



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 32 OF 2019

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)
PRACTICE AND PROCEDURE RULES, 2013)**

-AND-

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER
ARTICLE 22 OF THE CONSTITUTION OF KENYA.**

-AND-

**IN THE MATTER OF: THE DECISION BY THE DIRECTOR OF PUBLIC PROSECUTIONS IN HIS PRESS STATEMENT
DATED 16.4.2019 THAT SHAKEL AHMED KHAN AND NAZIR AHMED MATABKHAN, PRIVATE PERSONS BE CHARGED
WITH OFFENCE UNDER THE ETHICS AND ANTI-CORRUPTION ACT.**

-BETWEEN-

- 1. SHAKIL AHMED KHAN**
- 2. NAZIR AHMED MATABKHAN**
- 3. TORNADO CARRIERS LIMITED.....PETITIONERS**

VERSUS

- 1. ETHICS AND ANTI-CORRUPTION COMMISSION**
- 2. OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**
- 3. DIRECTORATE OF CRIMINAL INVESTIGATIONS**
- 4. ALL MAGISTRATES & ANTI-CORRUPTION COURTS**
- 5. THE KENYA NATIONAL HIGHWAYS AUTHORITY**
- 6. THE NATIONAL LAND COMMISSION**
- 7. THE ATTORNEY GENERAL.....RESPONDENTS**

RULING

1. The Petitioners herein filed a petition dated 22.4.19 against the Respondents herein, seeking various declarations and orders.

2. The Petition relates to compensation for compulsory acquisition of Land Reference MN/VI/3801 Mombasa (the property), belonging to the 3rd Petitioner, Tornado Carriers Limited (TCL). The 6th Respondent, National Land Commission (NLC), upon the request of the 5th Respondent, Kenya National Highways Authority (KeNHA) compulsorily acquired the property, for the construction of Mombasa Southern Bypass and Kipevu New Highway Container Terminal link road. It is alleged that the valuation and compulsory acquisition of the property

was fraudulent and compensation. Following investigation by EACC into the matter, a decision was made for the prosecution of a number of persons including, Shakil Ahmed Khan (Shakil), the 1st Petitioner and Nazir Ahmed Matabkhan (Nazir) 2nd Petitioner, both directors of TCL. The 1st and 2nd Petitioners were charged in Nairobi Anti-Corruption Case No. 6 of 2019. They attended Court on 13.5.19 and pleaded not guilty of the charges.

3. By an application dated 30.5.19, the Petitioners seek that one Catherine Ngari be enjoined as the 8th Respondent in the Petition and that the Petition be amended in terms of the draft attached to the Application. The grounds are set out in the Application and in the affidavit of Shakil sworn on even date. Besides being a director of TCL, Shakil is the son of Nazir.

4. The grounds are that after the filing of the Petition herein, Catherine Ngari swore an affidavit on 25.4.19, in ELC Petition No. 13 of 2019 which exonerated the Petitioners. Catherine Ngari who is an accountant with the 1st Respondent was in charge of the investigation on the criminal and civil aspects of the compensation. She recommended to the DPP, the prosecution of the Petitioners based on facts contained in her statement of 5.4.19. The facts are that the property was charged to Imperial Bank for Kshs. 9,500,000.00 in 2005, long before the compulsory acquisition; that on following the rejection of the assessed compensation of Kshs. 34,501,110.00 in 2015 by the 3rd Petitioner, another assessment of Kshs. 109,769,363.00 was done by the NLC; that an offer of Kshs. 75,259,253.00 was made to the 3rd Petitioner which was accepted; that a purported letter dated 30.11.17 signed by the 2nd Petitioner, the 3rd Petitioner accepted the award of Kshs. 109,769,363.00, and authorized NLC to pay Kshs. 54,500,000.00 to C. W. Chege & Co. Advocates was confirmed to be a forgery by a forensic document examiner. The Petitioners further state that the entire criminal case against them is based on the foregoing facts and also on the fact that the NLC failed to inform the Bank of the intention to acquire the property.

