



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Suit 356 of 2011**

**DOUGLAS KIPCHUMBA RUTTO.....PLAINTIFF**

**VERSUS**

**KENYA ANTI-CORRUPTION COMMISSION.....1<sup>ST</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**PETER GABRIEL MUTETI MUTISYA.....3<sup>RD</sup> DEFENDANT**

**THOMAS MWIWA.....4<sup>TH</sup> DEFENDANT**

**FRANCIS KIPCHOJO KIDOGO.....5<sup>TH</sup> DEFENDANT**

**CHRISTINE BAHATI.....6<sup>TH</sup> DEFENDANT**

**JUMA MUSI.....7<sup>TH</sup> DEFENDANT**

**SALESIO KINYUA MUGO.....8<sup>TH</sup> DEFENDANT**

**BERNARD OPIYO.....9<sup>TH</sup> DEFENDANT**

## RULING

By a Chamber Summons dated 26<sup>th</sup> January 2012 expressed to be brought under Order 1 rule 10(2), 14 and 25 of the Civil Procedure Rules, sections 3A of the Civil Procedure Act, Cap 21, Section 9(1) First Schedule of the **Anti-Corruption and Economic Crimes Act – 2003** (ACECA), and all other provisions of the law, the 1<sup>st</sup>, 5<sup>th</sup>, 7<sup>th</sup> 8<sup>th</sup> and 9<sup>th</sup> Defendants seek orders:

1. **THAT the names of the 5<sup>th</sup>, 7<sup>th</sup> 8<sup>th</sup> and 9<sup>th</sup> Defendants/Applicants herein be struck out from this suit.**
2. **THAT costs of this Application and the suit be awarded to the Applicants.**

The application is based on the following grounds:

1. **The 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Applicants were at all material times to this suit investigators appointed under the Anti-Corruption and Economic Crimes Act 2003 (ACECA) and duly employed by the 1<sup>st</sup> Defendant.**
2. **The Applicants were unlawfully sued by the Plaintiff yet they are non-suited.**
3. **The 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Applicants cannot be held personally liable for any act or omission committed in furtherance of their official duties as investigators employed by the 1<sup>st</sup> Defendant.**
4. **The Plaintiff is barred by law from bringing any action on proceeding for compensation or damages against the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants/Applicants in respect of anything done or omitted to be done in their official capacity as investigators with the 1<sup>st</sup> Defendant.**
5. **It is fair and just that the orders sought by the Applicants be granted.**

The application is supported by an affidavit sworn by **Francis Kipchojo Kidogo**, the 5<sup>th</sup> defendant, on 26<sup>th</sup> January 2012. According to him, the applicants are among other named defendants yet the said applicants at all material times were employed by the 1<sup>st</sup> Defendant and appointed as investigators under section 23 of the ACECA. According to legal advice received from the applicants' advocates, the applicants cannot be held personally liable for any act or omission committed in good faith while undertaking their official duties as investigators with the 1<sup>st</sup> Defendant. According to him the Plaintiff is barred by law from bringing any action or proceedings for compensation or damages against the applicants in respect of anything done or omitted to be done in their official capacities as investigators while working for the 1<sup>st</sup> Defendant. Therefore the Plaintiff ought not to have sued the Applicants in the first place. Further, the 6<sup>th</sup> Defendant passed away sometime in December 2010. It is therefore his view based on the same advise that if the suit is allowed to proceed for hearing with the applicants as Defendants the suit shall be tantamount to an abuse of the court process since the applicants are protected from personal liability by law hence the names of the applicants ought to be struck out from this suit with costs thereof.

In opposition to the application the plaintiff filed the grounds of opposition dated 16<sup>th</sup> March 2012 in which it was stated as follows:

1. **That the 1<sup>st</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants application before court is fatally defective, incompetent and its fate lies in it being struck out and/or dismissed.**
2. **That as shown in the plaint and the plaintiff reply to the 1<sup>st</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendant's defence, the said 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants never acted in good faith. Consequently it is**

necessary that the matter goes to full trial with the said parties so that the issue whether or not they acted in good faith will be addressed to during the main hearing. That in short the issue whether or not they acted in good faith is a triable issue and not an issue to be handled as a preliminary point of law.

