



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ACEC PETITION NO. 30 OF 2017**

**DR SOFIA MOHAMMED.....PETITIONER**

**VS**

**THE ETHICS AND ANTI CORRUPTION COMMISSION (EACC).....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION.....2<sup>ND</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE.....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner moved this court by way of a petition dated 1<sup>st</sup> November 2017 and supported by an affidavit of even date. She sought the following reliefs.

- a. AN ORDER OF PROHIBITION do issue to prohibit the Respondents whether by themselves, their servants, agents or whoever from; conducting further investigations outside the constitutional purview, arresting, charging and/or prosecuting the Petitioner in relation to matters of alleged abuse of office by the chief Officer, Health of Garissa county Government.
- b. AN ORDER OF PROHIBITION do issue to prohibit the Respondents whether by themselves, their servants, agents or whoever from: conducting further investigations outside the *constitutional purview, arresting, charging and/or prosecuting the Petitioner in relation to matters of alleged abuse of office by the chief Officer, Health of Garissa county Government.*
- c. A DECLARATION that the alleged misleading information to the members of the County government pertaining the recommended promotion by the Chief Officer-health of Garissa County Government does not amount to an abuse of the office or a matter within the mandate of the Ethics and Anti corruption Commission.
- d. Any other relief that this Honourable court may deem just and fit to grant
- e. That the costs of this petitioner be borne jointly and severally by the Respondents.

2. The petitioner is a registered and medical practitioner in Kenya having graduated with a bachelor of science degree in Medicine and surgery from the Afhad University Khartoum. At the time of filing the petition she was the County Chief Officer Department of Health Garissa County having been appointed on 18<sup>th</sup> November 2013 by the then Governor. She boasts of revamping the Garissa Health department to a point where the Garissa Ministry of Health scooped the best National Prize for service delivery and innovation by the Ministry of Health of Kenya in October 2016 (SMA -3 & 4).

3. She said she worked closely with the Garissa County Public Service Board (GCPSB) in recommending serving experienced and qualified officers for positions in line with the Ministry of Health's departmental organogram. This was meant to improve efficiency in service delivery (SMA 5 & 6). Following this recommendation the GCPSB advertised all the positions in the Daily Nation of 20<sup>th</sup> January 2014 (SMA7 & 8). The GCPSB assigned one Board member to guide in the shortlisting process. The recruitment process took off and a report (SMA 10) dated 29<sup>th</sup> April 2014 was done.

4. After this exercise she had a discussion with the GCPSB chairperson Mr. Harun Mohammed and the Head of the County Human Resource Management, Mr. Ahmed Bashir Abdi in respect of positions of heads of Divisions. She specifically requested the cancellation of the 20<sup>th</sup> January 2014 advertisement in respect of the top positions.

5. On 25<sup>th</sup> March 2014 she sourced internally and appointed the following to the top positions namely:

- a. Dr Farah Amin Hassan County Director Health
- b. Omat Mahat Ore as Head of Division of Administration, Human Resource, Finance and Quality Assurance.
- c. Abdi Shale Abdi as Head of Division Planning, Policy Monitoring and evaluation
- d. Habon Golo Abdi as Head of Division Family Health
- e. Mohamed Salat Dagane as Head of Division of Curative and referral Services and
- f. Siyat Moge Gure as Head of Division of Preventive and Promotion services.

6. The Petitioner vide a letter dated 15<sup>th</sup> December 2014 recommended the said individuals for promotion (**SMA12**). The appointments were subject to confirmation by the GCPSB. Later on 28<sup>th</sup> January 2015 the GCPSB Chairperson confirmed the officers as Heads of divisions (**SMA 13**) as per her recommendations.

