



Republic v Ethics and Anti-Corruption Commission; Wambugu (Exparte Applicant) (Judicial Review Application E002 of 2025) [2025] KEHC 4930 (KLR) (Anti-Corruption and Economic Crimes) (23 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4930 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
JUDICIAL REVIEW APPLICATION E002 OF 2025**

**LM NJUGUNA, J
APRIL 23, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION RESPONDENT

AND

MARTHA KARUNGARI WAMBUGU EXPARTE APPLICANT

RULING

1. The applicant has moved this court by way of an Exparte application dated the 19th March, 2025, which is brought under Order 53 Rules 1 & 2 of the civil Procedure Rules and section 7 (1) (a) (2) (a) (v) and 9 (4) of the Fair Administrative Actions Act. It is premised on the grounds set out on its body and it's supported by the annexed affidavit sworn by the applicant, on 18th March, 2025. The application seeks the following Orders: -
 1. Spent.
 2. That this Honourable court do grant the Exparte Applicant leave to commence judicial Review proceedings for
 - a. An order of prohibition directed against the Respondent prohibiting it from instituting legal proceedings against the Exparte Applicant the sum of Kshs.18,292,965.50.



- b. An order of Certiorari to bring into this court for the purpose of quashing the Respondent’s demand titled “Demand for Kshs.18,292,965/- being illegal payments authorized by you on behalf of Nairobi City County to Jemishley Construction Limited, an un-qualified supplier for goods not delivered dated 10th March 2025.”
 - c. An order of Certiorari to bring into this court for the purpose of quashing the Respondent’s investigations with regard to the alleged loss by the Nairobi City County of Kshs.18,292,965/- as indicated in the Respondent’s demand titled “Demand for Kshs.18,292,965/- being illegal payments authorized by you on behalf of Nairobi City County to Jemishley Construction Limited, an un-qualified supplier for goods not delivered dated 10th March 2025.
 - d. Costs.”
3. That the leave so granted by this court do act as a stay of any implementation of the Respondent’s demand titled “Demand for Kshs.18,292,965.50 being illegal payments authorized by you on behalf of Nairobi City County to Jemishley Construction Limited, an un-qualified supplier for goods not delivered dated 10th March 2025” pending the determination of the Ex-parte Applicant’s substantive Judicial Review Application.
 4. That the costs of this application be provided for.”
2. The Applicant states that she is an officer of the Nairobi City County Government and is facing a demand from the Respondent of Ksh.18, 292,965.50cts having established that the Applicant being a senior Government official of Nairobi City County was in breach of trust and had abused her office and had approved payment of Ksh.18,292,965.50 to a company called Jemishley Construction Limited the said company having not been pre-qualified and not having supplied any goods, thereby causing the Nairobi City County to suffer loss of public funds which demand, if not restrained, will cause the Ex-parte applicant to suffer great loss and damage as she denies any wrong doing.
 3. The applicant deposes that she has never acted in an unethical manner nor has she ever received any benefit from the said company nor is she a member of the company.
 4. It is the applicant’s case that the procurement of goods and services by the Nairobi City County is conducted under the provisions of *Public Procurement and Asset Disposal Act*, the regulations thereunder, and more importantly *Public Finance Management Act* being the prevailing Act with relation to the expenditure of public finances by public entities, and that the County Government has committees that oversee the procurement process, which committees she is not aware of.
 5. That by virtue of Section 6 (d) of the *Public Finance Management Act*, as read with Section 105 (1 (e) of the said Act, the Respondent is breaching the mandate of the County Treasury of Nairobi County Government, and therefore, acting outside its mandate, for Section 6(d) is the provision with regards to County Expenditure while Section 105(1) of the said Act grants the County Treasury the power to demand any explanation with regards to the County expenditure.
 6. The applicant contends that she only participates in one step of the process, as the second approver, where after many other people had already approved that the goods were received as per the contract and Tender specifications, and that she approved the payments on the strength of the approval of others that the goods had been received. Further, that she was not a member of the inspection committee and therefore, she cannot be held responsible for it.



