



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC JR NO 12 OF 2019

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

THE ETHICS AND ANTI-CORRUPTION COMMISSION.....3RD RESPONDENT

EX PARTE

FRANCIS KIBARA KARANJA.....1ST APPLICANT

MARTHA WAIRIMU WAITHAKA.....2ND APPLICANT

AND

SOSTENAH OGERO TARACHA.....INTENDED INTERESTED PARTY

RULING

1. The applicants herein moved the court on 8th May, 2019 by way of an application under certificate of urgency for orders of certiorari and prohibition to quash the decision of the respondents herein to prosecute them, for the offences of conspiracy to commit an offence of corruption and to prohibit them from prosecuting and conducting proceedings in Nairobi Chief Magistrates Court at Milimani ACC NO. 6 of 2019.
2. The respondents, when served, filed a replying affidavit to the said application sworn by one CATHERINE NGARI an Investigator with the 3rd respondent.
3. By a ruling dated 12th day of August, 2020, this court (Onyiego, J) granted leave to the applicants to file substantive application for Judicial Review, but declined to grant order of stay of the proceedings before the lower court.
4. The applicants on 7th September, 2020, sought orders for the extension of time within which to file the Notice of Motion for the judicial review, having failed to file the same within the seven-day period granted with leave, which order was granted by consent on 23rd September, 2020.
5. In the meantime, the intended third Party, by an application dated 30th September, 2020, moved the court for an order, that the court be pleased to enjoin him as a party to this suit and be granted leave to file pleadings and/or submissions.
6. The application was based on the grounds that the ex-parte applicants had sold to him their property Known as L.R NO 1333/ 163 Thome Estate at a purchase price of Ksh.42,500,000 for which the respondents preferred criminal charges against them, including the applicant herein, thereby making it necessary for him to be made a party to this proceeding, to enable the court to effectively and completely adjudicate

the issues in controversy.

7. The application was supported by his affidavit, in which he deposed that together with his partner Dr. Salome Munubi, they bought the subject property from the ex-parte applicants for a sum of Ksh.42,500,000, from which the respondents have preferred criminal charges against them for corruption offences on the ground that a sum of Ksh.9,050,000 paid to the ex-parte applicants at his instruction was associated with crime.

8. It was contended that the ex-parte applicants had filed the matter herein against the decision of the respondents to charge them, for which leave had been granted and it was therefore necessary that he be made a party to this proceeding, since it culminated from a sale agreement and the transaction between him and the applicants, which forms the basis of the challenged decision

9. He contended that if he was allowed to be a party and to file submissions, this court will be able to effectively and completely adjudicate on the issues in controversy

10. In response to the application, the 2nd respondent filed a replying affidavit, sworn by One Evah Kanyuira, in which she stated that they received a report from the 3rd Respondent in respect of process of compensation for acquisition of land LR No. MN/V/3801 for the construction of part of Port Reiz/Moi International Airport road, which was marred with massive irregularities

11. That out of the sums paid out of the transaction, a sum of Ksh. 9,050,000 was paid to the ex-parte applicants, on the instruction of the intended third party and his wife an official of the National Lands Commission, which funds were deemed to be proceeds of crime or corrupt practises and that the proceedings herein, were not concerned with the innocence or guilt of the applicants, but with the decision making process.

12. It was contended that the decision to charge the applicants was made on the basis of the facts that there was sufficient evidence and that both the evidential test and public interest test, under Article 157(11) of the constitution and the enabling statutes were met, noting that the ex parte applicants had never appeared in court in Anti-Corruption Case No. 6 of 2019.

SUBMISSIONS

13. Directions were issued by the court, that the application herein be heard by way of written submissions which were duly filed. On behalf the intended interested third party, it was contended that Order 1 Rule 10(2) of the Civil Procedure Rules allows the admission of a party to a proceeding if their presence may be necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the suit.

14. It was submitted that in **FRANCIS KARIUKI MURUATETU & ANOTHER v REPUBLIC** the Supreme Court outlined the elements that must be established in warranting the joinder of a party to a proceeding and stated that the issue to be determined must always remain the issues as presented by the principal parties.

15. It was submitted that there was a contention that the purchase of the subject property from the ex-parte applicants by the intended interested party was through irregularly acquired public funds and therefore placed the intended interested party at the heart of the subject matter, as his rights under Article 40 (1) of the Constitution was at risk.