7. Things took a different turn while she was away on maternity leave. On 2<sup>nd</sup> April 2015, there was an advert for the position of County Director of Health and two Deputy Directors without her knowledge and approval which she said was contrary to the law (**SMA14 & 15**). Other events that took place were as follows:

- i. A break in into her office in search of information.
- ii. Harassment and threats by the Chairperson of the GCPSB (**SMA 16**)
- iii. Purported cancellation of the appointments/confirmation of the officers (**SMA 17&18**).
- iv. In spite of her written request for Minutes of the Board resolutions leading to the cancellation of the appointments none has been forthcoming. This to her is violation of Articles 35 & 50 of the Constitution.
- v. She has been a target of unnecessary harassment, humiliation, embarrassment and frustration.
- vi. Criminal case no 1 of 2016 and criminal case no 5 of 2017 are some of the cases facing her. That there are freshly instituted investigations against her.

8. She has referred to several statements by people like Mr Ahmed Bashir Abdi (**SMA -11**); Fandosa (SMA 22); Abdirazak Said Adano (SMA 23); Abdisalam Sheikh Mohammed (SMA 24) in which the authors have denied attending the board meeting of 20<sup>th</sup> January 2016 and signed for on 22<sup>nd</sup> June 2016.

9. The Petitioner avers that she always worked in consultation with the GCPSB in whatever action she took. That for them to turn against her was a sure sign of dishonesty and discrimination against her person. She fears that the three Respondents and other State agencies acting at the instigation of a political power together with the GCPSB are out to cause her harm by using the criminal justice process.

10. It is because of all the issues raised above that she seeks the orders of prohibition against any further investigations plus a declaration that whatever she did does not amount to abuse of office.

11. In his submissions Mr Mbugua for the Petitioner gave a brief background to the Petition. It was Counsel's submissions that following the break-in at her office the Petitioner reported the matter vide OB no 3/14/2015 of Garissa Police Station and she also did a letter to the 1<sup>st</sup> Respondent. There was no other communication until she saw documents in a criminal case. He contended that the Petitioner had been subjected to various criminal cases.

12. Counsel argued that the Petitioner's rights to privacy and fair trial under article 50(2) & (4) of the Constitution had been violated. In reference to the respondent's independence as an institution he said they still are bound by Article 10 of the Constitution and can't act as dictatorships.

13. He also accused the Respondents of not acting lawfully by acquiring evidence unlawfully in respect to the Petitioner. To support this argument he referred to the case of **Stephen Oruwa Ambogo vs AG [2014] eKLR**

14. He further submitted that the Petitioner had been discriminated against yet she worked under delegated authority. Besides herself, there was no one else being investigated. She was also not absorbed in the new County Government. He added that though not aware of who broke into the office what is clear is that the Respondents are benefiting from the action. On this point of discrimination counsel referred to the case

of **Republic v IEBC (Nasa) Kenya & 6 Others [2017]eKLR**, where the need for adherence to the national principles and values was stressed.

15. He finally submitted that the conduct of the Respondents did not promote the principle of equality and observance of human rights. His summary is that Article 10 had been violated and the prayers sought should be granted.

16. The 1<sup>st</sup> Respondent filed a replying affidavit through Celestine Owiti an Ethics Officer with the 1<sup>st</sup> respondent. She averred that upon receipt of a report on the happenings at the Garissa County Government the 1<sup>st</sup> Respondent carried out investigations into the matters.

17. On 20<sup>th</sup> January 2014 there were adverts of various vacancies in the Health Department in the daily Nation. The vacancies included Deputy Directors for various departments. On 19<sup>th</sup> February 2014 the Garissa County Secretary/Chief Executive Officer sent an email to the Petitioner informing her that the GCPSB would assign one of its members to guide the recruitment process. On 25<sup>th</sup> March 2014 the Petitioner proceeded to appoint various persons as Deputy Directors for various departments in the said Ministry. (copies of appointment letters were annexed – “CO1”

18. The Petitioner later wrote to the GCPSB requesting for confirmation of these officers as holders of those offices. The Board did confirm them, but it was later realized it was wrong. The chair person through the GCPSB decided to cancel the confirmations/appointments (CO 2, 3, 4, 5).

