



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

MISC. APP. NO. (J.R) 35 OF 2016

(FORMERLY JR. NO. 568 OF 2016)

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR

JUDICIAL REVIEW ORDERS

OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: ARTICLES 10,22,23,25,27,47,50,157 AND

165 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: SECTIONS, 29 AND 73 OF THE PUBLIC

PROCUREMENT AND DISPOSAL ACT, 2005

AND

IN THE MATTER OF: REGULATIONS 8, 9,10,11,53 AND 54 OF THE

PUBLIC PROCUREMENT AND DISPOSAL REGULATIONS, 2006

AND

IN THE MATTER OF: THE OFFICE OF THE DIRECTOR OF PUBLIC

PROSECUTIONS ACT, 2013

AND

IN THE MATTER OF: SECTION 8 AND 9 OF THE LAW REFORM

ACT, CAP 26 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE

RULES, 2010

AND

IN THE MATTER OF: SECTIONS 9, 10 AND 11 OF THE FAIR

ADMINISTRATIVE ACT, 2015

BETWEEN

HASSAN NOOR HASSAN.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

AND

ETHICS AND ANTI CORRUPTION

COMMISSION.....INTERESTED PARTY

R U L I N G

Introduction

1. By a Chamber Summons dated 16th November 2016, the Applicant herein seeks the following orders:

a) THAT the Applicant be granted leave to apply for an Order of Prohibition against the Director of Public Prosecutions prohibiting him from prosecution or proceeding with the prosecution of the Applicant regarding the procurement of training materials for the automotive engineering faculty wide **Contract No. NYS/RT/29/204-2015(4) for the National Youth Service.**

b) THAT the Applicant be granted leave to apply for an Order of Certiorari to remove into this Honourable Court and quash the decisions of the Director of Public Prosecutions to charge and prosecute the Applicant regarding the procurement of training materials for automotive engineering faculty wide **Contract No. NYS/RT/29/204-2015(4) for the National Youth Service.**

c) THAT the grant of leave do operate as stay of the decision by the Director of Public Prosecutions to charge the Applicant with criminal offences for his actions in relation to the procurement of training materials for automotive engineering faculty wide **Contract No. NYS/RT/29/204-2015(4) for the National Youth Service.**

d) THAT costs of the Application be provided for.

2. This is not the substantive Notice of Motion where the court is required to look at the reasons for quashing the impugned decision. At this stage the court only needs to be satisfied that the Applicant has a prima facie case and that if prayers sought are not granted, this application will be rendered nugatory. The court has therefore captured the gist of each party's case in summary as set out below.

Applicant's Case

3. In support of the application, Hassan Noor Hassan, hereinafter the Applicant filed a statement together with an undated verifying affidavit filed on the 16th of November. In sum, according to the Applicant, the

National Youth Service (NYS) as the user department initiated the questioned tender in accordance with their work plan.

4. The Applicant states that the NYS requested to proceed by way of restrictive tender which is allowed under the law and which was also allowed by the Ministerial Tender Committee chaired by the Applicant. That the tender was opened by a Tender Opening Committee and evaluated by an Evaluation Committee both appointed by the Accounting Officer and the Applicant is not a member of either of them

5. The Applicant argues that the Evaluation Committee of the user department which had the duty to ensure that the bids were technically and financially responsive, prepared a report on the analysis of the tenders received and the final rating assigned and submitted the report.

6. The Applicant asserts that subsequently the notification of the award to the successful bidder M/s Blue Star Enterprises was done by the Principal Secretary, Ministry of Devolution and Planning. That a contract between the successful bidder and the NYS was signed by the principal secretary in the said ministry. Further that Local Purchase Order No. 2481900 was raised by the A.I.E holder and issued to Blue Star Enterprises and the goods delivered and received by the Acceptance Committee on behalf of the User Department vide S13 Form.

7. The Applicant urges that pursuant to a newspaper report in the Daily Nation of 14th November, 2016 he learned that he was to be arraigned in court on Wednesday 16th November, 2016 to answer charges preferred by the Respondent, in relation to alleged irregularities in the procurement of training materials in the automotive engineering faculty of the NYS.

8. It is his averment that the decision by the Respondent to prefer criminal charges against him, is unreasonable and amounts to gross abuse of the court process, since during the procurement process he discharged his duties in accordance with the law and in good faith. He has termed the intended criminal proceedings as oppressive, vexatious and illegal *ab initio*.

9. The Applicant contends that upon conclusion of investigations, the Interested Party (EACC) elected to institute civil proceedings against him among other persons, vide High Court Anti-Corruption Division Misc. Application No.7 of 2016. That the Applicant has filed a statement of defense and replying affidavit in the civil matter, in which the EACC's application is pending for ruling and the main suit is yet to be heard.

