



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Petition 359 of 2007

IN THE MATTER OF: SECTION 84 (1) CONSTITUTION OF KENYA

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER SECTION 77 (4) & (9) CONSTITUTION OF KENYA**

IN THE MATTER OF: THE ANTI-CORRUPTION & ECONOMIC CRIMES ACT, 2003

BETWEEN

MIDLAND FINANCE & SECURITIES LIMITED..... 1ST PETITIONER

GLOBETEL INC..... 2ND PETITIONER

AND

THE ATTORNEY-GENERAL..... 1ST RESPONDENT

KENYA ANTI-CORRUPTION COMMISSION..... 2ND RESPONDENT

RULING

On 04.04.07 the petitioners filed two chamber summons applications dated the same day.

The main chamber summons application was stated to be brought under rules 20, 21 and 32 of The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 – Legal Notice No.6 of 2006. The substantive prayers in the main application are 2, 3 and 4 which state as follows:

‘2 Pending the hearing and determination of this suit, the 1st Respondents (sic) be prohibited from acting upon any information, material and/or records obtained pursuant to the activities carried out under the agreement entered into between Price Waterhouse Coopers (PWC) and the Ministry of Finance on 17th January, 2007.

3. That pending the hearing and determination of the suit, an interim conservatory order be issued to restrain the Respondents, their agents and/or servants jointly and severally from

interfering and/or interrogating the Petitioners, directors, staff, consultants, sub-contractors, agents and/or servants in respect of the contracts entered into on 29th May, 2003 between the Petitioners and the Government of Kenya.

4. That pending the hearing and determination of the suit an interim conservatory order do issue to restrain the Respondents, their agents and/or servants herein jointly and severally from arresting and/or preferring any criminal charges against the Petitioners, their shareholders, directors, consultants, sub – contractors, agents and/or servants arising from the contracts entered into with the Government of Kenya on 29th May, 2003.’

The other chamber summons application is stated to be brought under rule 3 (2) of the High Court (Practice and Procedure) Rules made under the Judicature Act, Cap. 8 and its purport is to seek certification that the main application is urgent and that it be heard during the current court vacation.

The petitioners were represented at the *ex-parte* hearing of the applications by learned counsel, Mr. M. Kyalo.

Petitioners’ counsel narrated to the court that the petitioners and the Government of Kenya entered into a contract on 29.05.03 for the supply to the Government of telecommunications equipment. The contract is said to have been based on a legal opinion by the Attorney-General (1st respondent) that the object of the contract was lawful. The petitioners are said to have supplied the telecommunications equipment but that the Government declined to pay for the equipment.

It is alleged that on 17.10.07 the Government contracted Price Waterhouse Coopers to conduct forensic investigations into the contract of 29.05.03 to determine if there was corruption or economic crime committed in the procurement of the contract. Petitioners’ counsel stated that the petitioners became aware in mid-March, 2007 of the contract of 17.01.07 whereunder the Government contracted Price Waterhouse Coopers to carry out forensic investigations into possible corruption or economic crime which may have been involved in the procurement of the telecommunications equipment.

It is now reported that the petitioners are apprehensive that the findings of Price Waterhouse Coopers may be wrongfully used by the respondents to commence criminal proceedings against the petitioners; that if that happens, the information relating to the criminal proceedings is likely to be posted in the Website of the 2nd respondent; and that since the 2nd respondent’s Website is accessible to the public, such posting or publication would irreparably lower or damage the reputation of the petitioners in the eyes of the international business community. The petitioners maintain that the investigations by Price Waterhouse Coopers were not necessary because the contract of 29.05.03 between the petitioners and the Government contains a dispute settlement clause, namely, that any dispute which arose in the performance of the contract should be referred to arbitration.

The petitioners urge this court to certify the matter urgent as they want to protect themselves from the risk of criminal prosecution and likely defamation. The petitioners, therefore, ask the court to grant prayer 1 and certify this matter urgent and also grant prayers 2 and 3 of the main chamber summons application reproduced hereinabove pending *inter-partes* hearing of this matter so that the fundamental rights of the petitioners are protected from being abused during the pendency of the main chamber summons application and the petition. Petitioners’ counsel said he sought to rely on rules 21, 22 and 32 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006.

I have given due consideration to the two twin chamber summons applications now before court.

I note from section 7 of the Anti-Corruption and Economic Crimes Act, 2003 that the mandate of the Kenya Anti-Corruption Commission (2nd respondent) includes the undermentioned functions:

‘7. (1) The Commission shall have the following functions –

(a) to investigate any matter that, in the Commission's opinion, raises suspicion that any of the following have occurred or are about to occur –

(i) conduct constituting corruption or economic crime;

(ii) conduct liable to allow, encourage or cause conduct constituting corruption or economic crime;

(b) to investigate the conduct of any person that, in the opinion of the Commission, is conducive to corruption or economic crime;

(e) to examine the practices and procedures of

public bodies in order to facilitate the discovery of corrupt practices and to secure the revision of methods of work or procedures that, in the opinion of the Commission, may be conducive to corrupt practices'.

I further note from section 7 (2) of the same Act that a matter may be investigated by the Commission, *inter alia*, on receipt of a complaint or on its own initiative.

The Kenya Anti – Corruption Commission is a public body. This court does not know at this stage whether the Commission was or was not involved in getting Price Waterhouse Coopers to carry out the forensic investigations alluded to by the petitioners. But the said investigations look very much like the type the Commission would be mandated to undertake or instigate and that if the Commission did so, it would in fact be acting within its statutory mandate. Whether the activities of another institution of Government would eventually militate against the investigations complained of by the petitioners resulting in criminal prosecution is in my view an issue which can only be properly determined upon hearing representations or evidence from all concerned players. In short, I am of the view that it is premature for the investigations the petitioners seem to be fearful of to be prohibited without the benefit of the court hearing from the respondents what the investigations are all about and whether there is justification for them. Such a prohibition would be tantamount to putting the cart before the horse and I have no doubt in my mind that such prohibition at this *ex-parte* stage would not be in the public interest. Accordingly, I direct as follows:-

1. That the petitioners do serve their petition and the chamber summons applications upon the respondents to enable the respondents prepare for *inter-partes* hearing thereof.
2. That the matter be mentioned before the Presiding Judge of the Constitutional and Judicial Review Division of the High Court at Nairobi on 20.04.07 for directions as to when *inter-partes* hearing thereof should take place before that Division.

Costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 5th day of April, 2007.

B.P. KUBO

JUDGE