19. The 1<sup>st</sup> Respondent investigated all this as it believed there was breach of section 59 of the County Governments Act. There was suspicion that the Petitioner was involved in several suspicious activities. That the 1<sup>st</sup> Respondent started making inquiries into these activities by the Petitioner and there was nothing sinister about it. M/s Kibogi in her written and oral submissions told the court that the Petitioner’s office was investigated following what had been reported and there was therefore no discrimination. She contended that the Petitioner had failed to follow due process while promoting officers under her. This was violation of sections 63-70 of the County Governments Act.

20. She submitted that no one broke into the Petitioners’ office as claimed and whatever information they have in their possession was lawfully obtained. She further submitted that in misleading the GCPSB the Petitioner’s action amounted to abuse of office which the 1<sup>st</sup> Respondent has the mandate to investigate under the EACC Act, Article 252 and Chapter 6 of the Constitution.

21. Counsel submitted further that Garissa Chief Magistrate’s Criminal Case No. 1 of 2016 though partly heard was withdrawn in view of the Court of Appeal decision in the **Engineer Kamau case Civil Appeal No 102 of 2016** and for no other reason. That the other case that is pending at the said court is in respect of the matter now before this court. She contended that the Petitioner’s rights have not been violated. On the right to privacy she said the same is not absolute and the Petitioner does not know who broke into her offices. Secondly, the right to fair trial is not applicable in the present case as the 1<sup>st</sup> Respondent has acted above board. It was her argument that if the evidence they are using was unlawfully obtained it can be objected to during the criminal trial.

22. She finally submitted that this court cannot bar the EACC from investigating cases as that is its mandate. To support this submission she referred to two cases namely:

**i. Kenya National Examination Council v Republic Ex-parte Geoffrey Gathenji Njoroge & 9 Others Civil Appeal No 266 of 1996 [1997] eKLR**

**ii. Hillary Kipruto Bett v Director of Public Prosecutions & 2 Others JR case no 16 of 2016 [2016] eKLR.**

23. The 2<sup>nd</sup> Respondent filed grounds of opposition plus written submissions. Mr Ashimosi on behalf of the 2<sup>nd</sup> Respondent submitted that this being a Constitutional Petition the Petitioner had to state and demonstrate how provisions of the law had been violated. That the violations are alleged to have been committed by the GCPSB which is not a party to these proceedings. He submitted that there is no proof of any violation of the Petitioner’s rights. There is also no prayer to quash the decision to charge in Criminal Case no. 5 of 2017. She cannot therefore get any relief in that regard.

24. Mr Ashimosi argued that the Petitioner is seeking a blanket Prohibition order against investigations yet the EACC has the mandate to investigate. He said the DPP’s mandate to recommend charging of the Petitioner is not being challenged by the Petitioner. According to him, she has not proved her case.

25. On when the court may interfere with the DPP’s constitutional mandate under article 157 he referred to the following cases.

**i. Kenya Commercial Bank Ltd & 2 Others v Commissioner of Police & Anor, Nairobi Petition No 218 of 2012 (2013) eKLR.**

**ii. George Joshua Okungu & Anor v Chief Magistrate court accused at Nairobi & Anor [2014] eKLR.**

26. I have considered the petition, affidavit, annexures both written & oral submissions and the authorities cited herein. The main issue for determination is whether the Petitioner has satisfied the threshold for issuance of the order of prohibition and the Declaration sought.

The 3<sup>rd</sup> and 4<sup>th</sup> respondents did not file any papers though served. I have however found no single claim or orders sought against them.

Prayer A & B is one and the same prayer word for word. It states:

a. An ORDER OF PROHIBITION to prohibit the Respondents whether by themselves, their servants, agents or whoever from; conducting further investigations outside the constitutional purview, arresting, charging and/or prosecuting the Petitioner in relation to matters of alleged abuse of office by the Chief Officer, health of Garissa County Government.