Respondent's Case

10. Hellen K. Mutellah a Senior Prosecution Counsel in the office of the Director of Public Prosecutions (DPP), swore a replying affidavit on the 16th of November, 2016. She deponed that pursuant to **Section 35 of the Anti-Corruption and Economic Crimes Act, 2003 (ACECA)** as read with **Section 11(1) (d) of the Ethics and Anti-Corruption Commissions Act**, on 22nd September, 2016 the Ethics and Anti-Corruption Commission (EACC) forwarded to the DPP a report together with the duplicate investigation file.

11. The file pertained to an inquiry into allegations of procurement irregularities in the supply and delivery of training materials vide Automotive Engineering Contract No. NYS/RT/29/2014-2015(4). That pursuant to the mandate of the DPP under Article 157 of the Constitution, the inquiry file submitted by the EACC, was analyzed to ascertain the sufficiency of the evidence gathered by the EACC.

12. The EACC had conducted and concluded its investigations and recommended the charging of a number of individuals including the applicant with various of offences. Based on the independent review of the evidence, the DPP was satisfied that there was sufficient evidence and directed that the Applicant alongside others, be charged with several offences.

13. The Respondent asserts that the Applicant failed to show that in making the decision to charge, the

DPP had abrogated any provisions of the Constitution, or any written law, or any rules made thereunder, or that he had breached the rules of natural justice.

14. The Respondent contends that the Applicant and the Ministerial Tender Committee flouted the law with respect to the tendering process. Secondly, that judicial review applications do not deal with the innocence or otherwise of the Applicant. The Respondent also argues that **Section 193 (A) of the Criminal Procedure Code** permits concurrent criminal and civil proceedings. That in any case the respondent is not a party to the civil proceedings.

Interested Party's Case

15. The Interested Party (EACC), through **Mr. Mark Ndiema** their Forensic Investigator, filed a replying affidavit dated 21st November, 2016. Their case, is that the EACC is properly constituted under the provisions of **Article 50 (1) of the Constitution** read with **Section 53 of the Interpretation of General Provisions Act (CAP 2)** and paragraph 8 of the second schedule of the **Ethics and Anti-Corruption Commissions Act of 2011**.

16. Mr. Ndiema deposes that the Applicant had not raised any ground which would bring this application within the purview of judicial review. That if leave is granted, the Applicant would have caused this court to embark upon an examination and appraisal of the evidence with a view of demonstrating his innocence, which is not the function of a judicial review court. That the matters he has raised are prematurely before the court.

17. Mr. Ndiema avers that the Applicant has not demonstrated that there was any procedural impropriety, or a failure to observe the rules of natural justice in the process of arriving at the decision to prosecute. That the Applicant was interviewed during the investigations and he has not demonstrated that the intended prosecution is actuated by ulterior motive, or malice, or is otherwise an abuse of the court process.

18. Mr. Ndeima asserts that the Applicant has not demonstrated that the Respondent acted irrationally by arriving at the decision to prosecute, nor that the intended criminal proceedings are being instituted for other means other than the honest enforcement of criminal law. He urged the court not to restrain the Respondent and the EACC from discharging their respective Constitutional and statutory mandate, without any evidence of impropriety on their part.

Submissions for the Applicants

19. Counsels made brief oral submissions. Mr. Ahmed Nassir, learned Counsel for the Applicant urged that the grounds upon which the Interested Party and Respondent are resisting the application are untenable. That the intended prosecution is informed by the inability of the DPP to see the distinction of the Applicant as chairman of the Tender Committee in the Ministry of Devolution and Planning and the Tender Committee at NYS where he plays no role. That the intended prosecution is premised on that inability and the deliberate fusion of the roles of the Applicant by the DPP.

20. Counsel contended that the entire intended prosecution is premised on the assumption that there was no technical evaluation of the tender in question. He referred this court to the case of **Housing Finance Company vs Palm Homes Ltd and others [2002] 2KLR**, in which Khamoni J as he then was, applying the rule on Parole evidence, held that oral evidence could not be admitted to vary or contradict that which is written in a contract.

21. Counsel asserted that the subject tender was evaluated and it did not therefore, lie with the DPP to say that no technical evaluation was done, as a basis of a criminal prosecution.

22. To demonstrate further that the process of prosecution smirked of malafides and was an abuse of the court process, counsel submitted that the EACC investigated the matter and concluded that it was a civil case. That the DPP who says he is not a party in the civil case is in fact the 4th Applicant in the civil

application No. 7 of 2016 which is word for word similar to the evidence they intend to adduce in the criminal case.

