



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO 328 OF 2007

IN THE MATTER OF SECTION 84(1) OF THE CONSTITUTION OF KENYA (SINCE REPEALED AND REPLACED)

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL UNDER SECTIONS 70 (a) & (c), 72(1), 74(1), 75, 76 AND 77(1),(4),(7) & (8) OF THE SAID CONSTITUTION

BETWEEN

JOSEPH MBUI MAGARI.....PETITIONER

AND

- 1. KENYA ANTI-CORRUPTION COMMISSION**
- 2. ATTORNEY-GENERAL**

(Sued on his own behalf and on

behalf of the **COMMISSIONER OF POLICE.....RESPONDENTS**

RULING & DIRECTIONS

1. The Petitioner, **Joseph Mbui Magari**, was at one time a Permanent Secretary in the Ministry of Finance. During his tenure, the 1st Respondent alleges that certain acts of corruption took place which directly implicated the Petitioner. The 1st Respondent believed that the Petitioner had enriched himself as a result of the alleged corruption. On 12th July 2006, the 1st Respondent issued a notice to the Petitioner under the **Anti-Corruption Economic Crimes Act, 2003** (hereinafter referred to as the **Act**) requiring the Petitioner to, *inter alia*, enumerate all the properties that he had acquired between 1991 and 2002, specifically stating the times when and how he acquired them. In reply to the notice, the Petitioner wrote to the 1st Respondent vide a letter dated 7th August 2006 informing the 1st Respondent that he had sought legal advice and would not, in the circumstances, comply with the notice. The Petitioner was of the view that he would be prejudiced in the criminal trial facing him because the information was likely to be used against him. Upon his refusal to comply with the notice, the Petitioner was charged at the instance of the 1st Respondent pursuant to **section 26(1) and (2)** of the **Act**. This is the **Anti-Corruption Case No. 24 of 2007 (Makadara)**. The Petitioner had earlier been charged with two (2) counts of abuse of office under **section 46** of the **Act** and one (1) count of committing an Economic Crime under **Section 45(2(c))** of the **Act**.

2. The subsequent charge of the Petitioner prompted him to move to the High Court under Certificate of Urgency seeking conservatory orders to stay the taking of the plea or the hearing of any proceedings in the Anti-Corruption Case No. 24 of 2007 (Makadara). The Petitioner filed a constitutional reference before the High Court alleging that his fundamental rights and freedoms had been breached. The petition was presented in court under **section 84(1)** of the old **Constitution**. The Petitioner complained that his fundamental rights and freedoms as contained in **Sections 70 (a) & (c), 72(1), 75, 76, 77(1), (4),(7) & (8)** of the old **Constitution** had been breached. In particular, the Petitioner sought, *inter alia*, the following declarations from the court: a declaration that **Section 71** as read with **Sections 26 & 27** of the **Act** was *ultra vires* and contravened the Constitution of Kenya; a declaration that the notice issued on 12th July 2006 was against the principles of natural justice and was incompetent, vague and amounted to intrusion into the Petitioner's privacy, which intrusion was not reasonably justifiable in a democratic society; that the **Act**, which came into effect on 2nd May 2003, could not be applied retroactively to address alleged crimes committed before its enactment; a declaration that the constitutional right of the Petitioner against self-incrimination applied at all times prior to investigations, during investigations, prior to arraignment in court and during trial and could not be eroded by **sections 26, 30, 58 and 71** of the **Act**; and a declaration that the proceedings before the Anti-Corruption Court in Anti-Corruption Case No. 8 of 2007 (Makadara) was an abuse of the court process, null and void and ought to be terminated. The Respondents filed replying affidavits in opposition to the petition.

3. The then Chief Justice empanelled the present three-Judge bench to hear the petition in light of the issues raised in the petition. We heard the petition and reserved judgment. But soon thereafter two of us were transferred to stations far away from Nairobi, and it was difficult for us to meet for conferencing. Other events subsequently took place that fundamentally changed the substratum of the petition. These events hampered this court in its bid to reach a just determination of the issues raised on the basis of the pleadings as filed. The two fundamental intervening events were the promulgation of the New **Constitution** on 27th August 2010. This **Constitution** completely replaced the old **Constitution**. It introduced certain fundamental rights and freedoms in the bill of rights which were not available in the former **Constitution**. This court was of the opinion that it would be acting in vain if it were to hold and make a finding of unconstitutionality of the Act on the basis of the former **Constitution**, as prayed by the Petitioner, when the said **Constitution** is already repealed.

4. Further, the new constitutional dispensation affected, to a large extent, the interpretation and enforcement of the **Anti-Corruption and Economic Crimes Acts, 2003**. The new **Constitution** brought with it a paradigm shift in the governance structures of the country that necessitated legislative amendments to be made to various Acts of Parliament, including the **Anti-Corruption and Economic Crimes Act, 2003**. In respect of this Act the amendments were contained in **Act No. 22 of 2011** and **Act 12 of 2012**. These amendments, in our considered view, directly impacted the substratum of the Petitioner's case. We are of the view that the Petitioner would be prejudiced if this court were to render its decision on the basis of the current pleadings, the old **Constitution** and the unamended Act without taking into consideration the changed constitutional and legislative landscape. In this regard the Petitioner's learned counsel has himself had occasion after we heard the petition to seek leave to reopen arguments.

5. In the premises therefore, we direct the Petitioner to amend his petition so as to bring it into conformity with the current constitutional dispensation. The Petitioner shall amend and serve his amended petition within thirty (30) days of the date of these directions. The Respondents shall be given an opportunity to respond to the amended petition within thirty (30) days of being served. Thereafter, the parties shall be at liberty to list the petition before the **Constitutional and Human Rights Division** for directions as to the hearing of the petition. So that the Petitioner is not prejudiced, conservatory orders staying the prosecution of the Petitioner are hereby extended pending hearing and determination of the amended petition. It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 10TH DAY OF OCTOBER, 2014

H P G WAWERU

JUDGE

L KIMARU

JUDGE

R N SITATI

JUDGE