27. The evidence before this court is that investigations into the complaints by the GCPSB in respect to the recommendations/confirmations and/or appointments of officers were completed by the 1<sup>st</sup> Respondent. Thereafter the 1<sup>st</sup> Respondent made recommendations to the 2<sup>nd</sup> respondent who considered the evidence and recommended prosecution. The Petitioner with others are facing charges before the Garissa Chief Magistrate's court vide criminal case No. 5 of 2017.

28. In as much as the Petitioner has dwelt on the complaints raised by the GCPCB and justifying her actions, she has not made the said body a party to these proceedings. The GCPCB needed to defend itself against the allegation. Secondly she has not sought the quashing of the decision by the 2<sup>nd</sup> respondent to charge her vide Garissa Chief Magistrate's Court Criminal Case No. 5 of 2017.

29. In her prayer for Prohibition she wants this court to prohibit the Respondents from conducting further investigations. The reason for this, she says is that it is all witch-hunt, against her. The Petitioner is already facing charges related to her complaints raised in this Petition. She has not sought for those charges to be quashed. To allay her fears on further investigations and may be charges let her be assured that the law is clear that once a case is heard and determined one cannot be charged over the same facts again. Article 50(2) (o) of the Constitution provides:

**“(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;”**

30. The fact that the Petitioner has been charged on the 2<sup>nd</sup> Respondent's recommendations means investigations are complete and there are no further investigations to be carried out in respect of the same matter. It is not therefore clear why the Petitioner is seeking an order to prohibit further investigations.

31. It is the Petitioner's case that the 1<sup>st</sup> Respondent is using unlawfully obtained evidence to prosecute her. She relied on the case of **Mohamed Kurow Nur v Attorney General [2011] eKLR Anthony Muriithi vs O.C.S Meru Police Station & 2 others [2012] eKLR** to support her argument. The two cases found that unlawfully obtained evidence should not be used against an accused person. I support that finding as that is the position in Law.

32. Despite the allegations that evidence was unlawfully obtained from the Petitioner's office which was broken into, the Petitioner never placed before this court the evidence that was allegedly unlawfully obtained. This court is not the one hearing the criminal case involving the questioned evidence. The Petitioner will have the opportunity to object to the admissibility of that evidence in the criminal case against her at the appropriate time. The trial court will therefore address that issue and make a determination.

33. As has been held in several cases, this court can only interfere with the Respondent's investigatory powers if there is proof of any violation of the Petitioner's rights. That is basically what the court was stating in the cases of **Kenya Commercial Bank Ltd & 2 others (supra) and George Joshua Okungu & Anor** (supra). It was therefore the Petitioner's duty to demonstrate which Constitutional rights of hers had been violated. He who alleges a fact must prove it. Section 107 of the Evidence Act provides:

**“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”**

I have considered the material before this court and I find no evidence of violation of the petitioner's rights in as far as the case before the Chief Magistrate's court Garissa is concerned.

34. What has clearly come out is that the Petitioner wants this court to weigh and consider the sufficiency of the evidence in respect of the criminal case she is facing. She wants this court to declare that what she did does not amount to abuse of office. How can this court arrive at that without weighing the evidence? That is not the reserve of this court which cannot also prohibit the respondents from carrying out their mandate of investigating cases of corruption unless it has been clearly shown that by so doing the 1<sup>st</sup> Respondent is violating an individual's rights. The Petitioner has failed to demonstrate so. For this court to make the declaration the Petitioner seeks in prayer (c) of her petition the court will have to evaluate the evidence in the criminal case. That again is a reserve of the court hearing the criminal case.

35. In the final analysis I find that the petitioner has failed to demonstrate that she is deserving of the orders sought. The result is that the Petition lacks merit and is dismissed with costs.

Orders accordingly.

**Dated, signed and delivered this 31<sup>st</sup> day of July 2018 in open court at Nairobi.**

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**HEDWIG I. ONG'UDI**

**JUDGE**