



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: OMOLO, TUNOI & O’KUBASU, JJA)

CIVIL APPLICATION NO. NAI. 43 OF 2006 (24/2006)

BETWEEN

DR. CHRISTOPHER NDARATHI MURUNGARU APPLICANT

AND

KENYA ANTI-CORRUPTION COMMISSION1ST RESPONDENT

HON. ATTORNEY GENERAL2ND RESPONDENT

(An Application for Stay and/or an injunction for the purpose of enforcing or securing the enforcement of the provisions of the Constitution protecting the fundamental rights of the Applicant pending an intended appeal to be lodged in the Court of Appeal against the entire decision contained in the ruling and the order to be extracted therefrom given by the High Court of Kenya at Nairobi (Nyamu, J) dated 2nd February, 2006

in

H.C. Misc. Civil Appl. No. 54 of 2006 (O.S)

RULING OF THE COURT

On 9th January, 2006, **Mr. Justice Aaron G. Ringera**, the Director and Chief Executive Officer of the Kenya Anti Corruption Commission, hereinafter called “The Commission”, sent out a notice to the **Hon. Dr. Christopher Murungaru**, M.P. and the said notice was sent out pursuant to the provision contained in **section 26** of the Anti-Corruption and Economic Crimes Act, **Act No. 3** of 2003, hereinafter “the Act”. The Commission is a creature of **Part III section 6** of the Act and its functions are elaborately set out in **section 7** of the Act and like all other bodies created by or under an Act of Parliament, the Commission can only do that which it is authorized by the Act creating it and the Constitution of Kenya. The notice sent out to Dr. Murungaru, hereinafter the Applicant, was in the following terms:-

“OUR REFERENCE: KACC/INV. 6/36 (84).

9th January, 2006.

Hon. Dr. Christopher Murungaru,

Member of Parliament,

Continental House

Nairobi.

NOTICE TO FURNISH A STATEMENT OF PROPERTY PURSUANT TO SECTION 26 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT, NO. 3 OF 2003

WHEREAS you Hon. Dr. CHRISTOPHER MURUNGARU are reasonably suspected of Corruption and Economic Crime, NOW THEREFORE TAKE NOTICE that you are required to furnish to the Director, Kenya Anti-Corruption Commission, within 7 days of this notice, a written statement enumerating all your property.

The statement should include, but not limited (sic) the following details:

1. **List of all property owned, including money, and date of such acquisition.**
2. **Detailed particulars of the property, location, and with regards to money details of account(s) held.**
3. **Detailed particulars specifying how the property was acquired, state further whether it was purchase, a gift or inheritance and what consideration, if any, was given for the property including source and mode of financing applied.**
4. **List of any other property where you have direct of (sic) indirect details (sic) through a spouse, relative, friend, trust or business associate and provide details of the nature of interest held.**
5. **Particulars of any corporations, partnerships, businesses, or bodies in which you have a direct or indirect interest and the nature of such interest.**
6. **Particulars of capital or money market investments (i.e. bonds, stocks, T. Bills, shares fixed deposits etc.).**
7. **Details of your current employment and income.**

TAKE FURTHER NOTICE that failure to comply with this NOTICE is an offence punishable by a fine of upto Kenya shillings Three Hundred Thousand (K.Shs.300,000) or imprisonment for a term not exceeding three (3) years or both.”

[Signed]

JUSTICE AARON G. RINGERA

DIRECTOR/CHIEF EXECUTIVE.

(AGR/jao).”

Section 26 of the Act upon which the Director’s notice was based is in the following terms:-

“26 (1) The Commission may by notice in writing require a person reasonably suspected of corruption or economic crime to furnish, within a reasonable time specified in the notice, a written statement –

(a) enumerating the suspected person’s property and the times at which it was acquired; and

(b) stating, in relation to any property that was acquired at or about the time of the suspected corruption or economic crime, whether the property was acquired by purchase, gift, inheritance or in some other manner and what consideration, if any, was given for the property.

(2) A person who neglects or fails to comply with a requirement under this section is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for three years or to both.”

We pause here to point out that in order to issue a notice under this section the Commission and its Director must be in possession of some material from which it is “REASONABLY SUSPECTED” that the person to whom the notice is being issued has been involved in corruption or economic crime. In the absence of reasonable suspicion of involvement in corruption or economic crime, the Commission and its Director would have no power to issue a notice under **section 26** of the Act. The relevance of what we are saying here will become apparent in due course.

