



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

PETITION NO 37 OF 2019

TATU CITY LTD.....1ST PETITIONER

KOFINAF COMPANY LTD.....2ND PETITIONER

VERSUS

ETHICS AND ANTI CORRUPTION

COMMISSION.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

SIMON GICHARU.....1ST INTERESTED PARTY

CB RICHARD ELIS LTD.....2ND INTERESTED PARTY

NCBA BANK KENYA PLC.....3RD INTERESTED PARTY

AXIS REAL ESTATE LTD.....4TH INTERESTED PARTY

RULING

1. This matter was slated for hearing, together with Judicial Review Application No. 1 of 2019, on 9th March 2020. On 6th March 2020 however, Counsel for the Petitioners, Mr. Ahmednasir Abdullahi, wrote to the respondents with a copy to the court indicating his intention to draw to the attention of the court the decision of the Supreme Court in **Ethics and Anti-Corruption Commission v Tom Ojienda, SC, t/a Prof. Tom Ojienda & Associates & 2 others; Law Society of Kenya (Amicus curiae) Supreme Court Civil Application No. 21 of 2019** and to informally apply to the court for the hearing of the two matters to be stayed pending the decision of the Supreme Court in the matter.

2. In his application before the court on that day, Mr. Abdullahi sought to persuade the court that the decision in the ruling of the Supreme Court dated 7th February 2020 was a decision *in rem* and was applicable to all matters touching on the law that underpinned the application before the Supreme Court.

3. According to Mr. Abdullahi, the investigation that triggered this petition was stayed by the decision of the Supreme Court. He referred to the penultimate paragraph of his letter dated 6th March 2020 in which he had noted that the 1st respondent, when writing to the Interested Parties, cited the decision of the Court of Appeal in **Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others [2019] eKLR** (hereafter '**the Prof. Tom Ojienda case' or the Prof. Tom Ojienda decision**'), which he submitted is the decision that was stayed by the Supreme Court at paragraph 15 on page 7 of the decision. He submitted that there was a specific special directive against the respondent relying on that decision. Further, that the interpretation of section 27 of the Anti-corruption and Economic Crimes Act has bedeviled the courts, which is why the Supreme Court has given the orders. It was his submission therefore that until the Supreme Court gives its directions, the present matter was stayed by the Supreme Court ruling.

4. In her submissions in reply, Ms. Kibogy for the 1st respondent opposed the application to stay the proceedings until the Supreme Court rendered a judgment in the matter. She submitted that the Prof. Tom Ojienda case arose from specific investigations against Prof Tom Ojienda T/A Ojienda's Associates, and that the (Court of Appeal) decision in the matter has had a ripple effect affecting other cases and

ongoing investigations. In her view, the Supreme Court decision that no party should apply or use the Prof Tom Ojienda. High Court and Court of Appeal decisions was to address the ripple effect that had arisen as a result of these decisions. The matters that are pending in court, according to Ms. Kibogy, will not be affected by the decision and will not be stayed by the Supreme Court decision.

5. It was further her submission that section 27(3) of ACECA is a power conferred upon the 1st respondent, an investigative tool given to it by statute, with or without the Prof. Tom Ojienda case. The 1st respondent was therefore at liberty, depending on the circumstances of its investigations, to use section 27 of ACECA to obtain information from any party. It had, in the alternative, power to obtain information through warrants under section 118 of the Criminal Procedure Code and section 180 of the Evidence Act. All these, in her view, are methods of obtaining information and depend on the nature of the investigations, whether criminal or civil.

6. According to Ms. Kibogy, in reference to the 1st respondent's letter to the 3rd Interested Party, the Prof. Tom Ojienda case was cited because it was a specific direction or interpretation of the Court of Appeal decision on how the 1st respondent should obtain information. It was her submission, however, that the interpretation does not take away the power of the 1st respondent to obtain information through the section or through the interpretation. She asserted that there was no specific stay given to any case; that this case is not subject to adjudication by the Supreme Court nor has it any relation with the matter before the Supreme Court. The matter was not one in which the 1st respondent had obtained information through warrants and the outcome of the Supreme Court decision on whether the manner of obtaining evidence was legal or not will not affect the decision. Accordingly, there was no reason to await the outcome of the Supreme Court decision for this matter to proceed.

7. Mr. Kamau for the 2nd respondent agreed with Ms. Kibogy that the decision of the Supreme Court did not grant a stay in any matter. Further, that a consideration of Paragraph 5(b) of the Supreme Court ruling showed that the applicant, EACC, premised its application on the fact that the decision of the Court of Appeal had cited inconsistencies in the interpretation of section 27 of ACECA and sections 118 CPC and 180 of the Evidence Act. In his view, to the extent that the notices impugned in the petition are predicated on the interpretation of the decision in the Prof. Tom Ojienda case, it would be important to wait until the Supreme Court rendered its decision. However, to the extent that the notices were not issued pursuant to the decision, the matter could proceed.

8. Mr. Kenyatta, appearing for the 1st Interested Party, took the position that the 1st Interested Party had no interest or stake in the petition and was therefore leaving the determination of the issues raised by Mr. Abdullahi to the court. On their part, the 2nd and 4th Interested Parties, represented by Mr. Omwanza, supported the position taken by the petitioners.