3. That as shown in the pleadings on record, the 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants are necessary parties whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit.

4. That all persons including the investigators/employees of the Kenya Anti-corruption Commission are enjoined to act and observe the law and the limits of their mandate at all times. They do not enjoy “blanket immunity” particularly when their actions were not in good faith. The defendants should bear liability individually and severally.

5. That the present motion is vexatious, frivolous and constitutes an abuse of the process of the court and the fate of the same lies in it being struck out with costs suo motto.

The application was prosecuted by way of written submissions. According to the applicants, while reiterating the contents of the application and the supporting affidavit, under section 9 (1) of the ACECA – 2003 the Staff of the Commission are immune from any action or proceeding in respect of anything done or omitted in good faith under the Act while not relieving the Commission from liability. A similar provision, it is submitted, is contained in section 20 of the *Ethics and Anti Corruption Commission Act 2011*. Under section 33 of the transitional provision it is contended that the Staff of the Ethics and Anti Corruption Commission (EACC) (formerly known as KACC) are protected from personal liability while executing their duties under both Acts. As there is no dispute that the Plaintiff was arrested by the defendants in pursuance of their duties, they cannot be sued by the Plaintiff and the only recourse is to sue the Commission. In the applicants’ view the purpose of this provision is to guard persons acting honestly in the discharge of a public function from being harassed by actions imputing to them dishonesty and malice; to prevent vexatious actions and eliminate the risk of subjecting such state officers to danger; to prevent numerous actions from being brought against persons who are acting honestly while discharging their official duties; and that it is in the public interest that state officers be protected by law from intimidation and harassment. It is further submitted that under Article 250 (9) of the Constitution a member of a Commission, or the holder of an independent office, is not liable for anything done in good faith in the furtherance of a function or office and since the Constitution is the Supreme Law of the land its provisions are not subject to challenge before any Court hence the applicants cannot be sued. To sue the applicants, it is submitted is an act of desperation, illegal, unconstitutional and unlawful. In support of their submissions the applicants relied on Joyce Manyasi vs. Evan Gicheru & Others High Court Miscellaneous Application No. 920 of 2005; Spalding vs. Vilas 161 US 483 (1896); Maharaj vs. Attorney General of Trinidad & Tobago [1978] 2 All ER and Moses Mamalwa Mukamari vs. John O Makali & 3 Others HCCC No. 42 of 2012.

The plaintiff in his submissions relied on several decisions contained in his list of authorities containing no less than 41 authorities some of which I will consider herein. However, for reasons which I will disclose later in this ruling I do not consider it necessary or appropriate for the purposes of this decision to consider all the authorities cited. Based on the authority of *Dacey’s Law of the Constitution, 9<sup>th</sup> Edn. P. 193* it is submitted that officials are personally liable to punishment, or to payment of damages, for acts done in their official character but in excess of their lawful authority. Citing Darker vs. Chief Constable of West Midlands Police [2000] UKHL 44; [2003] 3 WLR 747, it is submitted that “since immunity may cut across the rights of others to a legal remedy and so runs counter to the policy that no wrong should be without a remedy, it should be allowed with reluctance, and should not be readily extended...That there is no general principle that in order to prevent honest police from being vexed and harassed by unfounded actions brought by hostile persons whom they have arrested, they should be given absolute immunity in respect of carrying out their duties, and that in order to protect the many honest police officers from the vexation of rebutting unfounded allegation the immunity should also extend to protect the few dishonest police officers...Immunity should not be extended to cover the wrongful fabrication of evidence”. The general rule, according to **Brennan, CJ, Dawson, Toohey and Grandon**,

