



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPL. NO.201 OF 2012

BETWEEN

REPUBLICAPPLICANT

AND

CHIEF MAGISTRATES COURT,

MILIMANI 1ST RESPONDENT

DIRECTOR PUBLIC

PROSECUTIONS 2ND RESPONDENT

ETHICS AND ANTI-CORRUPTION

COMMISSION 3RD RESPONDENT

EX PARTE

- 1. JOHN MOGUCHE ZACHARIAH**
- 2. THOMAS MOTURI OYUNGE**
- 3. BINLAW CONSTRUCTION COMPANY LIMITED**

JUDGMENT

1. The 1st and 2nd *ex-parte* applicants are the directors of the 3rd *ex-parte* applicant (“the applicants”). Pursuant to leave granted on 15th May 2012, they have brought the Notice of Motion dated 28th May 2012 seeking the following orders.

1. *THAT this honourable court be pleased to grant an order of prohibition to prohibit Criminal*

Proceedings ACC No. 35 of 2011 before the Chief Magistrate's Court at Milimani and prohibit the Ethics and Anti-corruption Commission from prosecuting the same and prohibit the Director of Public Prosecutions from conducting the same criminal proceedings.

2. *THAT costs of the application be provided for.*
2. The basic facts of the case are set out in the verifying affidavit of John Moguche Zachariah sworn on 11th May 2012 and a supplementary affidavit sworn on 30th May 2012. There is also a statement of facts dated 11th May 2012.
3. The 3rd applicant (“the Company”) was granted a contract by the Ministry of Special Programmes – Office of the President on 5th May 2000 for the rehabilitation of Mount Elgon District Water Supply and Sanitation facilities. In the course of the works, a disagreement arose as to the payment. In accordance with the contract the matter was first referred to an adjudicator and then to an arbitrator. The arbitrator awarded the Company the sum of Kshs. 97,176,206. The award was thereafter adopted by the ***High Court in Nairobi HC Misc. Appl. No. 237 of 2009*** and a decree issued. When the Company applied to enforce the decree by way of mandamus proceedings, it was alleged by the Ethics and Anti-Corruption Commission (“EACC”) that the decree was based on an award that was forged.
4. Following investigation by EACC, the applicants were charged for the following offences;
 - i. Making a false document contrary to **section 345** as read with **section 347(b)** and **section 349** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***.
 - ii. Uttering a false document with intent to defraud contrary to **section 353** of the ***Penal Code***.
 - iii. Attempt to commit a corruption offence contrary to **section 47A** of the ***Anti-Corruption and Economic Crimes Act, 2003 (“ACECA”)***.
 - iv. An alternative count of attempt to obtain by false pretences contrary to **section 313** as read with **section 389** of the ***Penal Code***.
5. The applicants’ grounds for challenging the proceedings as set out in the face of the Motion are as follows;
 - a. The criminal offences the applicants are charged with except Count 3 are offences under the ***Penal Code***.
 - b. The offences have been investigated and charged by the EACC which is clearly ultra-vires ***ACECA***.
 - c. Count 3 of the charges is purported to be an offence under ***ACECA*** and which offence does not exist.
 - d. EACC in investigating and charging the applicants has violated and prejudiced the applicants’ rights to a fair trial.
6. The applicants’ case is supported by written submissions dated 23rd July 2012. The application is opposed by the respondents. The 1st and 2nd respondents have filed Grounds of Objection dated 5th July 2012. The 3rd respondent relies on the replying affidavit of Gerald Munyiri sworn on 9th July 2012. It has also filed skeleton arguments dated 29th November 2012.
7. I have considered the submissions of the parties and I note that the applicants have raised issues that were not set out in statement of facts or the verifying affidavit. It is well established that in an application for judicial review the applicants’ case is confined to what has been set out in the statement of facts and the verifying affidavit. In ***Khobesh Agencies Limited and Others v Minister of Foreign Affairs and International relations and Others Nairobi JR No. 262 of 2012 [2013] eKLR*** the court noted that, “[28] *Therefore a party is not entitled to rely on any ground or seek any relief apart from the one indicated in the statement. The rationale for this is that in granting leave to apply for judicial review, the Court looks at the material before it and where a party having obtained leave based on a particular set of facts ought not to change his case*

midstream by abandoning the grounds upon which leave was granted and in effect change the nature of his case by relying on totally different state of affairs. Again where leave is granted to apply for a particular relief, it is that relief that the applicant is entitled to seek in the substantive Motion and he cannot be allowed to seek a relief for which leave was neither sought nor granted. This is so because an application for judicial review can only be granted where leave of the court has been sought to apply for a particular relief. Accordingly, a relief for which leave to apply therefor was not sought cannot be granted”

8. On the basis of what I have stated, the applicants cannot be permitted to litigate the issue whether there was a breach of **section 35** of **ACECA** which requires the recommendation of the Director of Public Prosecutions as a condition precedent for commencing the prosecution. This issue was not in the originating documents and was raised in the 1st applicant’s supplementary affidavit. I therefore decline to determine the issue. Furthermore, such an issue, as a matter of law, may be raised in the subordinate court as it goes to the validity of the charges the applicants are facing.
9. I shall therefore consider the grounds set out on the face of the motion and supported by the verifying affidavit as the issues for determination and deal with the arguments made by the parties making my conclusion on each issue.