5. The Petitioners allege that when Catherine Ngari directed that the Petitioners be charged, she was aware that they had rejected the award of Kshs. 34,501,110.00 and had accepted the award of Kshs. 75,259,253.00 and further that no award of Kshs. 109,769,363.00 had been given. Catherine Ngari was also in receipt of the forensic report on the forgery dated 15.3.19, while her statement is dated 5.4.19. She also stated on oath that the letter of 30.10.17 is a forgery and that there was no dispute on the award of Kshs. 75,259,253.00. She further swore an affidavit that the 3rd Petitioner's accounts be frozen. According to the Respondents, Catherine Ngari, not being an advocate has no capacity to make a decision to prosecute and the DPP ought not to have relied on her advice and direction as to whether there was sufficient evidence to sustain a conviction. Her decision that the Petitioners be prosecuted was made without jurisdiction and in violation of the Constitution.

6. According to the Petitioners therefore, it is necessary for Catherine Ngari to be enjoined as a respondent herein for her to explain to the Court her decision that the Petitioners be charged when she had already established the foregoing facts and further why she usurped the constitutional mandate of the 2nd Respondent. Catherine Ngari's decision was malicious. She and the 1st Respondent failed to discharge their duties in good faith, with credibility, impartiality, independence and integrity as required by law. They failed to respect the Petitioner's rights and freedoms. The Petitioners urged the Court to allow the application.

7. The Application was opposed by EAC by its Preliminary Objection (PO) dated 7.6.19, Grounds of Opposition dated 17.6.19 and a replying affidavit sworn by Catherine Ngari on 21.6.19. None of the other Respondents filed any response to the Application.

8. The objections in the PO are that the Application contravenes the provisions of Article 79, 236(a) and 252(1)(a) of the Constitution of Kenya, 2010 as read with Section 20 of the Ethics and Anti-Corruption Commission Act, 2011. As such, the Application is unconstitutional, statute barred and incurably bad in law.

9. EACC, in its Grounds of Opposition, reiterates the objection in its PO. EACC further states that Catherine Ngari was at all material times its duly appointed and authorized investigator. To the EACC therefore, there exists no justifiable, legal or reasonable basis for the Court to allow the joinder herein of Catherine Ngari in her personal capacity. The Application is aversive to public interest and prejudicial to the discharge of EACC's constitutional and statutory mandate of initiating and concluding investigations into allegations of corruption, economic crimes and fraudulent acquisition of public property including public funds. The Application is also based on generalities, conjecture and suppositions. It is incurably incompetent, bad in law and an abuse of the Court process. It is also intended to impede the rule of law and administration of criminal justice in Anti-Corruption Case No. 6 of 2019. The Application further contravenes Article 10(1) and (2) of the Constitution and Rule 10(2)(b)(c) and (d) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

10. In her Replying Affidavit, Catherine Ngari reiterated the contents of the PO and grounds of opposition. She further averred that she was part of the team that investigated the allegations of fraudulent compulsory acquisition and irregular compensation of land for various Government projects including the Standard Gauge Railway (SGR), which was within the EACC's legal mandate.

11. Catherine Ngari further stated that a list of the parcels of land and acreages to be acquired for the construction of the Port Reitz/Moi International Airport Road, was duly gazetted. Valuation of the 0.075 ha of the 3rd Petitioner's property to be acquired was valued at Kshs. 34,501,100.00 by Valuer, Jacinta Mutua. Upon receipt of the award letter dated 6.10.15, TCL rejected the award by a letter dated 20.10.15 and implored NLC to review the award and acquire both parcels at Kshs. 180,000,000.00. In response, a second valuation of the property was done by Joash Oindo who returned a value of Kshs. 109,769,363.00. An award of Kshs. 75,268,253.00 was issued to TCL by NLC vide its letter dated 16.9.17 which was accepted. From the NLC offices, EACC obtained the letter dated 30.10.17 purportedly signed by the 2nd Petitioner, for TCL acknowledging the award of 109,769,363.00, with instructions on how the same was to be disbursed. The 2nd Petitioner denied authoring the letter and EACC concluded that the same was a forgery through Catherine Ngari and Abdi Salat, its Deputy Coast Regional Manager. NLC proceeded to act on the instructions in the said letter and disbursed the funds in 2 tranches. Kshs. 55,269,363 was on 3.11.17 paid to TCL in its bank account at SBM Bank (K) Limited, which was on 6.12.17 moved to the accounts of Asia Akhtar Nazir Ahmed and Tarah Begum Khan held in NIC Bank. The balance of Kshs. 54,500,000/= was deposited in the account of C. W. Chege Advocates in an account held at I&M Bank, which amount was distributed to various persons some of whom are agents, associates relatives and companies of senior NLC officials. The Petitioners thus conspired with officials of NLC to commit the offence of corruption and fraudulently acquired public funds.