JJ, in **Mann vs. O'Neill [1997] 71 AL JR 903, 907**, is that the extension of absolute privilege is viewed with the most jealous suspicion, and resisted, unless its necessity is demonstrated. Relying on ***Police Liability For Negligent Investigations: When Will a Duty of Care Arise? [2006] Deakin Law Review Vol. 11 No. 2*** by **Mandy Shircore**, an Australian Scholar, it is contended that Courts should avoid reference to 'police immunity' as it masks the fact that there are circumstances where judicial scrutiny of police investigatory powers caution must be exercised to ensure that civil rights infringements are balanced against the pursuit of alleged criminal activity. In this case, it is submitted that the defendants ceased to act within the exercise of their functions by the sole fact that the acts committed by them constitute an abuse of power or excess of jurisdiction or even violation of the law and was in bad faith. "Good faith" as per **Rand, J** in Supreme Court of Canada case in **Roncarelli vs. Duplessis [1959] SCR 141** it is submitted " means carrying out the statute according to its intents and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; it does not mean for the purposes of exercising an unchallengeable right; it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status". According to **Black's Dictionary**, "Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, absence of malice and the absence of design to defraud or seek unconscionable advantage". In the plaintiff's view the protection from personal liability/immunity cannot be asserted without hearing the evidence. Under the Kenya Constitution, it is submitted that everyone whose rights and freedoms as set out in the Bill of Rights Chapter are violated in any way shall have an effective remedy before a court notwithstanding that the violation has been committed by persons acting in an official capacity hence the Court ought to provide the plaintiff with the opportunity to test his case on the merits of his claim for damages against all the defendants. In his view and on the authority of US Supreme Court Case in **Forman vs. Davis, 137 US 178, 182, 83 S. ct. 227, 230 (1962)**, if the underlying fact or circumstances relied on by a plaintiff may be proper subject of relief, he ought to be offered an opportunity to test his claim on the merits.

In my view the issue before me is whether on the material before me the Court ought to find that the applicants ought not to have been joined as parties to this suit. With respect to the plaintiff, the bulk of the written submissions revolve around issues of facts. Such issues properly speaking do not belong to the realm of submissions but ought to be in form of affidavit. Accordingly I have not seriously taken them into account since they are based on unsworn evidence. Parties and their Counsel should refrain from turning submissions into an avenue to adduce evidence which ought to be properly introduced by way of affidavits. When evidentiary material is placed in the submissions unsupported by affidavits the Court may well be entitled to ignore the same.

It is clear that there is no absolute immunity granted to investigators of the Commission. The immunity granted to the said officers under section 9(1) of the ***Anti-Corruption and Economic Crimes Act – 2003*** is only with respect to actions done or omitted in good faith. It is only in respect of such matters that an action or proceeding for damages cannot be brought against the applicants. With respect to section 20 of the ***Ethics and Anti Corruption Commission Act***, what is barred is the finding of personal liability on the part of the applicants for actions done in good faith. This section unlike section 9(1) aforesaid does not bar the bringing of an action but only bars the finding of liability. Similarly section 250(9) of the Constitution does not bar the bringing of an action against the applicants but similarly bars them from being liable for anything done in good faith. In my view, the wording of section 20 aforesaid as well as Article 250(9) aforesaid clearly recognises the fact that since the barrier to liability is not absolute, it would defeat the whole purpose of the partial liability if the bringing of an action is barred from the word go as would seem to be the position under section 9 (1) aforesaid. In my view the issue whether or not an action was done in good faith can only be determined by a Court of law and therefore to bar the commencement of such proceedings in the first place would, in my view, amount to unjustified limitation being placed on the already limited scope of the immunity granted to the applicants. To do so would in my view grant absolute immunity to the applicants contrary to the letter and spirit of both the legislation and the Constitution. As was correctly stated in **Darkar Case** (supra):

**"It is the principle that a wrong ought not to be without a remedy. The remedy is derogation from a person's right of access to the court which requires to be justified".**