9. Mr. Omwanza referred to paragraph 5(b) of the decision of the Supreme Court in which the 1st respondent had based its application on the ground that the decision of the Court of Appeal has created inconsistencies in the interpretation and application of section 118 of the Criminal Procedure Code, section 180 of the Evidence and section 27 of ACECA. His submission was that it was a matter of public policy that a law must be clear so that all affected are clear of its provisions. In his view, it is possible for parties to take divergent opinions on decisions of courts, and it was this question that would be before the Supreme Court with respect to the interpretation of section 26, 27 and 28 of ACECA, which will also be an issue before this court in this matter.

10. Mr. Omwanza submitted that in the case involving **Chris Okemo** (no citation was provided), the Supreme Court stayed all extradition proceedings before the courts to await its decision. He also cited the case of **LSK vs AG & another (2019) eKLR** (the WIBA case) in which the Court was dealing with the constitutionality of various provisions of the Work Injury Benefits Act, to submit that the Supreme Court had held that all cases on the issue pending in courts should have been stayed. It was his submission that the Supreme Court reprimanded the High Court for proceeding with a matter touching on WIBA. Mr. Omwanza argued that the point raised by Counsel for the petitioners was valid and the court should await the decision of the Supreme Court on the issue.

11. In his response to submissions by Ms. Kibogy, Mr. Abdullahi submitted that in order for the Supreme Court to grant the prayers it did, the 1st respondent had made an application seeking stay of the decision of the Court of Appeal in Civil Appeal No 109 of 2016. The Supreme Court had granted the said orders as the 1st respondent was unhappy with the decision of the Court of Appeal. In his view, the issue in contestation is whether the 1st respondent has powers to bypass the accused persons and whether it should give notice to a party. The Court of Appeal had decided that the 1st respondent should give notice to the applicant, which, according to Mr. Abdullahi, is the essence of the present petition- that the petitioners were not given notice. Learned Counsel noted that at paragraph 40 (iv) of the affidavit of the 1st respondent, reference is made to the the Prof. Tom Ojienda decision, and that the same decision is cited at paragraph 3 of the letter to the 3rd Interested Party.

12. Mr. Abdullahi's submission was that the substratum of this petition is the the Prof. Tom Ojienda decision in the High Court and the Court of Appeal; that the law is as it was directed by the Court of Appeal in the Prof. Tom Ojienda case; that the Supreme Court has stayed the petitioners' reliance on the case and in his view, it had stayed the matters that touch on the power of the EACC in relation to section 26, 27 and 28 of ACECA.

13. It was further argued on behalf of the petitioners that the notice to the bank was copied to the petitioners, while the one to the 4th Interested Party was not. It was Mr. Abdullahi's submission that the jurisprudence in the Tom Ojienda case is at the center of this petition. He relied on paragraph 91 of the **WIBA** decision in which he submitted the Supreme Court had held that the High Court should have held its horses before rendering a decision.

14. In response to a question from the court on what was meant by the 'effect' of the the Prof. Tom Ojienda decision that was stayed by the Supreme Court, Mr. Abdullahi submitted that it meant the 'breadth' and the 'width' of that decision, as well as the legal interpretation of those two decisions as it relates to the two decisions. He urged the court to await the decision of the Supreme Court which would clarify the law and simplify the present decision.

15. I have considered the submissions of the parties on this matter. I have noted the submissions and references to decisions of the Supreme

Court, such as the WIBA decision, and I agree with the submission that where a matter is in issue before the Supreme Court, the High Court ought to await a determination of the matter by the Supreme Court, as that decision is binding on it.

16. I take the view, however, that the present circumstances are different from the situation in the WIBA case, and probably also from the Chris Okemo case which Mr. Onwanza referred to without providing the court with the citation or a copy of the authority. I reach this conclusion after a perusal and consideration of the ruling of the Supreme Court that the petitioners seek to rely on in staying the present proceedings.

17. In the application before it in **Ethics and Anti-Corruption Commission v Tom Ojienda, SC, t/a Prof. Tom Ojienda & Associates & 2 others (supra)**, the Supreme Court was dealing with an application for stay of execution pending hearing and determination of an intended appeal by the 1st respondent in this matter against the judgment of the Court of Appeal dated 28th June, 2019 in **Civil Appeal Nos. 109 of 2016 & 103 of 2016 (Consolidated)**. At paragraph 15 of its ruling, the Supreme Court stated as follows:

“[15] We have considered these rival submissions. It is not in doubt that the fight against corruption and economic crimes is a matter of great public importance. In the circumstances, in the interest of justice and to provide guidance, a clear and authoritative statement of this Court on the issues raised is imperative. Consequently, we allow this application and direct that pending the hearing and final determination of the applicant’s appeal—No. 30 of 2019, the effect of the High Court and Court of Appeal decisions in this matter is hereby stayed. Neither party to this appeal, nor any other person shall use, apply or in any way rely upon them until the said appeal is heard and determined.” (Emphasis added).

