



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI CORRUPTION & ECONOMIC CRIMES DIVISION

CRIMINAL REVISION NO 13 OF 2018

1. PROF. MUHAMMED ABDALLA SWAZURI....APPLICANT/1ST ACCUSED
- 2 . DR. SALOME LUDENYI MUNUBI.....2ND ACCUSED
3. TOM AZIA CHAVANGI.....3RD ACCUSED
4. FRANCIS KARIMI MUGO.....4TH ACCUSED
5. ATANAS KARIUKI MAINA.....5TH ACCUSED
6. VICTOR WAHOME KARIUKI.....6TH ACCUSED
7. ELIJAH MWENDA NYAMU.....7TH ACCUSED
8. JOHN MWANGI MWANIKI.....8TH ACCUSED
9. CAROLINE NABLAYO KITUYI.....9TH ACCUSED
10. PETER NGANGA MBURU.....10TH ACCUSED
11. GLADYS MWIKALI MUYINGA.....11TH ACCUSED
12. OBADIAH MBUGUA WAINAINA.....12TH ACCUSED
13. DAVID BARNO SOME.....13TH ACCUSED
14. ESTHER FURA SOME.....14TH ACCUSED
15. DASAHE INVESTMENT LIMITED.....15TH ACCUSED
16. KEIBUKWO INVESTMENT LIMITED.....16TH ACCUSED
17. OLOMOTIT ESTATE LIMITED.....17TH ACCUSED

VERSUS

REPUBLIC.....RESPONDENT/APPLICANT

ETHICS AND ANTI CORRUPTION COMMISSION.....INTERESTED PARTY

RULING

1. The Applicant filed the Notice of Motion dated 21st January 2019 and filed on 22nd January 2019 under Articles 49(1)(h), 169(3) of the

Constitution and section 7 and 51 of the 4th schedule to National Land Commission Act (NLCA) seeking the following orders:

(2) That this court be pleased to set aside/vary its decision made on 1st November 2018 and allow the Applicant to convene meetings of the National Land Commission whose members include seven witnesses in Milimani ACC No 33 of 2018 Republic v Muhammad Swazuri & Others.

(3) That this court be pleased to give any other orders/directions it deems fit.

(4) That costs of this application be in the course.

2. The application is premised on the following grounds which are replicated in the supporting affidavit of the Applicant. The following are the grounds:

(a) The term of the present National Land Commission (NLC) membership ends on 19th February 2019 and the Applicant, who chairs the NLC is required of necessity to convene meetings and prepare for handover and transition together with other commissioners.

*(b) Via its ruling of 1st November 2018, this court allowed the Applicant, who is the Chairperson of the National Land Commission to return to office upon issuing an undertaking that the “ **shall not interact and/or interfere with the witnesses his place of work and also any witness.**”*

(c) Seven (7) witnesses lined up to testify in ACC No. 33 of 2018, namely Abigael Mbagaya, Dr Tom Konyimbih, Dr Rose Musyoka, Emma Muthoni Njogu, Abudikadir Adan Khalif and Clement Isaiah Lenashuru, are Commissioners (members) of the National Land Commission.

(d) Though the Applicant has been able to discharge his work as the Chairperson of the National Land Commission, he has restrained himself from calling for meetings of the National Land Commission in view that his fellow members of the commission are witnesses.

(e) Pursuant to the fourth Schedule of the National Land Commission Act, only the Applicant can lawfully convene meetings of the National Land Commission and his absence from any meeting renders the decision null and void by virtue of section 7 of the National Land Commission Act.

(f) The Applicant will be unable to undertake this public duty unless this court varies its orders requiring that he should not interact with witnesses.

(g) The Applicant undertakes that he shall not discuss any matter pertaining to ACC no. 33 of 2018 and if this court so determines, the Applicant is willing to notify the investigative agency, the Ethics and Anti Corruption Commission of the dates of the meeting so that it can send a representative to ensure that matters pertaining to ACC No. 33 of 2018 does not become a subject of discussion.

3. The Applicant in his supporting affidavit annexed a copy his undertaking pursuant to this court's Ruling of 1st November 2018 (MS2) and copy of the list of witnesses (MS3). He averred that he has been able to discharge his work as the chairperson of NLC in respect to all matters save for convening meetings since his fellow Commissioners are witnesses.

4. He therefore on this ground seeks to have the court vary its orders of 1st November 2018 and allow him interaction with his fellow commissioners in form of a meeting for preparation of a handover to the new commission.