That justification can only be determined at the hearing more so taking into account the nature of the cause of action herein which revolves around malicious prosecution. One of the ingredients of malicious prosecution is lack of reasonable and justifiable grounds for believing that a crime was committed. In other words the tort of malicious prosecution presupposes that the prosecution was undertaken on the basis of collateral considerations rather than the genuine intention to bring the offender to book. If the ingredients of malicious prosecution are proved they may well have the effect of rendering the issue of good faith untenable. In other words the tort of malicious prosecution may well be inconsistent with the *bona fides* of the prosecution. As was held by **Shah, JA** in **John Gitata Mwangi and 3 Others vs. Jonathan Njuguna Mwangi and 4 Others Civil Appeal No. 213 of 1997**, *viva voce* evidence fully tested on cross-examination places the Court in a better position to evaluate the same. In my considered view, for a court to be satisfied as to the existence of good faith, it must act on evidence and that evidence must be tested by cross-examination before being acted upon or at least persons against whom it is given must be given an opportunity to challenge it if only to demonstrate that justice has been done. No person should be made to feel that his interests have not been safeguarded or at least not been borne in mind by the Court in arriving at a decision which affects him. See **Republic vs. Kigera [2006] 1 KLR (E&L) 132**.

In order for me to find that the applicants are improperly joined in these proceedings it would be necessary for me to make a finding that the applicants acted in good faith. That finding I am afraid it is not possible to make at this stage of proceedings without evidence being presented in the normal manner. It would in my respectful view be a travesty of justice if the applicant were “let off the hook”, as it were at this stage only for the Court to find in the course of the trial that the applicants did not act in good faith. In the event of that happening the plaintiff would find himself in a position in which he may have to institute fresh proceedings against the applicants and that would be contrary to the overriding objective. The overriding objective, in my view, is tailored to enable the court deal with cases justly which includes ensuring that the parties are on an equal footing; ensuring that they are dealt with expeditiously and fairly; and allotting them appropriate share of the court’s resources, while taking into account the need to allot resources to other cases. The Court cannot be said to be allotting appropriate share of its resources while allotting resources to other cases when it makes decisions which expose parties to multiplicity of proceedings when the matters before the Court can be dealt with in one suit.

If on the other hand it eventually it turns out that the applicants were improperly joined in this suit, they would be entitled to costs. It has been said that seldom, if ever, do you come across an instance where a party has made a mistake in his pleadings which has put the other side to such disadvantage or that it cannot be cured by the application of that healing medicine. See **Waljee’s (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188**.

In **Marwaha vs. Pandit Dwarka Nath Nairobi HCCC No. 599 of 1952 [1952] 25 LRK 45** the Court expressed itself as follows:

**“This application under Order 1, rule 10(2) to strike out the second defendant is misconceived as the ground on which he seeks to be struck out amounts in substance to a defence on a point of law, namely his non-liability upon actions in tort at the time when the cause of action arose. That being so, the proper course would have been to file a defence and to plead this point in it, under Order 6, rule 27...The point was premature because upon the plaint alone it was not unequivocally clear that he is being sued in tort at all. Paragraph 9 of the plaint might seem to imply this, but it is at least consistent with an allegation of some statutory liability for non-feasance so far as the second defendant is concerned. If the nature of the liability is not made clear in the plaint, as indeed it is not, then the proper remedy would seem to be an application for particulars, or alternatively a denial of tortious liability in a statement of defence which, if not countered in a statement in reply by an assertion that the liability being imputed was not tortious but statutory, would establish on the pleadings that the liability being imputed was in tort, whereupon an application to determine the legal point as to liability before trial could be made under Order 6 rule 27”.**

In my view the issues raised in this application are issues which are better raised in the defence by the applicants at the hearing of the suit.

I have said enough to show that I do not find merit in the application dated 26<sup>th</sup> January 2012 which I hereby dismiss with costs to the plaintiff.

I have deliberately refrained from analysing the authorities cited herein at this stage as to do so would amount to trespassing upon the jurisdiction of the trial Court with respect to matters which properly speaking belong to the stage of the actual hearing of the case.

**Dated at Nairobi this 15<sup>th</sup> day of January 2013**

**G V ODUNGA**  
**JUDGE**

Delivered in the presence of:

Ms Ongaki for Mr Arusei for the Plaintiff/Respondent

Mr Omondi for Mr Machira for the 1<sup>st</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants/Applicants