16. It was submitted further that the intended interested party will suffer prejudice in case of non-joinder taking into account the relief sought by the ex parte applicants for which the case of **HABIBA W RAMADHAN & 7 OTHERS v MARY NJERI GITIBI [2017] eKLR** was submitted in support on the preposition that the test to be applied is whether the relief claimed by the plaintiff in the suit will directly affect the applicant

17. It was contended that if the application by the ex parte applicants was found to be without merit and the respondents might proceed to repossess the property purchased from them, they might seek to recover compensation from the applicant herein

18. It was submitted that the intended interested party was one of the parties alleged to had conspired with the ex parte applicants and should therefore be given an opportunity to present his side of the case. It was contended that the court ought to adopt a liberal interpretation of Order 1 Rule 10(2) as was stated in the case of **JMK vs MWM & Another [2015] eKLR** and that the court ought to follow the Supreme Court definition of an interested party in the case of **TRUSTED SOCIETY OF HUMAN RIGHT ALLIANCE v MUMO MATEMO [2014] eKLR**

19. On behalf of the respondents, it was submitted by the third respondent, that the applicant had brought the application herein under the provisions of article 50(1) of the constitution, sections 1A 1B and 3 A of the Civil Procedure Rules and Order 1 Rule 10(2) of the rules while the Judicial Review proceedings have been held to be sui generis in nature, for which the said rules do not apply as was stated in the case of **REPUBLIC v SALARIES AND REMUNERATION COMMISSION EX PARTE PARLIAMENTARY SERVICE COMMISSION & 4 OTHERS [2018] eKLR** , **DICKSON MIRICHO MURIUKI V CENTRAL PROVINCIAL LAND DISPUTE APPEALS COMMITTEE & 6 others [2008] eKLR**

20. It was submitted that the law on joinder of parties to a Judicial Review Application, was provided for under Rule 53(4) of the Civil Procedure Rules and that the applicant ought to disclose to court, how he or she is directly affected by the proceedings and that the issues he intends to canvass are relevant and cannot be adequately dealt with by the existing parties for which the case of **REPUBLIC V OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION & 7 Others EX-PARTE SYLVIA WAIRIMU NJUGUNA [2018] eKLR** was submitted in support

21. It was contended that the applicant had no special or identifiable interest in the proceeding herein and that no prejudice will be suffered by him if the orders sought are not granted, as the issues he intend to raise had been done so by the ex parte applicants.

22. These submissions were highlighted by Mr. Okubasu for the applicant and stated that the applicants in the JR, were only mentioned in two counts at the trial before the lower court, one of which is joined with the applicant herein and that since the application was based on Article 50 of the constitution, the provisions of Order 53 (4) where not applicable.

23. Ms Odipo stated that the applicant had not met the threshold for the grant of the orders sought, while Mr. Kinyanjui, submitted that the same had not indicated how he intended to enrich the court, as the pleading in the matter was already closed and therefore the intended party cannot change the direction of the case and further that the same did not explain the delay in bringing the application

DETERMINATION

24. From the proceeding herein, I have noted that the applicants herein were granted leave to file a substantive application for Judicial Review by the court on 23rd September, 2020, which application was filed on 25th September, and responded to by a replying affidavit sworn on 12th September, 2020. In the said application, the applicants are seeking the following orders :

a) an order of certiorari to remove into this Honourable Court and to quash the decision of the 1st 2nd and 3rd Respondents to prosecute the applicants for the offense of conspiracy to commit an offence of corruption contrary to section 47(A) (3) as read with section 48 of the ACECA

b) an order of prohibition to prohibit the respondents from prosecuting and or conducting proceedings against them in the Nairobi Chief Magistrates Court at Milimani ACC NO 6 of 2019.

25. Their complaint is that the 1st and the 2nd respondents in charging them, failed to take into account the relevant factors that, they were only mere vendors in the sale of a property they owned, and could not be taken to be part of a conspiracy in the manner presented in the charge, therefore the decision was made in bad faith and was irrational.

26. It was contended therein that as it would have been impossible for them, as vendors to know that, the intended interested party had used part of the purchase price from the proceeds of corruption, a fact that the intended interested party has not denied.

27. The power of this Court to grant joinder of Parties to a proceeding in a Judicial Review matters are provided for under the provisions of Order 53(4) of the Civil Procedure Rules which states as follows: (4) If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.

28. As regards constitutional matters, Rule 2 of the Constitution of Kenya protection of Rights and Fundamental Freedoms Practice and Procedure Rules defines Interested Party as a person or entity that has an identified stake or legal interest or duty in the proceedings before the court, but is not a party to the proceedings or may not be directly involved in the litigation.

29. Rule 7 of the said Rules provides as follows:

1) A person, with leave of the Court, may make an oral or written application to be joined as an interested party.

2) A court may on its own motion join any interested party to the proceedings before it.

