

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
MISC. APPLICATION NO. 78 OF 2014

DAVID KANJAI KETER.....1ST APPLICANT
BELDINE NGOME.....2ND APPLICANT
ESTHER WANDIA KAGEMA.....3RD APPLICANT
JOHN ONG'ONG'E MIKHAIL.....4TH APPLICANT
ARTHO HAMED.....5TH APPLICANT
PETER GACHIE.....6TH APPLICANT
MURIU GIKONYO.....7TH APPLICANT
DAVID GIKUNAL.....8TH APPLICANT
OKOTH ODUOR.....9TH APPLICANT
FELICIAN KAMWANJA MAINA.....10TH APPLICANT

VERSUS

ETHICS AND ANTI-CORRUPTION COMMISSION.....1ST RESPONDENT
DEPUTY PUBLIC PROSECUTION.....2ND RESPONDENT

RULING

In their Miscellaneous Application dated and filed on 10th November 2014, the Applicants herein sought the following orders -

- 1. that in exercise of its inherent jurisdiction, the Court do dispense with the service of the Application upon the Respondents in the first instance,*

2. that there be an order of stay of the intended prosecution against the applicants by the State,

3. that an order of inquiry be issued pending a Charge and Information of the alleged offence committed by the Applicants,

4. an order of anticipatory bail be issued.

2. The Application was premised upon the provisions of Section 3(1)(2)(3) and 123 of the Criminal Procedure Code (*Cap. 75, Laws of Kenya*), and Sections 39 and 48 of the Anti-Corruption Act 2003 (*No. 3 of 2003, and Articles 21, 22, 23, 47, 48 and 49 of the Constitution of Kenya 2010*).

3. The Application was supported by the Affidavit of David Kanjai Keter (*the first Applicant*) purportedly sworn on behalf of, and on the authority of the other nine applicants, and on the grounds on the face thereof.

4. The application did not proceed *ex parte* as prayed, and was ordered by the Court to be served upon the Respondents. The first Respondent filed both grounds of opposition as well as a Notice of Preliminary Objection. The Second Respondent neither entered an appearance nor filed any papers in response to the application.

5. When the matter came up before me on 12th November 2014, I held that in any application in which a Preliminary Objection is raised, it is necessary and procedurally competent to determine the Preliminary Objection and establish whether it disposes of the application or suit, in its entirety and consequently directed that the Preliminary Objection be heard and be determined first.

6. It was the submission of Mr. Murei learned counsel for the First Respondent, that the Applicants were seeking substantive orders in a Miscellaneous Application which was not founded upon any substantive pleading, whether, judicial review, constitutional petition, and if any special jurisdiction of the court is being sought, it is not specified.

7. In reply to submissions by Counsel for the Applicants Counsel for the First Respondent submitted *inter alia* that, inherent jurisdiction of the court is invoked when and where there are no provisions in the Constitution in light of the citations by the Applicants of various Articles of the Constitution and the Criminal Procedure Code, that even inherent jurisdiction must be founded upon some substantive suit or Petition, that mere Force Standing Orders cannot allow the Applicants to come to court by way of a Miscellaneous Application, that interlocutory applications must be based upon some substantive motion, suit, Petition or Plaintiff.

8. Whereas Counsel conceded that in matters of violations of right and fundamental freedoms, a person can come to court by way of a letter, (*epistolary jurisdiction*), this must depend on the nature of the case or alleged violations of a right or fundamental freedom. Without a substantive Petition, the current application is litigation by installments and is an ambush against the Respondent. For these reasons, the Preliminary Objection should be allowed, and the Miscellaneous Application should be struck out.

7. Counsel argued that if the application was premised upon any Constitutional Petition, Article 22 of the Constitution is clear as to the procedure to be adopted. Counsel submitted that there are new Rules - "*the Mutunga*" Rules which presuppose that a Petition will be filed contemporaneously with an application for interim or temporary orders. It was not so, in this application.

8. Counsel therefore concluded that for those reasons, the application was incompetent, and the court lacks jurisdiction to entertain the same, and prayed that the application be struck out with costs to the Respondents.