When the Applicant received the notice, he and his lawyer, Hon. P.K. Muite, SC, took the view that the Applicant was not obliged to comply with the notice because he was protected from such demands by certain sections of the Kenya Constitution. First **section 82** of the Constitution was raised and the Director was asked whether apart from the Applicant, similar notices had been sent to other Kenyans –

“..... who have been publicly spoken of during former Presidents Kenyatta and Moi regimes as having acquired well known and identifiable properties in either unexplained or known circumstances and to the best of my knowledge they have not been obligated to do what you require of my Client. NOT to be discriminated against is provided in section 82 of the Constitution of the Republic of Kenya.”

Secondly, the Applicant raised the issue that **section 26** of the Act upon which the notice to him was based was unconstitutional as it

“..... seeks implicitly to negate the constitutional presumption of innocence and seeks to impose an obligation on a citizen to investigate himself/herself and provide you with evidence of such self-investigation and indeed for a citizen to potentially incriminate themselves”

To these complaints by the Applicant, the Director of the Commission responded by his letter of 23rd January, 2006 as follows:-

“(a) The basis for reasonably suspecting Hon. Dr. Murungaru of corruption and economic crime is information in the hands of the Commission relating to his property.

(b) Similar notices have been issued to several other persons.

(c) There is no prohibition by law on the Kenya Anti-Corruption Commission on who may be the subject matter of such a notice and the timing of such notices is at the discretion of the Commission.

(d) The Constitutional presumption of innocence comes into play only once a person has been charged in a court of law.

(e) The Act places a positive obligation on your client to furnish the information set out in the notice and failure or refusal to do so, completes, an offence the liability for which is stated in section 26(2) of the Act.

..... we trust you will advise (sic) your client accordingly and we expect his compliance WITHIN 10 DAYS of your receipt of this letter.”

The Applicant did not comply with the requirements of the notice and on 1st February, 2006, a few days before the expiry of the 10-day notice, the Applicant moved to the High Court by way of an Originating

Summons pursuant to **sections 3, 67, 70 (a) and (c), 74, 76, 77 (a), 77(7) and 84 (1) and (2)** of the Constitution of Kenya and a total of nine questions were set out for the determination by the High Court. Among the questions to be determined by the High Court, which in this country is the Constitutional Court are those already set out in the correspondence exchanged between the Director of the Commission and learned counsel for the Applicant. Simultaneously with the filing of what has now come to be known in the country as a “*constitutional reference*” the Applicant also filed a summons in chambers and among the prayers sought in the summons were:-

“ **1.**

“**2. This Hon. Court be pleased to direct that in accordance with Rule 10 (b) of the Constitution of Kenya (Protection of Fundamental Rights and Freedom of the Individual) Practice & Procedure Rules, 2001, that all further proceedings, whether investigatory or prosecutorial by the Defendants be stayed pending the determination of the questions raised by the Plaintiff in the Originating Summons dated 1st February, 2006.**

(3)

(4) The suit be mentioned before the Hon. the Chief Justice on such a date as the court may direct for purposes of taking directions and the composition of the Bench to hear and determine the Constitutional question raised by the Plaintiff.

We take it that prayer (4) above was made pursuant to the fact that **section 67** of the Constitution was also cited in the Originating Summons as among the provisions on which the summons was brought. But our understanding of the matter is that as at 1st February, 2006 when the summons was brought, no court proceedings were in existence to warrant the invocation of **section 67**. That section applies –

“**where a question as to the interpretation of this Constitution arises in proceedings in a subordinate court and the court is of the opinion that the question involves a substantial question of law**”

No proceedings had started in any subordinate court by 1st February, 2006 and as at that date **section 67** of the Constitution was not available to the Applicant. The giving of direction by the Chief Justice is a practice which has arisen somehow but it is really not supported by the Constitution itself . All that **section 67 (3)** provides is that –

“**When the High Court is determining a matter in connection with a reference to it under subsection (1) (other than an interlocutory matter) it shall be composed of an uneven number of judges, not being less than three.**”

In this section, the intervention of the Chief Justice is really not to give directions but to designate the judges who are to hear the Constitutional issue(s) referred to the High Court by the subordinate court. The number of judges is not to be less than three and the only person who can name those judges is the Chief Justice. For that purpose, we do not know that the parties themselves are entitled to appear before the Chief Justice for a mention. The parties or their advocates cannot be expected to participate in the selection of the judges to hear the reference. **Section 84** of the Constitution does not have a similar provision to **section 67(3)** but we suppose the practice of designating the judges to hear matters alleging the violation of fundamental rights have been borrowed from the practice developed under **section 67(3)**. We think that it is good practice to have uneven number of judges hearing matters alleging violation of fundamental rights and once again, it is only the Chief Justice who would be in a position to designate such judges.