12. Catherine additionally stated that EACC established that NLC failed in its duty to obtain good title for KENHA and safeguard public interest as the property is charged to Imperial Bank. Further, NLC after making an award, which by law is final and conclusive, is not authorized by law to re-open an inquiry, cancel or issue another award. An aggrieved person's recourse lies in Court. There exists no legal document to indicate that NLC acquired the whole property, thus exposing the Government to potential litigation.

13. Catherine Ngari finally stated that at all material times, she acted under the instructions of the EACC and cannot therefore by law, be held personally liable for investigations undertaken on its behalf.

14. The Petitioners and the EACC filed their respective submissions which I have considered.

15. For the Petitioners, it was submitted that without the joinder in the Petition, of Catherine Ngari, a person they accuse of violating their rights, they will not enjoy their right to access to justice as guaranteed in Article 48 of the Constitution and Rule 3 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. (the Rules). It was further submitted that under Rule 5 of the Rules, the Court may at any stage of the proceedings enjoin any person whose presence before the Court is necessary for the adjudication of the matter before Court. Had the Petitioner been aware that Catherine Ngari had confirmed their innocence, they would have enjoined her as a party in the Petition.

16. It was further submitted that there is nothing in Article 79 of the Constitution, pursuant to which EACC was established by statute, to suggest that an employee of EACC is immune from any suit. The Petitioners contend that their interest in enjoining Catherine Ngari, is for her to explain why after finding them innocent, she still recommended their prosecution. To the Petitioners, their prosecution is malicious and vindictive and cannot be said to be an act of good faith. According to the Petitioners, had Catherine Ngari performed her functions in accordance with the Constitution or within the law, she would not have made the recommendation that she did.

17. The Petitioners contended that public officers are bound by the Constitution and are personally liable for violating the same. Were they not to be called out to bear personal responsibility whenever they acted maliciously and in bad faith, then the Petitioners submitted, Article 10 of the Constitution would have been worded differently. Sections 8, 9 and 38 of the Public Officers Ethics Act would not have been enacted. The Petitioners relied on the case of Njuguna S. Ndung'u v Ethics & Anti-Corruption Commission (EACC) & 3 others [2018] eKLR to support their submission

18. EACC's position is that it is the EACC and not Catherine Ngari who recommended the institution of criminal proceedings against the petitioners and their co-accused. It was submitted that Catherine Ngari, as its duly appointed and authorized investigator, undertook the investigation in relation to the compulsory acquisition and payment of compensation in respect of the property, on behalf of EACC as part of her duties. As such, the orders sought if granted would be manifestly aversive to public interest and prejudicial to the *personam* of Catherine Ngari. Further given that Catherine Ngari was part of the investigating team, it is unjust and unconstitutional to victimize her. EACC further submitted that no evidence was availed by the Petitioners to establish that Catherine Ngari acted in bad faith and beyond the scope of her official duties.

19. Pursuant to Article 79 of the Constitution of Kenya, 2010, Parliament enacted the Ethics and Anti-Corruption Commission Act under which EACC was established. The mandate EACC as provided in Section 11 of the Ethics and Anti-Corruption Commission Act is to *inter alia*:

investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act, the Anti-Corruption and Economic Crimes Act or any other law enacted pursuant to Chapter Six of the Constitution.

20. Pursuant to its statutory mandate, EACC tasked a team to investigate the allegations of fraudulent compulsory acquisition and irregular compensation of land for various Government projects, including the standard gauge railway. Catherine Ngari was part of that team. The Petitioner's accuse her of violating their rights by recommending their arrest and prosecution even after she had confirmed their innocence. As such, they want her to be enjoined in her personal capacity to explain herself. The question this Court then has to ask is, when is a public officer like Catherine Ngari held personally liable for the outcome of a task undertaken.

21. Section 20 of the Ethics and Anti-Corruption Commission Act protects employees of EACC from personal liability as follows:

Nothing done by a member of the Commission or by any person working under the instructions of the Commission shall, if done in good faith for the purpose of executing the powers, functions or duties of the Commission under the Constitution or this Act, render such member or officer personally liable for any action, claim or demand.