9. Ms Ngovi, learned Prosecution Counsel, for the Respondent, resisted objection by the Applicants' Counsel that since the Respondent had neither filed a Notice of Appearance, nor any grounds or Affidavit in response to the Application, they had no right of audience in court. Learned Prosecution Counsel submitted as Counsel for the Director or Public Prosecutions, they always had audience in criminal matters without even filing any papers. I think this submission is correct in criminal matters, as the DPP is a necessary party in such matters. However in these hybrid cases, such as Constitutional Petitions, it is desirable in my view to have a formal Notice of Appearance on behalf of the DPP. Having said this, failure to put in or file such a Memorandum of Appearance, is not a ground for denial of audience when counsel is present in court, so I allowed Counsel for the DPP to respond on the question of the Preliminary Objection.

10. Counsel for the Second Respondent associated themselves with the submissions of counsel for the First Respondent, that the orders sought are substantive in nature, and cannot be founded upon a Miscellaneous Application. The Application is therefore incompetent, and the orders sought cannot stand. Counsel submitted that Articles 21, 22 and 23 of the Constitution concern breach of rights and fundamental freedoms, and that the way to address such violations is by way of a Constitutional Petition and not through a Miscellaneous Application. It did not demonstrate why criminal proceedings should be stayed. Counsel submitted that the application is incompetent and should be dismissed with costs.

11. In response to the Respondents' Counsel's submissions, Counsel for the Applicants asked the court to disregard the submissions of Counsel for the Second Respondent as they had not filed any papers.

12. Counsel for the Applicants submitted that the application was brought and filed pursuant to the court's inherent jurisdiction under Section 3(4) of the Criminal Procedure Code, and Section 46 of the Force Standing Orders, and that Article 159 (2) (d) of the Constitution requires the court to disregard technicalities, and determine disputes on merits of such dispute(s).

13. Counsel emphasized in particular that under Order 46 of the Force Standing Orders, there is a procedure for an inquiry before an officer is charged with a criminal offence, and that these are the temporary orders the Applicants seek at this point. The application counsel submitted is in accord with the provision of Section 3(4) of the Criminal Procedure Code, and the court has jurisdiction to determine it.

14. Counsel for the Second Respondent once again associated themselves with submissions of Counsel for the First Respondent.

15. I have carefully reviewed the respective submissions of Counsel for the Respondents, and response thereto by Counsel for the Applicants. I perceive these to be the issues

(a) *whether the court has jurisdiction to determine the Preliminary Objection and the Application,*

(b) *whether there is a true Preliminary Objection,*

(c) *consequences of findings on (a) and (b).*

16. Again, I will explore these themes in turn. On the question whether the court has jurisdiction, I will begin with the *locus classicus* case OWNERS OF THE MOTOR VESSEL “LILIAN S” Vs CALTEX OIL (KENYA) LTD [1989] KLR 1 where Nyaranga S. A said page 14 -

Question of jurisdiction maybe raised by a party or by the court on its own motion and must be decided forthwith on the material before court. Jurisdiction is everything. Without a court has now proper to make one more step, where a court has no jurisdiction, there would be no basis for a confirmation of proceedings pending other evidence, a court of law downs its tools in aspect of the matter before it the moment it holds the opinion that it is without jurisdiction.

17. In so far as violation, done or threatened, of human rights concerned a special jurisdiction is conferred upon the High court by Article 23(1) of the Constitution of Kenya 2010. Both substantively and procedurally that jurisdiction is exercised in the manner prescribed by Article 22(3) which says -

“22 (1) – (2) ...

(3) *the Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that -*

(a) *the right of standing provided for in clause (2) are fully facilitated;*

(b) *formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal presentation;*

c. *no fee may be charged for commencing the proceedings;*

d. *the court, while observing the Rules of natural justice, shall not be unreasonably restricted by procedural technicalities and an organization or an individual with particular expertise may, with the leave of the court, appear as a friend of the court.*

18. A plea of contention that the application does not conform either to the constitution or the rules in relation trust does not deprive the court jurisdiction either to determine the matter in issue or the preliminary objection raised in relation thereto. The jurisdiction of the court is quiet clear. The contention to the contrary has no basis.

19. The second question is whether the objection raised by the first respondent is a true preliminary objection in MUKISA BISCUIT MANUFACTURERS VS WESTEND DISTRIBUTORS LTD [1969] E.A 499. Said at page 701 -

“.....a preliminary objection is in the nature of what used to be a demeanor. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised by any fact has to be ascertained, or if what is sought is the exercise of Judicial Discretion....”