23. Counsel admitted that while a criminal and civil case can run concurrently, the distinction is that in ordinary cases it is ordinary citizens who have civil cases in which one party, tries to engineer a criminal case to force the other party to settle. In this case it is the government of Kenya which is suing some of its citizens, claiming certain sums of money from them and also bringing a criminal case against those same citizens, for the purpose of inducing them to settle the civil case.

24. Counsel submitted that this is clear abuse of the process of court, because in Kenya criminal trials have become a propaganda tool for the government. That they are nothing but a Public Relations exercise used by the government when it wants to convince Kenyans that it is fighting corruption, to pick and charge Kenyans randomly without telling Kenyans what becomes of those cases. That this has the effect of destroying the rule of law.

25. Counsel referred the court to the case of **Bennett vs Horseferry Road Magistrates' Court and another [1993]3All ER**, in which Lord Oliver in a dissenting opinion said that the maintenance of the rule of law should prevail over public interest. He urged that it is not sufficient to say that the issues will be taken care of at the trial because an innocent person should not be arraigned in court to prove his own innocence. That a fundamental finding of the House of Lords in the foregoing case was that the judiciary should refuse to countenance behavior that threatens either basic human rights or rule of law.

Submissions for the Respondents

26. **Mr. Mule** for the Director of Public Prosecution opposed the application both for the grant of leave and for the leave so granted to operate as stay. He identified several parameters for consideration.

27. Mr. Mule first addressed the court **on whether leave is automatic or absolute**. Counsel submitted that under **Order 53 Rule 4** the court may direct the application to be served for hearing before grant of leave. That Justice Ong'undi did direct the application to be served and it was quite in order for an application for judicial review to be opposed. He referred to **HC Misc. No. 161 of 2016 John Wachira Wambugu and Law Society of Kenya**.

28. **On whether the leave may operate as stay**, Counsel argued that no prejudice will be suffered by the applicant if stay is not granted and referred the court to HC Msc. App. 405 of 2013. He stated that there are 56 exhibits and 48 witnesses in the intended prosecution and it is unlikely that the criminal case will commence and be concluded before this application is concluded.

29. **On what the Applicant must prove to obtain leave to commence Judicial Review proceedings**, Counsel asserted that the Applicant must prove a prima facie case for him to be granted leave. That in certiorari he must prove that the DPP lacked mandate or acted in excess of his legal mandate. Counsel stated that the DPP exercised state powers of prosecution under **Article 157 of the Constitution** and also acted pursuant to investigations by EACC, upon receipt of a report submitted under **Section 35 of ACECA 2003**.

30. On whether the Applicant had satisfied the threshold for grant of leave, Counsel submitted that EACC is properly constituted and relied on the authority of **Michael Kamau and others vs EACC**. That the Applicant has not demonstrated an arguable prima facie case while the Respondent has demonstrated at length, the criminal culpability for which the Applicant is to be charged. Counsel clarified that the proceedings are in relation to the dealings of the Ministerial Tender Committee which the Applicant chaired and not the Tender Committee of NYS.

31. Counsel further argued that the civil case adverted to is on asset recovery by the interested party and that the DPP is not a party thereto and is pursuing criminal justice. He urged the court to dismiss the application refuse to extend the interim orders granted on 17th November, 2016 and let the DPP do his work.

Submissions for the Interested Party

32. Learned Counsel Mr. Waudo opposed all the prayers in the application urging that leave ought to be granted only where on the material before it and without delving into the matter, the court considers that it is merited. That in this case the requirements for the grant of leave have not been met while the EACC has established reasonable suspicion against the Applicant.

33. Counsel argued that their case is based on the fact that whereas the law allows for restricted tendering, the application of that method is guided by **Section 29** and **73** of **Public Procurement and Disposal Act 2009** and **Regulation 53(1)**. That no reasons were given as required under **Section 29(3)(b)** and no cost benefit analysis was done to warrant the use of this method for reasons of urgency.

34. Further that the ten firms which were picked were selected in a manner unknown to law for a tender which was not planned or budgeted for. That the members of the evaluation committee were appointed on 2nd February 2015, three days after the contract had been awarded and on the same date that the winning bidder was notified of the award. Further that the value of the supplied items was grossly inflated.

35. Counsel urged that the Applicant had not shown that the Respondent acted irrationally or in excess of their constitutional or statutory mandate. That the Applicant had also not shown that the prosecution was actuated by malice or that the rules of natural justice were not observed. That the Respondent had not shown that the EACC should not be restrained in the discharged in their mandate without the evidence of impropriety on their part.

The Applicant's Rejoinder

36. Mr. Sagana the assisting Counsel for the Applicant submitted that the thematic area for satisfying the grant of the orders sought had been met since the subject tender was approved by the ministry and there were minutes for both the technical and financial evaluation of the tender.