22. It is reasonable to expect that after EACC carries out investigations into allegations of corruption, the result may be a recommendation to the DPP for the prosecution of any acts of corruption. In the instant case, upon the conclusion of the investigation, a recommendation was made to the DPP for the prosecution of the Petitioners and others.

23. Article 236 of the Constitution provides in part:

A public officer shall not be—

(a) victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law;

24. In Githu Muigai & another v Law Society of Kenya & another [2015] eKLR, the High Court, while finding that Section 8 of the Office of

the Attorney General Act, protected the holder of that office from personal liability, for acts done in good faith in the course of his official duties, stated:

This provision manifests the Legislature's intention to protect and safeguard the office of the Attorney General and enable the holder to perform the functions of the office without fear of being held personally culpable, if acting in good faith, while discharging the functions of the office under the Constitution or the Act.

25. Catherine Ngari, an employee of EACC is a public officer within the meaning of Article 260 of the Constitution. I am satisfied that the investigation undertaken by Catherine Ngari, as a public officer, in respect of the compulsory acquisition and compensation of the property was done in her official capacity as an investigator of EACC. Accordingly, she is protected from personal liability by Section 20 of the Act and Article 236(a) of the Constitution.

26. Relying on the case of Njuguna S. Ndung'u v Ethics & Anti-Corruption Commission (EACC) & 3 others [2018] eKLR, the Petitioners submitted that the decision to prosecute envisages that the evidence available is admissible and sufficient and that public interest requires that prosecution be conducted. Further, that the prosecution should objectively assess the totality of the evidence both for and against the suspects and the prospect of conviction. This accords with Article 157 of the Constitution.

27. In the Njuguna S. Ndung'u case (supra), Githinji, JA stated:

In addition to the provisions of the Constitution, the principles which guide the DPP in exercising his powers are stipulated in section 4 of the office of the Director of Public Prosecutions (ODPP) Act No. 2 of 2013 and in the National Prosecution Policy formulated by DPP under powers conferred upon him by section 5 (1) (c) of ODPP Act.

The learned Judge then went on to quote paras 4B(1) and (2) of the policy.

28. The Petitioners argued that Catherine Ngari, as an accountant who did have the qualifications of a judge of the High Court as required by Article 157(3), was ill equipped or incapable of making the assessment to prosecute the Petitioners or not.

29. The submission in this regard relates to the decision to prosecute. That decision is not within the mandate of EACC which is to investigate and recommend to the DPP the prosecution of any acts of corruption, etc. The decision falls squarely on the DPP and that is the reason why the aforesaid principles that guide the DPP, referred to by Njuguna S. Ndung'u case (supra), are in the National Prosecution Policy. The subject of the present Application is not the decision to prosecute but rather, the recommendation for prosecution. As such, the authority is not, in my view, helpful to the Petitioners' case.

30. It is the Petitioners' further contention that a person who institutes proceedings under Article 22(1) of the Constitution, may enjoin any person who contravenes, violates or infringes upon such person's rights or fundamental freedom. To the Petitioners, nobody is immune under Article 22 from joinder in proceedings.

31. Article 22(1) relied on by the Petitioners provides:

Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

32. I am in agreement with the Petitioners in this regard. The right to institute proceedings under Article 22 presupposes the right to enjoin any person as a respondent. This right however is not absolute. Persons who perform their official duties in good faith are shielded from personal liability. For a public officer to be held personally liable for carrying out the functions of office, it must be demonstrated, which was not, that such officer acted in bad faith or against the law. In the present case, I find nothing in the material placed before me to lead me to the conclusion that Catherine Ngari acted maliciously or in bad faith in the discharge of her investigative duties relating to the property, as an officer of EACC. Accordingly, by dint of Article 236 of the Constitution and Section 20 of the EACC Act, Catherine Ngari is insulated from personal liability.

33. In the end, I uphold the preliminary objection. The prayer for joinder of Catherine Ngari is incompetent and is hereby struck out. The prayer for amendment of the Petition is however allowed in so far as the same does not relate to the joinder of Catherine Ngari as a respondent in the Petition. Costs in the cause.

DATED, SIGNED and DELIVERED in MOMBASA this 22nd day of May 2020

M. THANDE

JUDGE

In the presence of: -

..... for the Applicant

..... for the 1st & 2nd Respondents

..... for the 3rd & 5th Respondents

..... for the 4th Respondent

.....Court Assistant