



**Nesco Services Limited v Ethics & Anti-Corruption Commission Act (Application E137 of 2023) [2024] KEHC 5217 (KLR) (Judicial Review) (18 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5217 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
APPLICATION E137 OF 2023**

**J NGAAH, J**

**MAY 18, 2024**

**BETWEEN**

**NESCO SERVICES LIMITED ..... APPLICANT**

**AND**

**ETHICS & ANTI-CORRUPTION COMMISSION ACT ..... RESPONDENT**

**RULING**

1. Before court is a chamber summons by the applicant for leave to file a substantive motion for the judicial review relief of *mandamus* against the respondent. The prayer for leave is couched as follows:
  - “ 1. Leave be granted to the Applicant in terms of Orders 53 and Sections 8 and 9 of the [Law Reform Act](#), Chapter 26 Laws of Kenya to: -
    - a. An order of Mandamus do (*sic*) issue to compel the Respondent carry out its constitutional and statutory mandate and investigate a complaint dated September 14, 2023 against its Chief Executive Officer, Mr. Twalib Mbarak and provide its feedback, findings and conclusions to the Applicant.”
2. The application is expressed to be brought under order 53 of the [Civil Procedure Rules](#) and sections 8 and 9 of the [Law Reform Act](#), cap. 26. It is based on a statutory statement dated 13 December 2023 and an affidavit sworn on even date by Harun Osoro Nyamboki, verifying the facts relied upon.
3. In summary, the applicant’s case for which it seeks leave is this: In January 2019, it lodged a complaint to the respondent’s Chief Executive Officer against a company called Kenelec Supplies Limited. This company is alleged to have illegally alienated a public property which, as far as I understand the



applicant, serves as the ingress and egress to and from the applicant's property. The applicant's property is itself described as L.R. No. 209/13557.

4. Rather than investigate the applicant's complaint, the respondent trained its guns on the applicant and commenced investigations on the applicant's acquisition or ownership of the property, L.R. No. 209/13557. The applicant was aggrieved by the course the respondent took and so it filed a complaint against the respondent's chief executive officer.
5. The applicant wants to file a suit for the judicial review order of *mandamus* because, as at the time of filing this application, no action had been taken on its complaint. It is the applicant's case:

“That, further by not dealing with the complaint of the Applicant the Respondent has flouted Section 35(1) & (2) of the Public Officers Ethics Act, 2003, that demands that the Respondent investigates any complaint to determine whether the public officer, being the Chief Executive Officer of the Commission has contravened the code of conduct & ethics.” (see par. 22 of the applicant's affidavit).

Before exercising my discretion to grant or not to grant leave, I invited the respondent to make its representation on the applicant's application.

6. The respondent obliged and opposed the application; it filed a replying affidavit sworn by Mr. Paul Mugwe that effect. Mr. Mugwe has admitted that indeed the respondent investigated the acquisition of L.R. No. 209/13557 and, as a matter of fact, he was part of the team that carried out the investigations.
7. The investigations established that L.R. No. 209/13557 is a public property that has been set aside as a car park. Having so established, the respondent filed proceedings for recovery of the property in the Environment and Land Court at Nairobi. These proceedings have been registered as ELC No. E211 of 2023 in which the respondent is named as the plaintiff and the applicant in these proceedings is the 1<sup>st</sup> defendant. Harun Osoro Nyambuki, a Director of the 1<sup>st</sup> defendant, and who, as noted, has sworn the affidavit verifying the facts relied upon in the instant application is named as the 2<sup>nd</sup> defendant.
8. Amongst the prayers in plaint, the respondent has sought for judgment against the respondents, severally and jointly for:
  - a) A declaration that land parcel no. 209/13557 is alienated public property set aside for utility as a public car park.
  - c) A declaration that the registration of L.R. No. 209/13557 in favour of the 2<sup>nd</sup> defendant in the transfer to the 1<sup>st</sup> defendant was irregular, illegal null and void ab initio.
  - d) An order for immediate vacant possession as against the 1<sup>st</sup> and 2<sup>nd</sup> defendants their agents, servants, employees and/or assigns from the suit property particularly described as L.R. No. 209/13557.
  - e) An order directing the Chief Land Registrar Nairobi to cancel the entries entered against land parcel no. and L.R. No. 209/13557 and recall the said title issued to the 1<sup>st</sup> defendant who is the current registered proprietor for cancellation.”
9. Mr. Mugwe has also sworn that the applicant attempted to stop the investigations into the illegal alienation of the property by filing a petition before the Environment and Land Court in Nairobi being petition no. E035 of 2022. The petition was, however, dismissed.



