



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(KARANJA, MARAGA & MWERA, JJ.A)**

**CIVIL APPLICATION NO. NAI 89 OF 2013 (UR 59/2013)**

**BETWEEN**

**KAMLESH MANSUKHLAL DAMJI  
PATTNI.....APPLICANT**

**VERSUS**

**THE INTERNATIONAL CENTRE FOR POLICY AND CONFLICT.....1ST  
RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....2ND  
RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS.....3RD  
RESPONDENT**

**THE COMMISSIONER OF POLICE.....4TH  
RESPONDENT**

**CHIEF MAGISTRATES COURT, NAIROBI.....5TH  
RESPONDENT**

**ELIJAH KIPNG'ENO ARAP  
BII.....INTERESTED PARTY**

*(An Application to strike out the Notice of Appeal dated 3<sup>rd</sup> April 2013 in an intended Appeal from the Judgment of the Constitutional and Judicial Review Division of High Court of Kenya at Nairobi (Mr. Justice J.M. Mutava) dated 20<sup>th</sup> March 2013 and read on 25<sup>th</sup> March 2013*

*in*

**J.R. MISC. CIVIL APPLICATION NO. 305 OF 2012)**

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## **RULING OF THE COURT.**

1. In his letter of 27<sup>th</sup> January 2013, the Director of Public Prosecutions (the DPP) terminated the plea bargain negotiations under **Section 137** of the **Criminal Procedure Code (CPC)** between his office and KamleshM. Pattni (Pattni) that were aimed at settling Nairobi Chief Magistrate's Criminal Case No. 518 of 2006 (the said Criminal Case). On 20<sup>th</sup> March 2013, Mutava, J partly allowed the Judicial Review application by Pattni and prohibited the Attorney General (the AG), the Director of Public Prosecutions (the DPP) and the Commissioner of Police or any other authority, body or person from prosecuting or continuing to prosecute him and his associated companies including Goldenberg International Limited (Goldenberg International) in Nairobi Chief Magistrate's Court Criminal Case No. 518 of 2006, Republic v. KamleshManuskhlalPattni and Others, or in any other matter relating to the Goldenberg affair or the Bosire Commission or otherwise and the Chief Magistrate, Law Courts Nairobi, from hearing or continuing to hear the said Criminal Case as it related to Pattni and his associated companies including Goldenberg International Limited. Before that Judicial Review Application was heard, Elijah KipngenoArapBii applied and was joined in it as an interested party.
2. In the course of hearing that application on 5<sup>th</sup> November 2012, a firm by the name International Centre for Policy and Conflict (ICPC), which had filed Constitutional Petition No. 279 of 2011 in which it has sought orders to restrain the AG and the DPP from terminating the said Criminal Case, applied, through its lawyers, to be given audience in the said Judicial Review Application. Although earlier that day the High Court had ordered it to file a formal application, when its lawyer appeared in court that afternoon without any formal application as directed, he was allowed to address the court under **Order 53 Rule 6** of the **Civil Procedure Rules**.
3. After hearing the application Mutava J dismissed the prayer for an order of certiorari but granted those of prohibition thus halting all criminal proceedings against Pattni and his associated companies including Goldenberg International as well as all cases against ArapBii who is one of the accused persons in the said Criminal Case and, as stated, had been joined in that application as a third party. Aggrieved by that decision, on 4<sup>th</sup> April 2013 ICPC filed a notice of appeal evincing its intension to appeal against the decision to this Court. On 24<sup>th</sup> April 2013, Pattni filed in this Court Civil Application No. 89 of 2013 seeking the striking out of that notice of appeal on the grounds that the same is incompetent and an abuse of the court process because:-
  - i. ICPC is a non-entity which has no locus standi to file the notice;
  - ii. ICPC having not been formally joined as an interested party in that Judicial Review application, no appeal lies at its instance from Mutava J's said decision;
  - iii. contrary to **Rule 77(1)** of the **Court of Appeal Rules**, the notice of appeal was served upon Pattni's lawyers out of time; and
  - iv. that ICPC is a mere busybody which, being actuated by vendetta, malice, blackmail and extortion, is bent on frustrating Pattni's freedom and constitutional rights.
4. On 7<sup>th</sup> May 2013 the DPP filed a similar application, being Civil Application No. 94 of 2013, also seeking to strike out ICPC's said notice of appeal on the grounds that it offends **Article 157** of the Constitution; that ICPC is masquerading as an interested party which it is not; that ICPC is a non-entity incapable of suing or being sued hence incapable of lodging a notice of appeal; and that ICPC's notice is an abuse of the process of court as it has another petition No. 279 of 2011.
5. When Civil Application No. 89 of 2013 came up for hearing before us on 8<sup>th</sup> May, 2013, at the instance and consent of all the parties, we consolidated it with the DPP's said Civil Application No. 94 of 2013.
6. Prior to the filing of the two applications, ICPC had on 23<sup>rd</sup> April, 2013 filed Civil Application No. 87 of 2013 seeking stay of the orders arising from Mutava J's said decision. As these three applications arise from the same decision and involve the same parties, we decided to hear Civil

Application No. 87 of 2013 immediately after hearing the other two. This ruling is on the two consolidated applications seeking to strike out ICPC's said notice of appeal, which we will treat as one.