18. The question is what was the ‘effect’ of the Court of Appeal decision, and the High Court decision preceding it, that the Supreme Court stayed in its ruling? In its decision, the Court of Appeal in **Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others (supra)** had stated as follows:

“We find and hold that in its investigations EACC is inflexibly bound to comply with the provisions of those sections which, for the avoidance of doubt, are as follows;

26. Statement of suspect’s property

(1) If, in the course of investigation into any offence, the Secretary is satisfied that it could assist or expedite such investigation, the Secretary may, by notice in writing, require a person who, for reasons to be stated in such notice, is reasonably suspected of corruption or economic crime to furnish, within a reasonable time specified in the notice, a written statement in relation to any property specified by the Secretary and with regard to such specified property—

....

27. Requirement to provide information, etc.

(1) The Commission may apply ex parte to the court for an order requiring an associate of a suspected person to provide, within a reasonable time specified in the order, a written statement stating, in relation to any property specified by the Secretary, whether the property was acquired by purchase, gift, inheritance or in some other manner, and what consideration, if any, was given for the property.

....

28. Production of records and property

(1) The Commission may apply, with notice to affected parties, to the court for an order to—

(a) require a person, whether or not suspected of corruption or economic crime, to produce specified records in his possession that may be required for an investigation; and

(b) require that person or any other to provide explanations or information within his knowledge with respect to such records, whether the records were produced by the person or not.

(2) A requirement under subsection (1)(b) may include a requirement to attend personally to provide explanations and information.

(3) A requirement under subsection (1) may require a person to produce records or provide explanations and information on an ongoing basis over a period of time, not exceeding six months.

The text of these provisions is quite clear and admitting to no ambiguity whatsoever, it is the duty of the courts to give full effect and meaning to them in interpretation, and the obligation of EACC to fully comply there with....

...

It is obvious from the above-quoted sections of the ACECA that the Legislature's intention was for a person of interest or suspect to be aware of the intended action of EACC against him. It also intended for a person of interest to first be given a chance to voluntarily comply with the notice before any action is taken against him. This was not done by EACC who chose the easier general path of seeking warrants, ex parte instead of paying due regard to the preliminary steps required under its constitutive and operative statute. In so doing, it infringed on Ojienda's fundamental rights and affected his interests, hence the learned Judge's invalidating action, which we have no difficulty endorsing.” (Emphasis added)

19. From the nature of the petitions and applications that have been presented in court, the ‘effect’ of the Ojienda decision, as appears to be the common understanding, is that whenever the EACC is carrying out an investigation with respect to corruption, including an investigation that entails inquiry into bank accounts, it must issue a notice under sections 26, 27 and 28 of ACECA, and that it cannot utilise the provisions of sections 118 and 120 of CPC and section 180 of the Evidence Act. This was the argument advanced to the court by the appellant in **Innocent Momanyi Obiri v Ethics & Anti-Corruption Commission & another (2019)eKLR** and was the basis of the decision of the High Court in **MWN v Inspector General of Police & 4 others [2019] eKLR**.

20. To my understanding, this ‘effect’ is what the Supreme Court stayed in its ruling. In so doing, it restored the position that preceded the Court of Appeal decision in the the Prof. Tom Ojienda case that had guided investigation and interpretation of challenges to warrants to investigate persons suspected of corruption and economic crimes-see **Mape Building & General Engineering v Attorney General & 3 others [2016] eKLR**; **Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others [2018] eKLR**; **Omwanza Ombati t/a Nchogu, Omwanza & Nyasimi Advocates v Director of Criminal Investigations Department Emmanuel Kanyungu & 3 others [2017] eKLR**; **Francis Njau Njoroge & another t/a Francrom General Merchants v Insurance Regulatory Authority & 5 others [2018] eKLR** and **William Baraka Mtengo v Attorney General & 3 others [2018] eKLR**. The principle that emerges from these decisions is that so long as the respondent follows the requirements with respect to obtaining search warrants, the court will be slow to find that the warrants are illegal or irregular.

21. In my view therefore, contrary to what Counsel for the petitioners and the 2nd and 4th Interested Parties appear to understand from the decision of the Supreme Court, the Court did not stay any decision in which the question of the applicable law that was at issue in the Prof. Tom Ojienda case arises. Its decision did not have the effect of stopping the 1st respondent from carrying on its investigations where there was reason to believe that there was corruption or economic crime committed.

22. On the contrary in my view, what the Supreme Court did was allow the 1st respondent specifically and investigative agencies such as the police and the Directorate of Criminal Investigations in general to apply before Magistrates’ Courts for warrants under sections 118 and 120 of the CPC and section 180 of the Evidence Act, as they used to do prior to the Court of Appeal decision in the Prof. Tom Ojienda decision.

23. In the premises, I find no basis for staying the present proceedings. In accordance with the directions issued earlier, this petition shall proceed to hearing together with JR Application No. 1 of 2019 which the present petition seeks to support.

Dated and Signed at Nairobi this 22nd day of April 2020

MUMBI NGUGI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent and pursuant to notices issued on 8th and 15th April 2020. The parties have waived compliance with Order 21 rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court.

MUMBI NGUGI

JUDGE