10. Thus, from the foregoing facts and upon a quick perusal of the material before court, it is not contested that the respondent conducted investigations into what, in its view, is an illegal alienation of a public property.
11. It is not in doubt that the respondent is mandated to undertake such investigations under Part IV of the *Anticorruption and Economic Crimes Act*, cap. 65. and according to section 13 (2)(c) of the *Ethics and Anticorruption Commission Act*, cap. 7H, it may conduct investigations on its own initiative or on a complaint made by any person. The entire section 13 on the powers of the respondent reads as follows:
  13. Powers of the Commission
    1. The Commission shall have all powers generally necessary for the execution of its functions under the *Constitution*, this *Act*, and any other written law.
    2. Without prejudice to the generality of subsection (1), the Commission shall have the power to—
      - a. educate and create awareness on any matter within the Commission's mandate;
      - b. undertake preventive measures against unethical and corrupt practices;
      - c. conduct investigations on its own initiative or on a complaint made by any person, and
      - d. conduct mediation, conciliation and negotiation.
      - e. hire such experts as may be necessary for the performance of any of its functions.
12. Thus, contrary to the applicant's argument that there was no complainant in the complaint against it as to warrant investigations by the respondent, it is apparent from section 13(2) (c) that there need not be any complainant for the respondent to execute its mandate of undertaking investigations. It may, on its own initiative, commence investigations against any person.
13. According to the respondent, its investigations revealed illegal acquisition of a public property. With these findings, it is not in dispute that the respondent has commenced proceedings for recovery of this property in accordance with its mandate under section 11(1) (j) of the *Ethics and Anticorruption Commission Act*. This section reads as follows:
  11. Additional functions of the Commission
    - (1) In addition to the functions of the Commission under Article 252 and Chapter Six of the *Constitution*, the Commission shall—
      - (j) institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures including proceedings for the recovery of property or proceeds of corruption located outside Kenya.