7. As pointed out, one of Pattni's grounds for challenging the competency of the notice of appeal is that ICPC is a non-entity not capable of suing or being sued. On this ground, Mr. Mwenesi, learned counsel teaming up with Mr. Kalove, for Pattni, submitted that as ICPC is not a legal entity, it is incapable of suing and cannot therefore appeal Justice Mutava's decision. He contended that **Article 259** of the Constitution allows unincorporated bodies to sue in respect of breaches of fundamental rights only.
8. On the ground that ICPC is masquerading as an interested party, counsel argued that as is clear from paragraph 20 of Mutava J's judgment, it is only Mr. Elijah Kingeno Arap Bii who was enjoined as an interested party. ICPC was only allowed to participate as an affected party and cannot, in his view, appeal against the decision given in such case.
9. On abuse of the court process, Mr. Mwenesi submitted that ICPC only opposed Pattni's prayer for an order of certiorari and as that prayer was dismissed, it has no ground to complain as one cannot appeal against the grant of orders one had sought or opposed.
10. On late service, Mr. Mwenesi submitted that the notice of appeal was filed on 4<sup>th</sup> April 2013 but, contrary to **Rule 77(1)** of the **Court of Appeal Rules**, which requires such notices to be served within seven days, it was not served until 17<sup>th</sup> April 2013. That rendered it incompetent and incapable of supporting an appeal or an application for stay of execution. In support of this argument, he cited the cases **Ahn v. Openda, [1982] eKLR; Njoroge v. Mwobi, [2008] eKLR; Cozzi Adriano v. Paola Dapino [2010] eKLR** and **Kamau v. Kinuthia [2005] eKLR**. On those grounds, Mr. Mwenesi urged us to strike ICPC's notice of appeal with costs.
11. As we have pointed out, the DPP filed Civil Application No. 94 of 2013 and also sought the striking out of ICPC's notice of appeal on the grounds that it is a usurpation of the DPP's powers under **Article 157** of the Constitution and an abuse of the court process. Arguing that application before us, Mr. Warui, learned counsel for the DPP, submitted mainly on the first ground that the notice of appeal is an abuse of the court process. Echoing Mr. Mwenesi's submissions that ICPC is not incorporated; that it was given an opportunity to apply to be joined as an interested party but did not; and that Pattni's prayer for an order of certiorari which is the only one ICPC opposed having been dismissed, its intention to appeal against Mutava J's decision is an abuse of the court process. Mr. Warui concluded that it is the DPP who is aggrieved against Mutava J's orders of prohibition and he filed a notice of appeal on 8<sup>th</sup> April 2013.
12. Mr. Oenga for the Attorney General did not support or oppose the application and left the matter to court.
13. In opposition to both applications, Mr. Havi, learned counsel for ICPC, dismissed the contention that ICPC is a non-entity with no locus standi in this matter. He submitted that **Articles 22(1), 23(3)** and **260** of the Constitution allows unincorporated bodies to take proceedings and seek appropriate orders including judicial review remedies. On ICPC's status in the Judicial Review application, counsel submitted that it did not apply to be joined as an interested party because under **Order 53 Rule 6** of the **Civil Procedure Rules**, any person who desires to be heard in any Judicial Review application has a right of audience and that is why the High Court gave ICPC's lawyers audience in the matter. Having participated, ICPC has a right of appeal and its notice of appeal is therefore competent. He referred us to page 165 of the record of this application where Mr. Toyo for ICPC is recorded as having told the High Court that in Petition No. 279 of 2011, ICPC has, on behalf of the Kenyan tax payers, sought to recover KShs. 5.8 billion from Pattni and his associated companies. It has therefore an additional ground of appeal against Mutava J's decision, which has cleared Pattni of all wrong doing in the Goldenberg affair. In his view, even if ICPC had not participated in the Judicial Review Application in the High Court, on the authority of

**Commercial Bank of Africa v. Ndirangu Civil Appeal No. 157 of 1991 (unreported)** and **Pattni v. Starwood Hotel Ltd, Civil Application No. NAI 330 of 2001 (unreported)** it has a right of appeal.

