



Republic v Ethics and Anti Corruption Commission; Patria Properties Limited & another (Exparte) (Judicial Review Miscellaneous Application E002 of 2021) [2022] KEELC 14803 (KLR) (11 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14803 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E002 OF 2021
AE DENA, J
NOVEMBER 11, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

ETHICS AND ANTI CORRUPTION COMMISSION RESPONDENT

AND

PATRIA PROPERTIES LIMITED EXPARTE

TEESIDE TRADING LIMITED EXPARTE

RULING

1. The facts surrounding the issues in dispute in the instant application are rather straight forward. Vide letters dated April 20, 2021 and April 21, 2021 the respondent herein informed the applicants of the decision to open an inquiry and investigations on how they acquired parcels of land registered as Land Reference Nos 14885/2, 14885/3, 14885/4, 14885/5, 14885/6, 14885/7 and 14885/8. Prior to this, the County Government of Kwale and 2 others had instituted a suit designated as Kwale ELC Petition No 10 of 2021 challenging the applicants acquisition and ownership of the suit properties. The petition is pending before this court.
2. The applicants sought for leave to file judicial review proceedings challenging the respondent’s decision to investigate their acquisition of the suit properties through the letters dated April 20, 2021 and April 21, 2021 despite a case over the same being in court. The court in its ruling delivered on May 11, 2022 allowed the filing of judicial review to contest the respondents intended investigations. An order of stay of investigations limited to the applicants and their directors, agents, officers, employees or any other person acting on their behalf was granted pending the hearing and determination of the judicial review proceedings.



3. The substantive judicial review application which is the subject of this ruling is dated May 19, 2022 and seeks for the following verbatim orders; -
 - a. An order of certiorari be and is hereby issued quashing the Respondent's decision communicated vide the Respondent's respective letters dated April 20, 2021 requiring the Exparte Applicants to appear before the respondents to record a statement and avail ownership records regarding the properties known as Land Reference Nos 14885/2, 14885/3, 14885/4, 14885/5, 14885/6, 14885/7 and 14885/8.
 - b. An order of Prohibition be and is hereby issued prohibiting the Respondent's its officer's employees or any other person acting on its behalf from opening an inquiry and conducting investigation on how the Applicants acquired their respective titles in respect of properties known as Land Reference Nos 14885/2,14885/3,14885/4,14885/5,14885/6,14885/7 and 14885/8.
 - c. Costs of this application be paid by the Respondent.
4. The Applicants case is that they are the registered owners of suit parcels referred to herein as Land Reference Nos 14885/2,14885/3,14885/4,14885/5,14885/6,14885/7 and 14885/8 by leases from the government of Kenya for a 10-year period. They state that the land was lawfully acquired and permits for development of the same procured from the county government of Kwale. The developments in question include a perimeter wall which triggered the filing of Kwale ELC Petition No 10 of 2021 and which suit challenges the acquisition of the land by the Applicants. It is the Applicants case that the respondent's intention to carry out investigations over the acquisition process of the suit properties despite their being a pending case in court is not only prejudicial but a procedural impropriety and breach of the rules of natural justice. They further term the intended investigations an illegality.
5. Turning to the Respondent's case, it is stated that they received a complaint that land parcels Nos LR 12962, LR 12963 and LR 12964 which were later subdivided to LR Nos 14885/2, 14885/3, 14885/4, 14885/5, 14885/6, 14885/7 and 14885/8 had been illegally acquired. That the said parcels were being held in trust by the County Government of Kwale and had further been gazetted as cultural heritage sites. That pursuant to the provisions of section 23 of the [Anti-Corruption and Economic Crimes Act](#), the Respondents issued letters to the applicants inviting them for interviews and statement recording.
6. The Respondent states that it was cited as the 5th Interested Party in Kwale ELC Petition no 10 of 2021 where it entered appearance on 15/7/2021. That they have however not been served with suit papers on the suit. The respondent states that it is mandated to investigate all complaints pursuant to the provisions of sections 25 and 25A of the [Anti-Corruption and Economic Crimes Act 2003](#). The said powers are listed in a number of authorities mentioned in the Respondent's submissions and which the court has considered.
7. The Respondent states that the court ought not interfere with its mandate to investigate. That it is mandated to ensure compliance and enforcement of the principles of leadership and integrity as enshrined in chapter 6 of the [Constitution](#) and which includes investigating the conduct of any person that in its opinion has indulged in an economic crime pursuant to section 11 of the [Ethics & Anti-Corruption Commission Act 2011](#) before making recommendations to the office of the Director of Public Prosecution. That the Commission is further empowered to institute and conduct civil proceedings in court for purposes of recovery and protection of public property.
8. According to the Respondent, the Applicant has failed to prove that the Commission acted illegally during investigation into allegations that there was a violation or threatened violation of the Applicants



