



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION (JR) NO. 2 OF 2011

IN THE MATTER OF: AN APPLICATION BY AMINA

SHEKHE MOHAMED FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

AND

IN THE MATTER OF: THE KENYA ANTI-CORRUPTION

COMMISSION

AND

IN THE MATTER OF: THE ANTI-CORRUPTION AND

ECONOMIC CRIMES

ACT, 2003

AND

IN THE MATTER OF: THE REGISTERED LAND ACT

CHAPTER 300 OF

THE LAWS OF KENYA

BETWEEN

REPUBLIC ::::::::::::::::::::::::::::::: APPLICANT

-V E R S U S-

KENYA ANTI-CORRUPTION COMMISSION ::: RESPONDENT

EXPARTE

AMINA SHEKHE MOHAMED

JUDGMENT

(1) The exparte applicant, **AMINA SHEKHE MOHAMED** has moved this court seeking the following relief-

“An order of mandamus compelling the Respondent to release and remit back to the Applicant all the original certificate of lease, transfer of lease and approved development plan in respect of MSA BLOCK XVII/1320 belonging to Amina Shekhe Mohamed after it makes the necessary copies of the same.”

(2) Although not amended, the respondent in these proceedings is now The Ethics and Anti-

Corruption Commission (hereinafter the Commission) by dint of Section 33 of The Ethics and Anti-Corruption Act, Act No. 22 of 2011. (the “Act”) The Section provides that any function, transaction or investigation carried out by Kenya Anti-Corruption Commission before the commencement of the Act is deemed to have been carried out under the Act.

(3) It is agreed by the parties that by a requisition dated 18th November 2009 the Respondent asked the exparte applicant to attend before its officers at Mombasa for purposes of investigations into an alleged irregular allocation of MSA/BLOCK XVII/1320 said to be a road reserve.

(4) After doing so the Respondent requested, and the exparte Applicant obliged through their advocates Mogaka Omwenga & Mabeya, for the original Title Deed, Transfer of Lease and Approval Development Plan. And so the Respondent has had these documents since 20th November 2009 or thereabouts. On several occasions, notably 12th February 2010, 8th March 2010, 5th April 2010, 28th April 2010, 30th April 2010, 21st May 2010, 10th August 2010 and 21st October 2010, the exparte applicant writing through her advocate has demanded the return of the above documents and/or the outcome of the investigation. The answer to these demands from the Respondent has been that the investigations are still ongoing and there is no knowing when they will be concluded. That answer and refusal to return the documents has prompted these proceedings.

(5) It is argued for the exparte applicant that the investigations have taken an inordinate length of time and the conduct of the respondent is an affront to the exparte applicant’s Constitutional right to property and sanctity of title.

(6) On its part the Respondent says that it has a statutory mandate to investigate corruption or economic crime or any conduct liable to allow or encourage it. That in the course of carrying out this mandate it has retained the documents of the exparte applicant. That in the interest of public good this court should not curtail the ongoing investigations by granting the relief’s sought.

(7) The Respondent contends that it cannot be barred or limited from carrying out its mandate (**Republic –Vs- Kenya Anti-Corruption Commission & 4 Others exparte Jackson Gichoni Mwangi & 5 Others (2010)KLR**). That the court should frown upon parties rushing to court to stop law enforcement agencies from carrying out their legitimate duties (**Neptune Credit Management Ltd & Another –Vs- Chief Magistrates Court & 2 Others [2005]**)

(8) In addition the Respondent argues that the court has a role to protect public interest such as sustenance of ongoing investigations. The court was asked to find that public interest far outweighs private interest. So maintaining ongoing investigations far outweighs the applicants interest in holding the documents.

(9) It is common ground that the Respondent is investigating the propriety or otherwise of the alienation of Msa/Block XVII/1320 said to be a road reserve. If I understand the Respondent correctly it does not argue that it is generally insulated from judicial review in the exercise of its constitutional and statutory mandate. Yet I hear the Respondent say that given that it is performing its investigatory duties, judicial discretion should not be exercised in favour of the exparte applicant and that this is not a matter suitable for the courts intervention.

(10) Courts should be very slow to review the operational decisions of a law enforcer or public investigator. The Court cannot direct the Respondent on when and how to exercise its powers in a specific investigation. As long as it is acting within the confines of the law, then the management of an investigation is the prerogative of the Respondent. It is not for the Court to suggest or impose timelines for the conclusion of an investigation. The Respondent is best placed to estimate or assess the time it requires to conclude an investigation into corruption or an economic crime. The time required will vary from case to case and will depend on the circumstances and factors of each case which includes its age, the locus of investigation, the need for scientific or forensic examination, the number of witnesses, the cooperation of the witnesses and suspects, and the complexity of the case. The list is endless.

(11) Section 28 of the Act guarantees the independence of the Respondent in the following words-

“Except as provided in the Constitution and this Act, Commission shall, in the performance of its functions, not be subject to the direction or control of any person or authority.”

Although the Respondent is not subject or answerable to the control of any person or authority it is nevertheless answerable to the law.