Be that as it may, the chamber summons was brought on a total of ten grounds numbered (a) to (j). We set out some of the salient ones:-

“**(a) The 1st Defendant [the Commission] has been, is being or is likely to contravene the Plaintiff’s,**

inherent, inalienable, fundamental, legal and constitutional rights enshrined and declared under sections 70(a), 70(c), 74, 76(1), 77(1), 77 2(2)(a), 77 (7) and 82 of the Constitution of Kenya.

(b) The Plaintiff's allegation of contravention or likely contravention of his fundamental rights and freedoms is sufficient to warrant the immediate intervention of this Hon. Court.

(c) The Provisions of sections 26, 27 and 28 of the Anti-Corruption and Economic Crimes Act, 2003, are inconsistent with sections 70, 74, 77(2)(a) and 77(7) of the Constitution of Kenya and therefore null and void to the extent of such inconsistency in terms of section 3 of the Constitution.

(d)

(e) The statutory notices are a flagrant affront to the universally acknowledged presumption of innocence contained in International Human Rights Instruments such as Article 11(1) of the Universal Declaration of Human Rights (1948) to which Kenya is a signatory.

(f)

(g) Any trial commenced on the basis of investigations pursuant to the said statutory notice will not be fair and will violate the Applicant's fundamental right to a fair hearing guaranteed by section 77(1) and 77(9) of the Constitution.

(h)

(i) The 1st Defendant has issued statutory notices under sections 26, 27 and 28 of the Anti-Corruption and Economic Crimes Act and have demanded the Plaintiff (sic) to either appear or produce documents and information before it on or about 3rd February and 15th February, 2006 at 10.00 a.m. and unless this Hon. Court intervenes and issues the requisite direction as required by the Constitutional, Practice and Procedure Rules, the Plaintiff's fundamental rights and freedoms are likely to be infringed, violated and contravened.

(j)"

It is prayer No.2 in the chamber summons which was heard by Nyamu, J and by his Ruling dated 2nd February, 2006 the learned Judge refused to order any form of stay. He held that the application before him should have been made under **Rule 11** and not under **Rule 10(b)** of the now repealed Constitutional Practice & Procedure Rules, "*the Chunga Rules.*" The learned Judge rightly held that **Rule 10 (b)** was only applicable in respect of proceedings under **section 67** of the Constitution and that in the case before him **Rule 11** would have been the appropriate one. The learned Judge thought he was not being technical about the matter and agreed with Hon. Muite that the Originating Summons did raise various constitutional points for argument. But on balance he inclined –

"to the view the grant of a stay in the circumstances would cause greater hardship to the law enforcement agencies and inhibit the workability of their strategies."

The Applicant now comes to this Court under **Rule 5(2)(b)** of the Rules of the Court. He has filed a notice of appeal against the decision of Nyamu, J from which we have taken the above extract. The principles which the Court applies in applications of this nature are now old-hat – an applicant under **Rule 5(2)(b)** must show an arguable appeal, i.e. an appeal which is not frivolous and next he must show that if the stay or the injunction sought is not granted, the intended appeal, if it were to be successful, would have been rendered nugatory by the refusal to grant the stay.

Hon. Muite contended that they have an arguable appeal; Professor Githu Muigai, learned counsel for the Commission and Mr. Horace Okumu, learned counsel for the Hon. the Attorney-General, the 2nd Respondent, were of the view that there was no arguable appeal.

We start from the point that even Nyamu, J was of the view that the Originating Summons before him raised points which were not frivolous. On a matter touching on the fundamental rights of an individual, was the learned Judge of the High Court right in concentrating so much on whether the chamber summons before him was under **Rule 10(b)** or **Rule 11**? What was the Applicant asking the Judge to do? The Applicant had been issued with a notice to furnish the Commission with certain information. The Commission was undoubtedly proceeding under section 26 of the Act. But the Applicant was saying that **sections 26, 27 & 28** of that Act were contrary to the provisions of **section 77** of the Constitution which provide for fair trial. The Director of the Commission was of the view that provisions relating to fair trials only apply in courts and not in the process of investigation. Yet Parliament itself by The Criminal Law (Amendment) Act, 2003, i.e. Act No. 5 of 2003 took away from the police whose duty, like the Commission, is to investigate suspected crimes, the power to record confessions from persons suspected of crimes. Even before the passing of that Act, the Judges' Rules applied to officers who were investigating crimes against suspected persons. If these provisions applied to the process of investigations, why would the fair trial provisions of **section 77** of the Constitution only apply in the courts?