constitutional rights by the Commission. The court is urged to allow the commission to complete its investigations and forward its report to the Director of Public Prosecution.

Submissions

9. Parties filed and exchanged submissions buttressing their positions. The Applicants filed theirs on September 9, 2022 and the Respondent on the September 15, 2022.

Applicants Submissions

10. Rehashing the prayers in Kwale ELC Petition No 10 of 2021 (herein the petition) the applicant submitted that the question of the legality of or lack thereof of the applicant's title is the central issue in both proceedings pending in the petition and the investigations by the respondent. That the respondent lacked jurisdiction and mandate to conduct parallel inquiry and investigation. That being aware of the pendency of the petition where they are participating as an interested party the respondent has insisted it will abide by its decision to investigate has asked the applicants to submit their documents of ownership herein. That this was illegal and was an error of law. Reliance was placed on *Republic v Tigania East District Land Adjudication and Settlement Officer & ano.; Shadrack Muthee M'Imanja (Interested Party) Exparte Applicant Domenica Kalotia Kalalu* (2020) eKLR. It was submitted that only the Environment and Land court had jurisdiction to determine the legality or otherwise of the titles and not EACC, thus rendering the respondent's decision a nullity and should be quashed and prohibition ordered. Justice Odunga's dictum in *Peter thiongo Njuguna Vs Senior Resident Magistrates court Githunguri & 2 others* (2014) restating the *Macfoy Vs United Africa Co Ltd* case was relied upon.
11. It was further contended that by inviting the applicants to appear and submit ownership records, the Respondents was unprocedurally seeking and soliciting evidence which may be used adversely in the Petition. That while the respondent was expected to address the court either in support of against the petition, it had instead become a judge in its own cause by seeking evidence that which the applicant can potentially use in the petition. Additionally, it was suspected that the it is the petitioners who lodged the complaint with the Respondent, abusing the investigative machinery to coerce and intimidate the applicants to cede their rights over the properties. This was grossly unreasonable, procedurally improper and demonstrated utter disregard for the principles of natural justice. *Republic Vs Director of Public Prosecution & 3 Others Exparte Mansukhlal Shantilal Patel & 2 Others* and *Kenya National Examination Council V Republic Exparte Geoffrey Gathenji Njoroge & 9 Others* (1977) eKLR were relied upon to buttress this point.
12. Other grounds were violation of applicant's constitutional right to fair hearing as guaranteed by Article 50(1) of the *Constitution* to have the dispute determined by the court where it is pending. On costs it was submitted that the same should follow the event if the application succeeds.

Respondents Submissions

13. The respondent submitted that the investigations were anchored under sections 11 and 23 of the *EACC Act*. That they were enjoined as an Interested Party and entered appearance in the petition however the pleadings have not been served upon them despite request. The Commission addressed the court on the two issues namely whether the applicant has met the threshold for grant of the orders of certiorari and prohibition and whether the court ought to interfere with the mandate of the Commission to investigate and also protect public property.
14. Referring to the Uganda case of *Pastoli ...Vs Kabale District Local Government Canal & Others* (2008)2EA 300 it was submitted that the applicants had not demonstrated illegality, irrationality, procedural impropriety on the party of the Commission. It is submitted that under Section 23 of the