(12) In discharging its investigatory mandate the Respondent

is carrying out a statutory duty. This duty is administrative in nature or akin to an administrative function. The ex parte applicant is a person under investigation and has certain expectations guaranteed by Articles 47(1) and 47(2) of the Constitution which provide as follows-

“(1) Every person has the right to

administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a

person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

(13) In addition, the Act itself contemplates that investigations shall be conducted and concluded without undue delay. It is for this reason that delay in the conduct of investigations may amount to maladministration and Section 11(6)(e) of the Act provides an internal mechanism for dealing with it. That Section empowers Commissioners to the Respondent-

“deal with reports of conduct amounting to maladministration, including but not limited to delay in the conduct of investigations and unreasonable invasion of privacy by the Commission or its staff.”

While Section 12 of The Act enjoins the Respondent to observe the rules of natural justice in discharging its functions. One such rule would be that a person under investigation should know the outcome of the investigation without undue delay.

(14) On my reading of The Constitution and statute a person under investigation has a right and expectation to an expeditious, efficient, lawful, reasonable and procedurally fair process. It needs to be repeated, for clarity, that what amounts to an expeditious and efficient investigation will depend on the facts and circumstances of each case and is a matter which a Court of law may not be best placed to judge. Where however a person adversely affected by the investigations raises a concern of undue delay than the investigator has a duty to explain the alleged delay.

(15) It is also the further view of this Court that the rights and expectations discussed above are also the rights of a complainant who has instigated an investigation. The complainant has an interest in the outcome of the investigations and that too must be protected.

(16) The ex parte applicant here has raised a complaint that the investigations have taken an inordinately long time to conclude. That as a result her constitutional right to property has been restricted or limited. The ex parte applicant raised that concern in no less than eight (8) letters written to the Respondent before the institution of these proceedings. The onus was on the investigator to offer an explanation. Such explanation could deny that, in the nature of the investigations, there was any delay or that there was a delay but that it was neither unreasonable, improper or oppressive in the circumstances.

(17) The Respondents explanation is in two letters, dated 12th March 2010 and 18th May 2010.

In so far as is relevant, the first letter read,

“We wish to inform you that the investigations in relation to the documents required by you are still ongoing. We are therefore unable to return the documents at the moment.”

The letter of 18th May 2010 read,

“... We cannot predict with certainty when we will conclude investigations ... kindly impress on your client the need for patience as the matter is under investigations.”

(18) Between 18th May 2010 and 18th January 2011 (when these proceedings were commenced) no further explanation was given to the ex parte applicant. These proceedings gave the respondent yet another opportunity to make an explanation. The detective here JOHN MWONGELA swore an affidavit on 9th March 2011, in which he proffered an explanation in the following paragraphs-

“That given the extent of involvement of the individual against whom there is an ongoing investigation, the Court ought not to grant any Order that will reduce the investigations into a farce.

That the retention of the documents by the Respondent is necessary as the said documents will be exhibits in any subsequent proceedings by the Respondent.”

(19) The court has keenly looked at the explanations made in the letters and the answer to the application. The court is not satisfied that the respondent has furnished a good reason for taking 26 months in concluding the investigation and thereby withholding the ex parte applicants documents. The Respondent should have given an explanation either justifying the delay or arguing that in the nature of the investigations there was no delay at all. The failure to make that explanation, when requested, is a breach of the law. The inference this court makes is that there is no plausible explanation.

(20) This matter involves an investigation into an alleged impropriety in respect to public land. As said earlier it is in this type of matters that courts should exercise judicial caution and be very slow to intervene. But what is to be done where, like here, an affected part has persistently beseeched the investigator for some explanation but non has been forthcoming. I think that some intervention is called for.

(21) The court has no intention of deterring the Respondent from carrying out its mandate. That would be counter to public policy. It is a consolation, I think, that twelve months ago, on 9th March 2011, the detective herein in paragraph 14 of his affidavit gave this assurance to court-

“So far the investigations are not complete though they are at a very advanced stage.”

Surely the Respondent has had its time! But in the interest of public good more shall be added to it.

(22) The court has to find some harmony between public interest and the interests of the Ex parte applicant. As usual this is an intractable task! I will allow the application only to the extent that it affords the Respondent another six (6) months to retain the documents for purposes of completing the investigations.

(23) I now turn to the issue of costs. It is not said or suggested that the Respondent acted mala fides in calling for the documents. The Respondent has a daunting task in fighting the endemic and festering vice of corruption. Its spirit should not be dampened. For this reason I shall not order any costs against the Respondent. Each party shall meet its costs.

These are my orders-

(a) An order of mandamus hereby issues compelling the Respondent to release and remit back to the Ex parte Applicant the original Certificate of Lease, Transfer of Lease and Approved Development Plan in respect of Msa Block XVII/1320 within six (6) months from the date of this order

if the Respondent shall not have completed the investigations into the said property.

(b) Each party to bear its own costs.

Dated and delivered at Mombasa this 16th day of March, 2012.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-

Omwenga for Applicant

Magiya for Nzioki Wa Makau for Respondent

Court clerk - Moriasi

F. TUIYOTT
JUDGE