7. That she verily believes that the respondent's demand is wrong, ill judged, biased and in breach of it's mandate and if not restrained, the Respondent will proceed to levy charges against her that will include the Respondent seeking to freeze her assets including Bank accounts which action would leave her destitute. That she believes that the respondent's action breaches her Constitutional right to a fair Administrative Action as the demand makes no mention of who raised the allegations and her ability to cross examine her.
8. The applicant contends that under the Provisions of the *Public Finance Management Act*, the County Treasurer is the person that has the right to discipline her with regard to expenditure of the County.
9. The Court gave directions on filing of submissions and Counsel for the applicant complied with the said directions and filed his submissions.

Applicant's Submissions

10. The applicant submitted on the jurisdiction of the court to grant Judicial Review Orders that stems from Article 23 (3) (f) of *the Constitution*, Section 8 of the *Law Reform Act* and Part III of the Fair Administrative Actions Act and cited the case of Multiline Services Limited Vs. Nairobi County Government (2023) KEHC 23794 (KLR), on the importance of leave before filing a substantive application for review. Reliance was also placed on the case of Odhiambo Achillah T/A Achilla T.O and company Advocates vs. Kenneth Wabwire Akide T/A Akide & Company Advocates & three others (2015) eKLR on the same subject.
11. The applicant further submitted that she has a right to a fair Administrative Action and that failure by the Respondent to adhere to the rights afforded to her, renders the respondent's demand illegal as she has the right to petition this court for the Orders sought in her application.
12. The applicant has argued that her recording of the witness statement with the Respondent should not be considered as a right to be heard and that the Respondent had failed to adhere to her rights as allowed under the Rules of Natural Justice, as she was not granted an opportunity to see and rebut the evidence that was alleged against her when she was recording the statement. As a consequence, the decision making of the Respondent was wrong. Reliance was placed on the case of Commissioner of Lands Vs. Kunste Hotel Limited (1997) e KLR.
13. The applicant submitted that at this stage of the proceedings, it has been shown that she has a valid claim against the Respondent and she is deserving of the orders she has sought herein.

Analysis And Determination

14. This court has considered the application and the submissions filed herein, and the only issue for determination is whether the applicant has satisfied the court that she is deserving of the Orders that she has sought in her application.
15. The Ex-parte applicant herein has sought Orders for leave to commence Judicial Review proceedings and has moved the court under Order 53 Rules 1 & 2 and section 7 (1) (a) (2) (a) (v) and 9 (4) of Fair Administrative Actions Act.
16. The rationale for seeking leave was stated by the court in the case of Multiline Services Limited Vs. Nairobi City County (supra) in which the court stated: -

“Leave is meant to eliminate at an early stage any applications for judicial review which are either frivolous , vexatious or hopeless; to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further



consideration; to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error; and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.”

17. On what constitutes a frivolous application, the court in the case of *Odhiambo Achillah T/A Achilla T.O & Company Advocates* (supra), stated: -

“A matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the court; or (iv) when to put up a defence would be wasting court’s time; or (v) when it is not capable of reasoned argument.

Again a pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bonafide and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense.

A matter is said to be vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (iv) it is brought so that the party’s pleadings should have some fanciful advantage; or (v) where it can really lead to no possible good.”