20. By Legal Notice Number 117 of 28th June, 2013 the Hon. the Chief Justice established the constitution of Kenya (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS, PRACTICE AND PROCEDURE RULES 2013 pursuant to Article 22(2) of the Constitution, Rule 54 and 10 – thereof provided that any grievance concerning the violation, infringement, actual or threatened shall be by way of Petition, Rule 19 of the Rules Procedures that any application under the Petition shall be by way of a Notice of Motion for purposes of Conservatory Orders pending the hearing and determination of a Petition.

21. Though Article 22(3)(b) provides that the formalities to proceedings, including commencement thereof would be kept to a minimum, and that the court would, if necessary, entertain proceedings on the basis of informal presentation under Rule 10(3) of the Rules. The application herein seeks substantive orders which require compliance with both the substantive and procedural provisions of the Constitution. Both substantive and procedural provisions of the Constitution have equal force or effect. Is there a cause for application of the epistolary jurisdiction as envisaged by Article 22(3)(b) (*supra*)? With respect, I do not think so.

22. I say so **firstly** because, the Rules are very clear, that proceedings for redress of a grievance or an allegation of a breach, violation, or infringement or threat of any right or fundamental freedom shall be brought by way of a Petition – in the **MATTER OF ALLEGED CONTRAVENTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS**. There is no provision for such proceedings to be commenced by way of a Miscellaneous Application.

23. **Secondly**, even if the action was commenced by way of an Epistolary (*informal*) application, which must disclose denial, violation, infringement or threat to a right or

fundamental freedom a Miscellaneous Application cannot be equated to an epistolary application.

24. **Thirdly**, there is need not trivialise constitutional applications, where ordinary suits would apply. This is because the interpretation of any provisions of the Constitution particularly its provisions on rights and fundamental freedoms is a delicate matter especially where it relates to matters of prosecution which may lead to attainment of the freedom of an individual or citizen. Such actions need to be properly grounded in a petition to allow the state organ or Respondent to adequately prepare and announce the allegation of violation of human rights or fundamental freedoms of its citizens or residents.

25. **Fourthly**, in saying this, I am fully cognizant of the provisions of section 46(1) of the Police Service Act, 2011 which expressly provides that subject to the limitations of rights to the limitations of rights and fundamental freedoms of the officer set out in section 4 of the Act, a Police Officer shall be entitled to all the rights set out in the Constitution. The limitation of a right or fundamental freedom is to be both reasonable and justifiable in open and democratic society based on human dignity, equality and freedom, and are to be limited only for the purposes set out in section 47(2)

- The protection of classified information
- The maintenance and presentation of national security
- The security and safety of the officers of the service
- independence and integrity of the Service
- enforcement of the right and fundamental freedom by any individual does not prejudice the right and fundamental freedoms of others.

26. **Fifth** and save as aforesaid, section 88 of the Police Service Act provides that a Police Officer who commits a criminal offence, as against law shall be payable to criminal proceedings in a court of law, and section 88 (a) says that notwithstanding subsection (3), the commission may take disciplinary action against a police officer who commits a criminal offence whether leading to disciplinary action, conviction or acquittal.

27. **Sixth**, it must always be borne in mind that an accused or suspect if arraigned in court is deemed innocent, and his or her expectation and right is to have a fair trial which is to begin and conclude without unreasonable delay as guaranteed under Article 50 (e) of the Constitution. There is no equivalent right either under the Constitution or Police Service Act not to be charged or tried by a competent court of law.

28. **Seventh**, even where there is an alternative procedure for an inquiry as is provided by Section 88 of the Police Act 2011, the power or discretion to order such inquiry lies with the state organ National Police Service Commission.

The court's jurisdiction would only arise where an artificial probably by way of Judicial Review, as to the proper exercise of such discretion. As the exercise of such discretion is merely another advance for disciplinary action against an arising Police Officer, and may be taken even after conviction on acquittal, and is therefore not a condition precedent to a

prosecution, it cannot therefore be a foundation of any application for alleged breach of any constitutional right or fundamental freedom.

29. For these reasons, I uphold the preliminary objection raised by Counsel for the First Respondent and be supported by counsel for the second respondent. The miscellaneous application dated and filed on 10th November, 2014 is therefore struck out with a discretion that each party shall bear its own costs.

It is so ordered.

Dated, signed and delivered at Nakuru this 21st day of November, 2014

M. J. ANYARA EMUKULE

JUDGE



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