Act all complaints must be investigated and persons suspected summoned to shed more light on the same. Further that it for the Commission to establish whether an offence has been committed it cannot rely only on information and material that is volunteered. Counsel relied on the Privy Council dictum in *Shaban bin Hussein Vs Chong Fook Kam & another* (1970)AC 942,948 and *National Director of Prosecutions Vs Zuma* (2007)SCA 137 (RSA). That the Commission adhered to rules of natural justice by the invitation to the applicants herein who had not demonstrated how the said rules have been breached. That the applicants to avoid impeding the Commissions ability to deliver fair administration ought to have in good faith presented themselves to the process instead of invoking the judicial review jurisdiction of the court and challenge the outcome if aggrieved as was the position enunciated in *Republic Vs Ethics and Anti-Corruption Commission Exparte Nairobi City Council Assembly & 13 Others* (2019) eKLR.

15. Additionally, the Respondent urged that judicial review is concerned with the decision making process itself and not the merits of the decision made as restated by JV Odunga J in *Kenya Medical Practitioners and Dentists Board & 2Others* (2013) eKLR. That the courts role is supervisory and a decision can only be set aside if flawed in certain defined and limited respects which the applicant had failed to demonstrate
16. On whether the court ought to interfere with the mandate to investigate, counsel pointed that this court should not usurp the commissions constitutional and statutory mandate conferred by Article 79 of the *Constitution* and Section 11 of the *EACC Act*. That the court must apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended. It was urged that the application was an abuse of the court process intended to stop the Commission from executing its lawful mandate. That the applicants were not accused person within the confines of Article 50(2) of the *Constitution* and the allegations that the information is being sought for use in the petition were being made in bad faith since they failed to serve the pleadings upon the Commission. Noting the place of an Interested party as enunciated in the Mutunga Rules it was urged that the mere mention of the Commission as such does not bar it from carrying out its mandate.
17. Counsel prayed that it was important that the Commission is allowed to complete its investigations and forward its report to the DPP or take any other action within its mandate. That costs be borne by the applicants.

Analysis and Determination

18. Having considered the application, the responses, submissions and authorities cited I agree with the applicants that the issue for determination is whether the exparte applicants have met the threshold for grant of the orders they are seeking before this court.
19. I will start by looking at the objective and purpose for Judicial review which really is to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment – see *Republic vs Kenya National Examination Council ex-parte Geoffrey Gathenji and 9 Others*. It is not in dispute that indeed the EACC is a public body constituted under the *Ethics Anti-Corruption Commission Act* 2011 pursuant to Article 75 of the *Constitution*.
20. It is now settled that judicial review is not concerned with the merits of the decision being challenged but rather with the decision-making process. In the case of *Municipal Council of Mombasa v Republic*



Ě Umoja Consultants Ltd (Interested Party) Civil Appeal 185 of 2001 [2002] eKLR the Court of Appeal emphasized as follows;-

"The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at. Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker consider relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review"

21. In addition, the criteria enunciated by Justice Kasule in *Pastoli Vs Kabale District Local Government Canal Ě Others* supra and which has been adopted in many of our courts will apply. That is the applicant must demonstrate illegality, irrationality, procedural impropriety on the part of the public body in this case the respondent Commission.
22. The decision that is being sought to be reviewed appears to me is the Commission's decision to undertake investigations and specifically summons to the applicants for interview and statement recording. It is noteworthy in the circumstances of this case the real decision as to whether the suspects should be charged has not been made. Did the Commission have the powers to make this decision to summon the applicants for statement recording and to provide documents? Art 79 provides for the enactment of legislation to establish an independent ethics and anticorruption commission, which shall be and have the status and powers of a commission under Chapter 15, for purposes of ensuring compliance with, and enforcement of, the provisions of chapter 6 of the Constitution. Parliament indeed enacted the Ethics and Anti-Corruption Commission Act, Act No 22 of 2011. Section 11 of the Act provides for the functions of the Commission which are in addition to the functions under Article 252.
23. Article 252 gives the general functions and powers of the Commissions key among which is the conduct of investigations on their own initiative or on a complaint by a member of the public. It is stated that further pursuant to the provisions of section 23 of the Anti-Corruption and Economic Crimes Act, the Respondents issued the impugned letter or summons. Section 23 provides for the conduct and nature of investigations by the Commission; -
 - (1) The Secretary or a person authorized by the Secretary may conduct an investigation on behalf of the Commission.
 - (2) Except as otherwise provided by this Part, the powers conferred on the Commission by this Part may be exercised, for the purposes of an investigation, by the Secretary or an investigator.
 - (3) For the purposes of an investigation, the Secretary and an investigator shall have the powers, privileges and immunities of a police officer in addition to any other powers the Secretary or investigator has under this Part.
 - (4) The provisions of the Criminal Procedure Code (Cap 75), the Evidence Act (Cap 80), the Police Act (Cap 84) and any other law conferring on the police the powers, privileges and immunities necessary for the detection, prevention and investigation of offences relating to corruption and economic crime shall, so far as they are not inconsistent with the provision of this Act or any other



