



**Hamisi v Ethics and Anti-Corruption Commission (Miscellaneous Application E001 of 2022) [2024] KEHC 6431 (KLR) (4 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6431 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
MISCELLANEOUS APPLICATION E001 OF 2022**

**SM GITHINJI, J**

**JUNE 4, 2024**

**BETWEEN**

**AZIZ OMAR HAMISI ..... APPLICANT**

**AND**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... RESPONDENT**

**RULING**

1. The Applicant vide a Notice of Motion dated 2<sup>nd</sup> December 2022 brought under Article 47 of the Constitution of Kenya 2010, Section 11 (1) (d), 12 (c) and 13 (2) (c) of the Ethics and Anti Commission Act and Order 53 Rule 1 & 2 of the Civil Procedure Rules moved the court seeking the following orders;
  1. That the honourable court be pleased to grant leave to the Applicant to file an application for Judicial Review seeking the following orders;
    - a. An order of certiorari to bring into this honourable court for purposes of being quashed the remarks of the respondent in the Applicant's certificate of good conduct.
    - b. An order of mandamus directing the Respondent to review its remarks on the Applicant's certificate of good conduct.
    - c. An order of mandamus directing the Respondent to refund the Applicant's cash bail of Kshs. 10,000 and subsequently clear his name completely in relation to the subject investigations.
    - d. An order of prohibition forbidding the Respondent from conducting any further investigations in relation to the subject matter of investigations on the Applicant herein.
    - e. A declaration that the Respondent's act of assaulting and threatening to coerce the Applicant to give information on 11/4/2021 is oppressive malicious and amounts



to contravention of the Applicant's constitutional right to security of the person, freedom from torture and cruel, inhuman or degrading treatment or punishment, right to the protection of human dignity and secure protection of the law.

- f. A declaration that the remarks that the Respondent put on the Applicant's certificate of good conduct amount to violation of the Applicant's constitutional right to secure protection of the law.
  - g. A declaration that the speculative charges which are indicated in the Applicant's Certificate of good conduct are in contravention of the Applicant's constitutional right to be presumed innocent until the contrary is proved, to be informed of the charge with sufficient detail to answer it and the right to a public trial.
  - h. A declaration that by coercing the Applicant to give information on 11/04/2021 violated the Applicant's Constitutional right to refuse to give incriminating evidence.
  - i. A declaration that the inordinate and unreasonable delay of investigations by the respondent on the alleged offence amounts to breach of the Applicant's constitutional right to have the trial begin and conclude without unreasonable delay.
  - j. A declaration that the offences alleged against the Applicant are speculative with no legal basis, formality and justification.
  - k. That general damages, exemplary damages, interest on the same and costs of this application be awarded to the Applicant.
2. The application is premised on the grounds set out on its face and on the supporting affidavit of Aziz Omar Hamisi the applicant, who stated that on 11/4/2019 he was arrested by the Respondent's officers and taken to their offices for interrogation and the officers assaulted him by beating, threatening and forcing him to give self-incriminating information as admission of facts that amount to offence of bribery. He stated that later same day in the evening the Respondent's officers took him to Malindi Police station where he was released on a cash bail of Kshs. 10,000 and ordered to be reporting to the Respondent's offices. He further stated that on the same day he reported the assault at Malindi Police station and the same was captured in the Occurrence book. It was additionally deponed that the respondent did not take his finger prints but took his identity card and has since never charged him with any offence in a court of law.
  3. Mr. Aziz Omar further deponed that he recently applied for a certificate of good conduct wherein the respondent put in remarks that he has a pending case for bribery involving agents, of which remarks he is aggrieved by thus the instant application.
  4. The respondent filed grounds of opposition in response and a replying affidavit sworn by Reuben Njagi an investigator and one of the respondent's officers. He deponed that he is one on the respondent's officers involved in the investigation of complaints/allegations of bribery, economic crimes and other offences levelled against the applicant in exercise of its statutory authority. That it is a fact that the officers of the respondent arrested the applicant in the course of an operation that was part of investigations of the complaints and allegations levelled against him which investigations are incomplete. He also stated that the applicant's grievance concerns a certificate of good conduct which is issued by the Directorate of Criminal investigations which is a separate entity from the Respondent.



## Analysis and Determination

5. The application was canvassed by way of written submissions. I have considered the application as well as the annexures thereto. I have further considered the written submissions and the authorities relied upon by the parties. The issue for determination is whether the orders sought in the nature of a judicial review are merited.
6. It is trite that judicial review is more concerned with the manner in which a decision is made rather than the merits of the decision. The court is concerned with the lawfulness of the process by which the decision is made. The grounds upon which an order of judicial review can issue include where the decision complained of is tainted with illegality, irrationality and procedural impropriety (where there is failure to act fairly on the part of the decision-making authority in the process of taking a decision) or where the rules of natural justice are not complied with. It may also be issued where the decision is made without or in excess of jurisdiction. [See *Republic v National Land Commission & another Ex-parte Farmers Choice Limited* (2020) eKLR].
6. The gravamen of the applicant's case is that he was arrested by officers of the respondent, assaulted and forced to give self-incriminating evidence and additionally that the respondent put in remarks to the effect that he has a pending case for bribery which remarks reflected on his certificate of good conduct. The question that arises then is whether the Respondent conducted itself with illegality, irrationality or procedural impropriety.
7. The Respondent is established pursuant to the decree in Article 79 of the *Constitution* which mandated Parliament to enact legislation to establish an independent ethics and anti-corruption commission. Being a Commission it is vested with the powers granted to Commissions under Article 252 of the *Constitution*. Under Article 252 (1) (a), Commissions may conduct investigations on their own initiative or on a complaint made by a member of the public. The specific powers given to the Ethics and Anti-Corruption Commission are in Section 13 of the *Ethics and Anti-Corruption Commission Act*, Act No. 22 of 2011. It states as follows: -
  - “(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;
    - (d) conduct mediation, conciliation and negotiation; and
    - (e) hire such experts as may be necessary for the performance of any of its functions.”
8. In the replying affidavit by the respondent, Mr. Reuben Njagi, he stated that there is an ongoing investigation against the Applicant over allegations of bribery and economic crimes which investigations are incomplete. In my view, there is nothing wrong with the Respondent carrying out



its duties as envisaged by the Constitution and the Ethics and Anti-Corruption Act. Further, it would be premature to impugn the Respondent's position yet there is no conclusive decision made as the investigations are ongoing. The Applicant has not supplied any proof that the Respondent made the said remarks. Moreover, the Applicant's contention is that the said remarks are reflected in the certificate of good conduct. It is common knowledge that a Certificate of good conduct is issued by the Directorate of Criminal Investigations and not the Respondent. This goes to show that the reliefs herein sought cannot be enforced against the Respondent as they are not the proper party to this suit.

9. I must also point out that after keen perusal of the file and the substantive application to be specific, most of the prayers sought are declarations for infringement of human rights. The said prayers can only be property raised through a constitutional petition and not in an application for Judicial Review.
10. Consequently, I find that the application lacks merit and the same is hereby dismissed with no orders as to costs. File is closed.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 4<sup>TH</sup> DAY OF JUNE, 2024.**

.....

**S.M. GITHINJI**

**JUDGE**

In the absence of: -

Mr Mbaka for the Respondent

Mr Wambua Kilonzo for the Applicant