Mandate to investigate and prosecute offences under the Penal Code

10. Grounds (a) and (b) of the Motion deal with the mandate of the EACC to investigate and prosecute offence under the **Penal Code**. The charges that the applicants are facing and which I have set out in paragraph 5 above are in respect of offences in the **Penal Code**.
11. The applicants’ case is that the EACC is mandated to investigate only offences under **ACECA** which are set out in **sections 39, 40, 41, 42, 43, 44, 45, 46, 47** and **47** of the Act. They argue that EACC went outside its statutory mandate to investigate offences which are reserved for other State organs and that if Parliament intended that EACC would deal with other offence it would have so stated in the Act.
12. The applicants submit that the offences for which they are charged have nothing to do with protection of the public or government revenue. That these offences are of general nature and to extend the jurisdiction to the EACC to deal with **Penal Code** offences would extend the jurisdiction of the EACC to matters concerning ordinary citizens committing offences not covered by **ACECA**.
13. The respondents contend that the purpose of **ACECA** as set out in the preamble to, “*provide for the prevention, investigation and punishment of corruption, economic crime and related offences and for matters incidental therefore and connected therewith.*” They argue that the Act contemplates that EACC will deal with all any offences that are connected with corruption and economic crimes. The respondents point to **section 2(1)(b)** of **ACECA** which states that, “*economic crime means an offence involving dishonest under any written law providing for the maintenance or protection of public revenue.*” The respondents therefore submit that all the offences for which the applicants are charged with relate to the maintenance and protection of public revenue.
14. The applicants argument lacks merit as **section 2(1)(b)** of the **ACECA** is clear that economic crimes include offences “*under any written law.*” These laws include the **Penal Code**. Furthermore there is no prohibition in the **ACECA** that prevents the EACC from dealing with offences as long as they fall within the definition of economic crimes. The offences concern the forgery of a decree whose purpose is to obtain payment from the government as such it falls within the definition of economic crime under **ACECA**.
15. I find and hold that the EACC is entitled to investigate any offence within the purview of economic crimes notwithstanding the fact that the offences are under the **Penal Code**.

Whether the offence charged under section 47A of ACECA is offence known to the law

16. The applicants have been charged with the offence of attempt to commit a corruption offence contrary to **section 47A(1)** of **ACECA**. They contend that such an offence does not exist in law and the manner in which the charge is framed violates the law against duplex charges.
17. The respondents on the other hand assert that the offence is proper and that in any event a defective charge is a matter for the Magistrates Court to deal with in the course of trial.
18. I find and hold that matters of the competence criminal charges are provided for under **sections 89(5), 137 and 214** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**. The subordinate court is empowered to amend, substitute or strike out defective charges hence the applicants are not without an avenue for relief in that regard. I adopt the holding of the court in **William S. K. Ruto and Another v Attorney General Nairobi HCCC No. 1192 of 2005 [2010]eKLR** where it held that, *“The applicants only need to move the trial magistrate to strike out the charge for being incompetent or the prosecution can seek to substitute the charges. The fact that the charge is defective does not raise a Constitutional issue.”*

Violation of the Rights of the applicants

19. The applicant alleges in the face of the motion that their rights to a fair trial have been violated and prejudiced. I have perused the applicants' founding depositions and there is no averment of how these rights have been violated. Such violation must be particularized. The applicants' case cannot be made out in the submissions in the absence of a factual basis established in the verifying affidavit.
20. As I explained earlier in the judgment, it is incumbent on the applicants to lay a factual basis for the inquiry they seek the court to embark upon. In the absence of demonstrable violation of any rights to a fair trial in the verifying affidavit, I decline to entertain any submission on this ground.

Conclusion

21. The Motion before the court seeks to prohibit the EACC from prosecuting the matter and the Director of Public Prosecutions from conducting the prosecution. When does an order of prohibition issue? The Court of Appeal in **Kenya National Examination Council v Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 others, CA Civil Appeal 266 of 1996 [1997] eKLR** observed as follows, *“What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.”*
22. The State's prosecutorial powers are vested in the DPP under **Article 157** of the Constitution, the pertinent part which provides as follows;

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

- a. *institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.*

23. The decision to institute criminal proceedings by the DPP is discretionary. Such exercise of power is not subject to the direction or control by any authority as **Article 157(10)** stipulates that;

(10) The Director of Public Prosecutions shall not require the consent of any person

or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

24. The provisions of the Constitution are also replicated under **section 6** of the ***Office of the Director of Public Prosecutions Act, No. 2 of 2013***. These powers are not absolute and the court is entitled to intervene if it is established that the exercise of the powers is contrary to the objects of the Constitution. The court will also intervene if the powers to investigate and prosecute are exercised irrationally, capriciously, unlawfully or maliciously.

25. Likewise the EACC, under **ACECA**, is empowered to investigate corruption and economic crimes. Its task of investigating the applicants is complete and the matter is now in the hands of the DPP who, in accordance with his constitutional mandate, has commenced criminal proceedings. An order of prohibition cannot lie in the circumstances against the EACC nor can it issue as prayed for in the Motion as it is not the EACC prosecuting the case but rather the DPP.

26. The applicant has not established any facts that would entitle the court to call upon its arsenal of weapons to attack the decision of the DPP to prosecute the applicants. Consequently an order of prohibition cannot issue.

Disposition

27. For the reasons I have stated, the Notice of Motion dated 28th May 2012 is dismissed with costs to the respondents.

DATED and DELIVERED at NAIROBI this 24th day of January 2014

D.S. MAJANJA

JUDGE

Mr Nyabena instructed by Nyabena Nyakundi and Company Advocates for the ex-parte applicants.

Mr Mule, State Counsel, instructed by the Director of Public Prosecutions for the 1st and 2nd respondent.

Mr Machira, Advocate instructed by the 3rd respondent.