law, apply to the Secretary and an investigator as if reference in those provisions to a police officer included reference to the Secretary or an investigator.”

24. On the basis of the foregoing the summons were issued within the Commissions mandate and powers. This then takes me to the question whether the EACC in making the decision to investigate/summon the applicants considered relevant matters or took into account irrelevant matters? The respondent’s case is that they received a complaint where it is suspected public property was illegally leased to the applicants since the land was a gazetted National monument and in other words was not available for lease. That as per their mandate it is imperative that every complaint must be investigated. But the *exparte* applicants contend that by doing this the Commission was soliciting evidence to use adversely against them in the petition. Infact this appears to be the substratum of the applicant’s grievance. It implies that the Commission ought to have considered the fact that there were parallel proceedings commenced by way of petition where the issue of ownership was for determination and where they were a party. Were these relevant matters to be considered by the Commission? My answer is in the negative. First I have not seen such a prescription given in the Act herein, the Commissions duty was to proceed within their mandate provided that they observe the law and the dictates of the *constitution*. I do not see how their move could be unreasonable or in utter disregard of natural justice or breach of any procedure. This court has not been shown which procedure was disregarded. Essentially, natural justice requires that a person receive a fair and unbiased hearing before a decision is made that will negatively affect them. Isn’t natural justice about giving the chance to any party to give their side of the story and which opportunity the Applicants were granted through the summons herein? Would it be reasonable for the commission in every matter involving the ownership of land that is before the court in civil proceedings and where it is a party be the reason for not summoning a party thereto for investigations? In my view no. I do not think the legislature meant the jurisdiction of the ELC court for this. In any case the civil proceedings and the investigative process are two distinct processes. It is only fair that the court allows other state organs or government departments freedom to execute their mandate freely without undue interference. I do not find any prejudice suffered or likely to be suffered if the investigations continued as that is a lawful legal process bestowed upon EACC- See [Joash Oindo & another v Ethics and Anti-Corruption Commission & another ; National Land Commission & another \(Interested Parties\)](#) [2020]eKLR.
25. I also join links with my brother Justice Mativo who in the case of [Republic Vs Ethics and Anti-Corruption Commission Exparte Nairobi City Council Assembly & 13 Others](#) (2019) eKLR stated that ‘In undertaking its mandate, EACC is constitutionally mandated under article 252 of the *Constitution* to invite or summon any person for purposes of undertaking investigations. The *Constitution* must be read holistically so as to achieve its purposes, values and principles.’
26. In view of my analysis and findings above I find that the *ex parte* applicants have not established any grounds for this court to grant the judicial review orders of certiorari and prohibition. The notice of motion dated May 19, 2022 is hereby dismissed with costs to the respondent.

It is so ordered.

DELIVERED AND DATED AT KWALE THIS 11TH DAY OF NOVEMBER, 2022

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms Kinuva HB for Mr. Oluga for the Applicants

Ms. Songole for the Respondents



Mr. Denis Mwakina- Court Assistant.