14. On late service, Mr. Havi submitted that this Court has Pattni's word against that of Opany, the process server. He urged us to believe Opany's word as there is no logic in serving the notice of appeal on all the other parties on 11<sup>th</sup> April but go to serve Pattni on 17<sup>th</sup> April 2013. Citing the cases of **Kiangoi v. Waruru[2010] eKLR** and **Max International Co Ltd v. Pezzotta[2011] eKLR**, he submitted that at any rate the trend nowadays is that challenges to suits based on late service cannot be sustained. On those grounds, he urged us to dismiss both applications with costs.
15. In a riposte, Mr. Mwenesi submitted that in Kiangoi's case, it was held that one has locus standi if one's interests are affected. ICPC has no interest in this matter. If indeed it has a claim against Pattni and his associated companies, then let it pursue it in Petition No. 279 of 2011.
16. We have considered these rival submissions and read the authorities cited by counsel for the parties. The first issue is ICPC's legal status and locus standi in this matter. **Article 22(1) & (2) (c)** of the Constitution provides that any person can, on his own behalf or on behalf of the public apply to enforce any right or fundamental right under the Bill of Rights. Under **Article 23(3)(f)**, Judicial Review orders are among the remedies such person can seek. A "person" is defined by **Article 260** to include an unincorporated body. We therefore find that ICPC has the requisite legal personality to be involved in these proceedings.
17. In our view, any party that participates in a case in the trial court has a right to appeal the court's decision. We therefore disagree with counsel for the applicants that having not been formally joined as an interested party, ICPC has no locus standi to appeal against Mutava J's decision. Justice Mutava allowed ICPC to oppose the Judicial Review Application. It has therefore a right to appeal against his decision.
18. Counsel for the applicants also contended that ICPC only opposed the order for certiorari, which was dismissed. In the circumstances, ICPC got what it sought and has no reason to complain by way of appeal to this Court. In response to that, counsel for ICPC argued that besides opposing the prayers for the orders of certiorari, ICPC had, while seeking to be heard in the Judicial Review Application, indicated that it has in Petition No. 279 of 2011 sought, on behalf of the Kenyan public, recovery of KShs. 5.8 billion from Pattni and his companies. Whatever bearing the decision of Mutava J has or will have on ICPC's said Petition is neither an issue nor a matter we can decide on the basis of the material placed before us in this application. That should be left to the decision of the Court that will hear the appeal ICPC intends to file.
19. The last ground relied on in the two applications is that the notice of appeal is incompetent because contrary to **Rule 76(1)** of the **Court of Appeal Rules**, it was not served upon Pattni within the prescribed time of seven days from the date of filing. It is not in dispute that the notice was filed on 4<sup>th</sup> April, 2013. According to counsel for ICPC, the notice was served on all the respondents including Pattni's lawyers by 11<sup>th</sup> April 2013. In support of that argument, he referred us to the replying affidavit of Isaac Adede Opany who categorically states that on 11<sup>th</sup> April 2013, he went to the offices of Kalove & Company in Westlands but could not gain access into them as they are fenced in. At his request, the guard at the gate to those offices called a Mr. Dawood from M/s Kalove & Company Advocates' offices who took copies of the notice of appeal to their offices but returned them after about 30 minutes and said he could not accept service as Mr. Kalove, apparently the one handling Pattni's matters, was not in. Against that averment is Mr. Pattni's affidavit in support of his application that his Advocates' office was served with the notice on 17<sup>th</sup> April, 2013. Mr. Opany denied going back to those offices on 17<sup>th</sup> April, 2013.
20. Counsel for the parties did not deem it fit to call the process server and/or Mr. Dawood for cross-examination. Mr. Kalove himself did not deem it fit to swear an affidavit to say whether or not there is a Mr. Dawood in his office. He, however, confirmed that his offices are in a fenced

compound accessible through a gate. As a matter of fact Mr. Pattni said in his affidavit that the notice of appeal was left with the watchman at the gate to M/s Kalove& Company Advocates' offices on 17<sup>th</sup> April, 2013. We also have nothing from that watchman as to when the notice was left with him. In the circumstances we find that Pattni's lawyers were served with ICPC's notice of appeal on 11<sup>th</sup> April 2013. Being of that view, we do not need to go into the authorities cited by counsel for ICPC that the trend these days is to ignore late service of documents like notices of appeal and decide matters on the merits.

21. Taking all these factors into account, we find that the applicants have failed to prove on a balance of probabilities that the notice of appeal was served on 17<sup>th</sup> and not on 11<sup>th</sup> April 2013. That, with our earlier findings, leaves us with no option but to find that ICPC's notice of appeal was served in time and is competently before court. Consequently, we dismiss Civil Application Nos. 89 and 94 of 2013 with costs.

**DATED and delivered at Nairobi this 12<sup>th</sup> day of July 2013.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**D.K. MARAGA**

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**JUDGE OF APPEAL**

**J.W. MWERA**

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**JUDGE OF APPEAL**

*I certify that this is a  
true copy of the original*

**DEPUTY REGISTRAR**