We cannot answer those questions in this motion. They are clearly substantial questions and must be answered and can only be answered first in the Originating Summons filed by the Applicant. Before the questions are answered, should the Commission be allowed to proceed under **section 26** of the Act? It has in fact done so and charged the Applicant with the offence created by **section 26(2)** of the Act. Should that trial be allowed to go on before the constitutionality of the section is determined? We do not have the slightest doubt on the matter that the Applicant's intended appeal is arguable. We remind the Commission and the 2nd Respondent that they are and cannot be stopped from carrying out their own investigations into the allegations of corruption or economic crime against the Applicant. Indeed the Director of the Commission says that they reasonably suspect the Applicant of involvement in corruption and economic crime because of information the Commission has. That information must have been obtained without the participation of the Applicant. It would be easy and very convenient for the Commission if the Applicant was to provide them with further information. But the Applicant is saying that under the Constitution he is not obliged to do so. It would be extremely surprising if the investigations of the Commission were to be paralyzed simply because an accused person refuses to participate in the investigations. The Commission can and must go on with its independent investigations but the question whether the Applicant is bound to supply them with the information they require from him should and ought to await the resolution of the issue of whether or not **sections 26, 27 and 28** of the Act creating the Commission are constitutional.

Will the appeal be rendered nugatory if we do not grant a stay and the appeal were to succeed? As we have said, the Applicant has already been charged before a magistrate with the offence created by **section 26(2)** of the Act. If the trial of the Applicant were to proceed before the magistrate, he risks being fined Kshs.300,000/- or going to prison for three years or to both fine and imprisonment.

In cases which are purely civil, this Court hardly grants a stay of proceedings on the basis that even if the proceedings to be stayed went ahead and were determined, that would not render an appeal nugatory because if the appeal succeeded, the decision of the trial court would be nullified and an appropriate order for costs in respect of the abortive hearing can be made – see for example **SILVERSTEIN V. CHESONI**, [2002] KLR 867. But matters involving penal consequences must, of necessity, be treated differently. It can be of no consolation to tell a man that his appeal will not be rendered nugatory even if he went to prison for only one week. The appeal would have been rendered nugatory.

Lastly, before we leave the matter, Professor Muigai told us that their strongest point on the motion before us is the public interest. We understood him to be saying that the Kenyan public is very impatient with the fact that cases involving corruption or economic crimes hardly go on in the courts because of applications like the one we are dealing with. Our short answer to Professor Muigai is this. We recognize and are well aware of the fact that the public has a legitimate interest in seeing that crime, of whatever nature, is detected, prosecuted and adequately punished. But in our view, the Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the courts, sometimes even to the annoyance of the public. The only institution charged with the duty to interpret the

provisions of the Constitution and to enforce those provisions is the High Court and where it is permissible, with an appeal to the Court of Appeal. We have said before and we will repeat it. The Kenyan nation has chosen the path of democracy; our Constitution itself talks of what is justifiable in a democratic society. Democracy is often an inefficient and at times a messy system. A dictatorship, on the other hand, might be quite efficient and less messy. In a dictatorship, we could simply round up all those persons we suspect to be involved in corruption and economic crimes and simply lock them up without much ado. That is not the path Kenya has taken. It has opted for the rule of law and the rule of law implies due process. The courts must stick to that path even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the court's decisions. Occasionally, those who have been mighty and powerful are the ones who would run to seek the protection of the courts when circumstances have changed. The courts must continue to give justice to all and sundry irrespective of their status or former status. What orders should we make in the motion before us?

We think we should stay and we hereby do, the implementation and enforcement of the NOTICE dated 9th January, 2006 issued by the Director of the Commission to the Applicant and since **Criminal Case No. ACC 11 of 2006** in the Magistrate's court was instituted pursuant to that NOTICE, the hearing of that case is also hereby stayed pending hearing and determination of the appeal brought to this Court or the hearing and determination of the Applicant's Originating Summons in the High Court whichever is the earlier. In other words, this order of stay does not prevent the High Court from hearing and determining the constitutionality of the sections of the Act challenged by the Applicant. We also wish to make it abundantly clear that this order of stay does not in any way prevent the Commission from independently investigating the Applicant and if necessary, recommending his being charged with an offence of corruption or economic crime based on the evidence which the Commission may obtain by its own investigations. The costs of the motion before us shall be in the appeal already filed. Those shall be our orders.

Dated and delivered at Nairobi this 24th day of March, 2006.

R.S.C. OMOLO

.....

JUDGE OF APPEAL

P.K. TUNOI

.....

JUDGE OF APPEAL

E.O. O'KUBASU

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.