3) Whereas the application herein is stated to be based under the provision of Order 1 Rule 1 of the Civil Procedure Rules and whereas the respondents have submitted that the same is brought under the wrong provision of the rules, in view of the provisions of Article 158 of the Constitution, and noting that the application is based on Article 50 of the Constitution, I take the view that the same is not fatal to the substantive issue raised in the application.

4) The Supreme Court of Kenya in the case of **FRANCIS KAROKI MURUATETU & ANOTHER v REPUBLIC [2019] eKLR** set out the principles to be considered on an application for joinder of parties and stated as follows:

“[37] From the foregoing legal provisions, and from the case

law, the following elements emerge as applicable where

a party seeks to be enjoined in proceedings as an

interested party:

One must move the Court by way of a formal application. Enjoinder is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:-

i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be

clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.

ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.

iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

32. In the case of **SKOV ESTATE & 5 OTHERS v AGRICULTURAL DEVELOPMENT CORPORATION & ANOTHER [2015] eKLR** the court had this to say as regards what a party in the position of the applicant must meet to be enjoined as an interested party:

“17. It will be seen that Order 1 Rule 10 (2) gives leeway to the court to enjoin to the suit, a person whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit.

18. In my view, for one to convince the court that he/she needs to be enjoined to the suit as interested party, such person must demonstrate that it is necessary that he/she be enjoined in the suit, so that the court may settle all questions involved in the matter. It is not enough for one to merely show that he/she has a cursory interest in the subject matter of litigation. Litigation invariably affects many people. A judgment or order in most cases does not only affect the litigants in the matter. It does have ramifications for others as well and one may very well argue that these others have an interest in the litigation. That is a fair argument, but a mere interest, without a demonstration that the presence of such party will assist in the settlement of the questions involved in the suit, is not enough to entitle one be enjoined in a suit as interested party. In other words, there needs to be a demonstration that the interest of the person goes further than “merely being affected” by the judgment or order. It must be shown that the presence of that person is necessary, so that the issues in the suit may be settled, and that if the person is not enjoined, the court may not be fully equipped to settle the questions in the suit or may be handicapped in one way or another. A joinder may also be allowed if the intended interested party has a claim of his own, which in the circumstances of the matter, needs to be tried, or is convenient to be tried alongside the claims of the incumbent plaintiff and defendant. The threshold for joinder of an interested party should not be too low, or else, this is prone to open doors for busybodies to be joined to proceedings, merely to spectate or confuse the issues in the matter. Apart from the above, whether or not to enjoin a person as an interested party, must be looked at within the context and surrounding circumstances of each particular case.”

33. In this matter before me, the applicants interest in the subject matter is that it rises out a sales agreement between him and the ex parte applicants, which forms the basis of the criminal proceedings before the Chief Magistrates Court which the applicants are seeking to quash by way of certiorari. The fact that they entered into that agreement is not disputed and that the applicants complain is only that the decision to prosecute them was unreasonable and done in bad faith

34. From the affidavit in support of the interested party’s application, the same has not identified any right or interest in the application for judicial review and or any input the same is likely to add to the proceedings herein, to enable the court come to a just conclusion of the matter, save to confirm that he entered into the agreement, which has not been denies.

35. The mere fact that the applicant has been charged together with the ex-parte applicants in a criminal case does not to my mind make him an interested party in a judicial review application wherein the applicants are only challenging the process which led to them being charged in respect of a transaction entered into between them and the applicant herein , as even if the court were to rule in favour of the ex parte applicants, the same would not stop the respondents from proceeding with the case against him .

36. I am in agreement with the submissions by the respondent that the application by the ex parte applicants is only seeking to quash the decision to charge them and has got nothing to do with the ownership of the subject property and therefore there is no input the applicant herein will bring to the court while determining the application.

37. The process and decision to charge the ex- parte applicants and the intended interested party herein were made independently of each other and I am quite unpersuaded that that there is any input the intended interested party will bring to the proceedings herein, save to confirm that he indeed entered into a sale agreement with the ex-parte applicants herein, fact which is not disputed by the Respondents.

38. It therefore follows that the applicant has failed to meet the threshold set both in law and decisions of superior court having failed to prove any stake in the issues in dispute between the ex parte applicants and the respondents and or to show anything new which he shall offer or advance which might be relevant to the court in the resolution of the issues herein.

39. I therefore find and hold that the application herein dated 30th September, 2020 lacks merit and is hereby dismissed with cost to the respondents.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11th DAY OF MAY, 2021

.....

J. WAKIAGA

JUDGE

In the presence of:

Mr. Okubasu for Proposed interested party

No appearance by Miss Odepo for Applicant

No Appearance by Mr. Maina for Respondent