14. Of course, the results of the respondent's investigations to the effect that L.R. No. 209/13557 is a public property illegally alienated and the evidence on which this contention is based will be tested at the hearing of the suit the respondent has filed in the Environment and Land Court for recovery of the property. At any rate, the respondent's claim is subject to proof. No doubt, the applicant will have a chance to oppose the respondent's suit and not only controvert the evidence on which the respondent relies but also submit its own evidence to prove that it is the legal and rightful owner of L.R. No. 209/13557.
15. That being the case, neither the respondent nor its chief executive can be faulted for exercising the respondent's mandate under Part IV of the *Anticorruption and Economic Crimes Act* and sections 11(1)(j) and 13(2)(c) of the *Ethics and Anticorruption Commission Act*. The intended suit against the respondent's chief executive would, in these circumstances, be diversionary.
16. It follows that to the extent that the applicant is seeking leave of this Honourable Court to file an application for mandamus targeted at the respondent to investigate its chief executive only because the respondent focused its investigations on one complaint rather than the other, the application is misconceived and an abuse of the process of this Honourable Court.
17. Even then, the evidence by the respondent that the applicant's complaint was received later than the complaint with respect to the illegal alienation of L.R. No. 209/13557 has not been controverted. To be precise, it has been deposed by Mr. Mugwe that the complaint with respect to the illegal alienation of L.R. No. 209/13557 was received on 21 September 2018 and it was captured in the respondent's records as report no. 76,521. The applicant's complaint was received by the respondent on 16 January 2019 and recorded as report no. 79,246.
18. There is, therefore, no dispute that the complaint with respect to L.R. No. 209/13557 was made earlier than the complainant made by the applicant on the acquisition of L.R. No. 209/18289. Accordingly, there is no factual basis for the allegation that the investigation of the complaint against the applicant was preferred to that which the applicant made. The complaint against the applicant simply ranked first and, subject to the respondent's program of its activities, it is logical that having been received first in time, the complaint against the applicant would be given priority.
19. One other reason why the applicant does not merit exercise of this Honourable Court's discretion in its favour is that the applicant has suppressed facts material to its application. It is only after the respondent filed its replying affidavit when it became apparent to this court that the applicant had filed a petition against the respondent contesting the respondent's investigations and had, in that petition, gone further and petitioned for, among other prayers:
  - a) A declaration that the petitioner's right to property under Articles 40, 60 (1) (b) and 64 of the *Constitution* is threatened by the intended actions of the 1<sup>st</sup> respondent.
  - b) A declaration that the threatened actions by the 1<sup>st</sup> respondent of inspection and valuation are illegal, unlawful and unconstitutional as L.R. No. 209/13557 is private property.
  - c) A declaration that the petitioner is the legal owner of the suit property land reference number L.R. No. 209/13557 situate in Nairobi West Area of the City County of Nairobi."



20. The petition which was registered in the Environment and Land Court at Nairobi as ELC Petition No. 35 of 2022 was eventually dismissed, a fact that the applicant has not disclosed to this Honourable Court yet it is material to his complaint against the chief executive officer of the respondent.
21. The applicant also suppressed the fact that, the respondent filed a suit against it together with its Director for recovery L.R. No. 209/13557 and that the suit is pending for determination in the Environment and Land Court. There is no doubt that, going by the statutory statement and the affidavit sworn verifying the facts relied upon, the suit is relevant to these proceedings to the extent that the background facts upon which the suit in the Environment and Land Court is founded are the same facts on which the applicant's substantive motion would be grounded if leave was to be granted.
22. It is trite that in an application for leave to file a substantive motion for judicial review reliefs, material facts must be disclosed regardless of whether they are prejudicial to an applicant's case. It has been held that in such an application, *uberrimae fides* is required and leave will not be granted, or may be later set aside, if there has been deliberate misrepresentation or concealment of material facts in the applicant's affidavit or affidavits.
23. In *R versus Kensington Income Tax Commissioner, ex parte Princess Edmond De Polignac* (1917) 1KB 495, Viscount LJ addressed this point and stated as follows:

“Where an *ex parte* application has been made to this Court for a rule *nisi* or other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that the Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit.”
24. The last point I wish to make is that a judicial review court would, ordinarily, not delve into the merits of the applicant's case in an application for leave. In order to guard against taking that course, Lord Diplock, in *IRC V National Federation of Self-Employed and Small Businesses Ltd (supra)* suggested the following approach.

“If, on a quick perusal of the material then available, the court thinks the application discloses what might on further consideration turn out to be an arguable case in favor of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.”
25. I have considered and evaluated the material before me only to the extent that it is necessary to demonstrate that the applicant's case, if leave is granted, would not be arguable. If I may repeat, it would not be arguable because the respondent or its chief executive cannot be faulted for executing the respondent's constitutional and statutory mandate and; secondly, the applicant does not merit grant of leave for suppressing facts material to its application.



26. For reasons I have stated, I am inclined to reject the applicant's application for leave. Its application is hereby dismissed. Considering that the application has been dismissed at this infancy stage of the judicial review proceedings, I will not make any order as to costs. It is so ordered.

**SIGNED, DATED AND UPLOADED ON THE CTS ON 18 MAY 2024.**

**NGAAH JAIRUS**

**JUDGE**