18. The applicant herein has sought an Order of prohibition against the Anti-Corruption Commission prohibiting it from instituting legal proceedings against her, an Order of Certiorari to bring into this court for purposes of quashing its demand of Ksh. 18,292,965.50 and an Order of Certiorari to bring into this court for purposes of quashing the respondent’s investigations with regard to the alleged loss by Nairobi City County of the amount stated. She has sought that the leave granted do act as a stay of the implementation of the respondent’s demand of the said amount of money.
19. The applicant has annexed the demand notice dated the 10th March 2025 demanding the payment of the said amount of money from him by the Respondent herein, being illegal payment that she authorized on behalf of Nairobi City County which amount was paid to Jemishley Construction Limited, an un-prequalified supplier for goods not delivered. The notice states that it was issued by the Respondent pursuant to Section 3 of the *Ethics and Anti-Corruption Commission Act*, 2011 which mandates the Respondent to undertake investigations of acts of corruption or violation of codes of ethics or other matters prescribed under the *Anti-Corruption and Economic Crimes Act*, No. 3 of 2003 (ACECA) and all relevant Acts.
20. The notice further states that it was issued under Sections 51, 52 and 53 of the ACECA as read with section 11(1) (j) of the EACC Act, 2011, which mandates the Respondent to institute and conduct proceedings in court for purposes of recovery or protection of public property, or for the freezing or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.
21. Section 45 of the Anti-Corruption & Economic Crimes Act is meant to protect public property and it states;
- “9(1) A person is guilty of an offence if the person fraudulently or otherwise unlawfully-
- a. Acquires public property or public service or benefit;
 - b. Mortgages, charges or disposes of any public property



- c. Damages public property; including causing a computer or any other electronic machinery to perform any other function that directly or indirectly results in a loss or adversely affects any public revenue or service; or
 - d. Fails to pay taxes or any fees, levies or charges payable to, any public body or effects or obtains any exemption, remission, reduction or abatement from payment of any such taxes, fees, levies or charges
- (2) An officer or a person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person-
- (a) Fraudulently makes payment or excessive payment from public revenues for-
 - (i) sub- standard or defective goods;
 - (ii) Goods not supplied or not supplied in full; or
 - (iii) Services not rendered or not adequately rendered;
 - b. Willfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures; or
 - c. Engages in a project without prior planning
- (3) In this section, ‘Public property’ means real or personal property, including money, of a public body or under the control of, or consigned or due to, a public body.

22. This section and in particular Section 45 (2) (a) (ii) and 45 (2) (b) is the legal foundation of the criminal investigations that the Respondent is undertaking against the Ex-parte applicant herein, and would not be faulted for undertaking any investigations where it has reasonable suspicion that any of the offences prescribed in this provision has been committed.

23. Article 252 of *the Constitution* is on general functions and powers of Commissions and independent offices. It provides in the relevant part 252(1) each Commission, and each holder of an independent office:-

- a. May conduct investigations on its own initiative or on a complaint made by a member of the public;

24. Section 11 of the Ethics and Anti- Corruption Commission Act is on the additional powers of the Respondent and it states: -

- (1) In addition to the functions of the Commission under Article 252 and Chapter Six of *the Constitution*, the Commission shall-
 - (d) Investigate and recommend to the Director of public prosecutions of any acts of corruption or violation of codes of ethics or other matter prescribed under this Act or any other law enacted pursuant to Chapter Six of *the Constitution*.



25. The Commission in its demand letter has stated that its investigations established that during the financial year 2019/2020, the Exparte-applicant, while serving as the Director-Debt management at Nairobi City County and other officials in collusion with Jemishey Construction Limited, embezzled public funds totaling to Ksh 18,292,965.50 and that the Applicant herein approved payment of the said amount to the said company.
26. On her part, the Applicant has denied any wrong doing and has stated that she approved the payment after many other people had approved that the goods had been received as per the contract, and that as she was not a member of Inspection and Acceptance Committee, she cannot be held responsible for the payment and subsequent loss, if any.
27. The Applicant has stated that the Respondent is undertaking investigations and the same are not yet complete. Under the relevant Act, it is within their mandate to do so and this court cannot interfere with the said mandate at this juncture. However, the Applicant is at liberty to file a substantive application for judicial review.
28. In the premises foregoing, the application is allowed in terms of Prayer 2 (a), (b) and (c). For avoidance of doubt, prayer (3) is hereby disallowed.
29. The court makes no orders on costs.
30. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 23RD DAY OF APRIL 2025.

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L.M. NJUGUNA

JUDGE

In the presence of:-

No appearance for the Applicant

Court Assistant – Adan