37. Counsel contended that all the grievances of the Respondent are directed towards the NYS and not the Applicant. That procurements being very specialized proceedings there cannot miss one or two regulations which were not followed. That for that reason the law gives civil and criminal immunity to those who discharge this mandate, if they do so in good faith. Counsel maintained that the good faith of the Applicant had not been challenged, neither had it been shown that he acted fraudulently or inappropriately or under undue influence or pressure or malafides.

Determination

38. I have considered the application, the affidavits filed herein and the rival submissions and my determination as set out in the following paragraphs. I will begin by addressing the prayer seeking leave which would be the precursor to the prayer seeking to have that leave operate as stay. **Order 53 Rule 1(2) of the Civil Procedure Rules** which governs this application provides the general procedure for applying for leave and it states that:

“An application for such leave as the aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on”.

39. An application seeking leave is made ex parte at the initial stage. It is only after leave is granted that the actual Judicial Review proceedings should be instituted in the name of the Republic with the aggrieved party as the Ex parte Applicant. – See **Farmers Bus Service & others vs Transport Licensing Appeal Tribunal (1959) EA 779**.

40. The proviso to the rule is to the effect that where the circumstances so require, the judge may direct

that the application be served for hearing inter partes before grant of leave and further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.

41. This being principally an application seeking leave to commence judicial review proceedings, it is important to examine the purpose and the principles which guide the court in the exercise of its discretion in deciding whether or not to grant the leave sought. In **Aga Khan Education Services v Republic ex parte Seif [2004] eKLR**, the Court of Appeal observed that the principles of law applicable in these matters are that in order to enable a judge to grant leave under Order 53, there must be prima facie evidence of an arguable case.

42. In **The matter of an application by Samuel Muchiri Wanjuguna & 6 others** and in **The matter of the Minister for Agriculture and the Tea Act, Civil Appeal No. 144 of 2000** the Court approved and applied the principles to be found in the English case of **R v. Secretary of State, Ex p. Herbage [1978] 1 ALL ER 324** where it was stated thus:

“It cannot be denied that leave should be granted, if on the material available, the court considers without going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the Respondent under the inherent jurisdiction of the court; to the judge who granted leave to set aside such leave- see Halsbury’s Laws of England, 4th Edition Vol 1 (1) paragraph 167 at page 1276”

Once therefore, there is an arguable case, leave is to be granted and the court, at that stage, is not called upon to go into the matter in depth.

43. The Court of Appeal did set the standard of an arguable case in **Karikui v Attorney General [1992] KLR 8** at page 15 by quoting Lord Scarman in the case of **Inland Revenue Commissioners V National Federation of Self- Employed and Small Business Ltd [1981] All ER 93** where he stated that:

“It is wrong in law, as I understand the case, for the Court to attempt an assessment of the sufficiency of an applicant’s interests without regard to the matter of his complaint. If he fails to show, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse by busybodies, cranks and other mischief makers. I do not see any other purpose served by the requirements for leave.”

Grant of leave is therefore not automatic whether or not it is opposed.

44. The threshold for the grant of leave is a low one. An applicant only needs to show that his interests have been affected or threatened by the actions of the public body. In the case before me, the Applicant seeks leave to apply for an order of prohibition against the Respondent, prohibiting it from proceeding with the prosecution of the Applicant regarding the procurement of training materials for automotive engineering faculty vide **Contract No. NYS/RT/29/204-2015(4) for the National Youth Service**.

45. The fact that the EACC has already sought another remedy through the institution of a civil suit is no bar to the commencement of criminal proceedings. The same cause of action can give rise to both civil and criminal proceedings and this allowed under **Section 193(A) of the Criminal Procedure Code**.

46. The grant of leave to file judicial review proceedings as well as the ultimate grant of the orders of certiorari, mandamus and prohibition is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought to be initiated to satisfy itself that there is reasonable basis to justify the leave sought so as to file the substantive application in court.

47. I have analyzed all the material before me and considered the arguments advanced together with the

authorities referred to by both sides. I find that the Applicant has failed to show that in making the decision to charge, the DPP had abrogated any provisions of the Constitution, or any written law, or any rules made thereunder, or that he had breached the rules of natural justice.

48. The Applicant has therefore not satisfied the threshold for this court to grant the leave sought. Having so concluded, it is not necessary for me to consider the next issue, namely whether leave should operate as stay. The application dated 16th November, 2016 is therefore dismissed with no orders as to costs.

SIGNED, DATED this 24th day of November, 2016.

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L. A. ACHODE

JUDGE

In the presence ofAdvocate for the Applicant

In the presence ofAdvocate for the Respondents

In the presence ofAdvocate for the Interested Party