur with him that there are matters to be investigated in this case and grant conservatory orders as prayed.

Mr. Njoroge for the respondents submitted that the petitioners’ main complaints were that the DMP was not competent and that the convening of the Court Martial was unconstitutional. He argued that **Section 163 of the KDF Act** which provided for the convening of the Court Martial had been complied with. He submitted that independence was not the only factor to be considered when a Court Martial is being convened. He urged the Court to take note of the fact that none of the provisions of the **KDF Act** had been declared unconstitutional and the Court should act on the presumption that the Act was within the parameters of the Constitution.

Mr. Njoroge contended that **Article 169 of the Constitution** which creates subordinate courts among them the Court Martial provides in **Article 169(2)** that Parliament shall enact legislation in respect of subordinate courts. As a consequence Parliament enacted the **KDF Act** which among other things provides for the operationalization of the Court Martial.

On the issue of the DMP holding two offices, counsel for the respondents submitted that **Section 214 of the KDF Act** allows the Defence Council to appoint persons to conduct prosecutions. He argued that **Section 214** should be read together with **Section 213 of the KDF Act**. He contended that the DMP was not barred from holding any other office. He stated that the DMP does not prosecute the cases before the Court Martial and in any case **Section 214** mitigates any perceived prejudice that may arise in the minds of the petitioners.

The respondents contended that the petitioners had jumped the gun by rushing to file a constitutional petition instead of filing an appeal as provided by the **KDF Act**. He cited various authorities in support of his contention that whenever statute provides for a process to be followed by an aggrieved party, that process should be adhered to. He pointed out that an appeal mechanism had been provided to the petitioners by **Section 186 of the KDF Act**.

Mr. Njoroge pointed out that **Article 24(5) of the Constitution** limits the rights of persons held in service custody and the 2nd and 3rd petitioners are in service custody. He stated that **Section 54 of the KDF Act** deals with the issue of service custody and the petitioners ought to have first applied for bail in the Court Martial. He asserted that the military process should be allowed to proceed to conclusion and thereafter

the High Court can take over if there is an appeal.

Mr. Njoroge urged the Court to find that the chances of success of the petition are minimal and there are no grounds for granting conservatory orders. He prayed for the dismissal of the application with costs to the respondents.

In reply Mr. Were asserted that there is indeed evidence on record to show that both the **Constitution** and the **KDF Act** had been breached and there is therefore need for this Court to intervene by issuing the necessary orders.

The latest decision on what should be taken into account when issuing conservatory orders is that of the Supreme Court of Kenya (Ojwang & Wanjala SCJJ) in the case of **GATIRAU PETER MUNYA v. DICKSON MWENDA KITHINJI AND 2 OTHERS**, Supreme Court of Kenya Petition No. 2 of 2014. In the matter the Court stated that:

“[84] That leaves pending the main interlocutory matters: *whether we should stay the hand of the Independent Electoral and Boundaries Commission, and the Speaker of Meru County Assembly, so they do not move to alter the state of affairs at the Meru County gubernatorial office, pending the hearing and determination of the applicant’s appeal.*

[85] These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being characterized by *injunctions, orders of stay, conservatory orders* and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of “stay orders” is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.

[86] “*Conservatory orders*” bear a more decided *public law* connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the *public interest*. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the *inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.*”

The petitioners have put forth strong arguments in support of their case. The respondents have on their part also strongly submitted that their arguments should carry the day.

This being an application for conservatory orders, I must act with restraint so as not to prejudice the petition. For that reason, the authorities submitted to the Court by the parties are better left for consideration at the hearing of the petition. I have looked at **Section 310 of the KDF Act** and I hold the opinion that there are rules and regulations for conducting the trials of the applicants before the Court Martial. Whether or not the applicants were held in custody in excess of eight days without special reports being submitted by their commanders as required by **Section 140 of the KDF Act** is a matter of fact. The issue should be considered by the Court Martial and if the applicants are aggrieved, they can always file an appeal.

At this stage it is enough to state that order is the cornerstone of any disciplined force like the KDF. The people of Kenya recognized this fact and provided in **Article 24(5) of the Constitution**:

“Despite clause (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service—

- (a) Article 31—Privacy;**
- (b) Article 36—Freedom of association;**
- (c) Article 37—Assembly, demonstration, picketing and petition;**
- (d) Article 41—Labour relations;**
- (e) Article 43—Economic and social rights; and**
- (f) Article 49—Rights of arrested persons.”**

Sub- Articles 1 and 2 of Article 24 states:

“(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.”

I am alive to **Article 25 of the Constitution** which provides for the rights and fundamental freedoms which cannot be limited. It states:

“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) freedom from slavery or servitude;

(c) the right to a fair trial; and

(d) the right to an order of *habeas corpus*.”

In my view the petitioners have not directly alleged that any of the core rights found in **Article 25** have been breached. One can say that their right to a fair hearing may have been breached. The decision on this issue can only be made after the petition has been heard.

Granting conservatory orders in the **GATIRAU PETER MUNYA** case (supra) the Supreme Court stated that:

[97] Bearing in mind the nature of the competing claims, against the background of the public cause, we have focused our perception on the public interest, and the concept of *good governance*, that runs in tandem with the conscientious deployment of the scarce resources drawn from the public. Proper husbandry over public monetary and other resources, we take judicial notice, is a major challenge to all active institutions and processes of governance; and the Courts, by their established attribute of line-drawing, must ever have an interest in contributing to the safeguarding of such resources.”

From the above cited passage it is clear that several factors have to be taken into account when addressing the element of public interest. The factors to be considered vary from case to case.

A Court Martial has inbuilt mechanisms for protecting the rights of those who appear before it. At this stage it would be prejudicial to the petition to state whether the applicants' case has high chances of success or not.

One cannot say that this petition will be rendered nugatory if the applicants' trials are not stopped. In my view, there are three factors which make me reach the conclusion that the conservatory orders should not be granted.

Firstly, the public interest requires that discipline is maintained within the Kenya Defence Forces and one of the methods of maintaining order and discipline is by court martialling those who breach military rules.

Secondly, the petitioners have recourse to appeal if their cases are heard and determined before this petition is concluded.

Thirdly, if it is later found that the petitioners' constitutional rights have been violated, they can always be compensated.

Although the most appropriate action is to forestall a threatened breach of constitutional rights, at times the public interest outweighs the perceived fears held by the individual citizens that their rights are about to be breached.

For the reasons stated, I dismiss the chamber summons application dated 16th May, 2014. Costs will be in the cause.

Dated, signed and delivered at Nairobi this 6th day of June, 2014

W. KORIR,

JUDGE OF THE HIGH COURT