5. Mr Okubasu for the Applicant reiterated what is in the grounds and supporting affidavit. He submitted that only two witnesses in the criminal case were employees of NLC while the rest were commissioners over whom he has no control. He stressed that it is only the Applicant who should call for a meeting at the NLC. Further that the commissioners term of office expires on 19th February 2019 and a handing over report must be done. He finally submitted that the Applicant was ready to notify the Interested party herein (EACC) of any meeting to be held to ensure that the criminal case ACC No 33 of 2018 is not discussed.

6. The Application was opposed by the Respondent who relied on its replying affidavit sworn on 29th January 2019. In the affidavit sworn by Esther Njuguna a prosecution counsel in the Respondent's office it was averred that the Applicant had not made any basis for the review of the orders of the prevailing bail terms. That no new facts or circumstances have been established. Further that the Applicant should not be allowed to renege on his own undertaking which was not influenced.

7. She further averred that upon the Applicant's return to the office, the said office was broken into and material documents and evidence stolen therefrom. That since the Applicant is not the office he holds, the order for him not to interfere with witnesses cannot bring the office to a halt. There was a great fear of his interference with witnesses if the application is allowed.

8. Mr. Muteti for the Respondent submitted that the application was misconceived and had no legal basis. He argued that considering the application, annexures, letter dated 1st November 2018 (MS2) in which he made an undertaking, he found the Applicant to be an innovative litigant who takes court orders very lightly. He wondered whom NLC could be handing over to when the terms of the commissioners comes to an end. His request counsel said was bent on interfering with the State witnesses.

9. Mr. Muteti submitted that when the Respondent sought review of the orders of 1st November 2018 there had been no indication of any difficulty in transacting any business at NLC. He said the Applicant had failed to satisfy the court as to any change of circumstance to warrant the grant of the orders sought.

10. Counsel referred to two cases namely:

(i) Republic v Leonard Kanari Gitau [2017] eKLR paragraphs 18 and 19 where the court stated:

“From the ruling under review, it is clear that this court declined to grant the applicant bond on the ground that there was possibility of the same interfering with two key prosecution witnesses based on the special relationship between them and the accused and further due to the fact that the same was an influential member of society who was a licenced gun holder who was likely to create fear in the potential prosecution witnesses.

From the material placed before the court, the said two witnesses have since testified before Lady Justice Lesiit and their evidence is now safely on record. It has further been deponed by the accused person, which has not been controverted, that upon his arrest he surrendered his firearm to the police. This therefore means that the circumstances prevailing as at the time when the same was denied bail have since changed thereby entitling the same to right of review”

(ii) DPP v Ummulkheyr & 3 Others [2015]eKLR paragraphs 13 and 15 Where the court observed.

“This matter came to me for revision vide High Court Miscellaneous Revision Criminal Application No. 169 of 2015. And even though this court is vested with unlimited original jurisdiction in criminal and civil matters, I am of the considered view that it would not be proper practice to review, vary ,discharge or vacate my own orders arrived at on revision of the lower court’s decision. In fact as it is now, this court is functus officio in so far as that order of 22nd October 2012 is concerned.....

If I consider and allows this application by the Directory of Public Prosecution, I would be opening a pandora box and set a dangerous precedent, that a party who is not happy with a court ruling will always come up with new issues to invoke this court’s jurisdiction”

11. It was his final submissions that none of the Commissioners has testified in the matter before the Chief Magistrate’s court and interference must be avoided. The Applicant can always prepare for handing over after 19th February 2019.

12. The Interested Party relied on its grounds of opposition dated 25th January 2019. Mr Muraya appearing for it associated himself with the submissions by Mr. Muteti for the Respondent. His main ground was that there was no legal or factual ground given to this court to warrant the varying of this court’s orders of 1st November 2018. He argued that there was nothing new presented including the vacation of office date to warrant the issuance of the orders sought. He noted that the Applicant was not handing over to any of the Commissioners as all of them were leaving office.

13. Counsel contended that there was no justification for calling of meetings for handing over. He submitted that the conditions the subject of this application were not imposed on the Applicant. He voluntarily made an undertaking while knowing his term was ending on 19th February 2019 and nothing had changed. He could as well do handing over notes and leave them at NLC since he had been working. All in all counsel submitted that the Application lacked merit.

14. In a rejoinder Mr. Okubasu submitted that there was no danger or prejudice to be caused if the application were to be allowed. He contended that section 6 of schedule 4 of the NLCA requires 4 meetings to be held and so the Applicant has to hold meetings. He added that the authorities cited were not relevant.

Analysis & determination

15. This court on 1st November 2018 on Application by the Applicant varied bond terms issued by the Magistrate’s court in respect to the Applicant in Nrb ACC No 33 of 2018. Part of the conditions were that the applicant was not to interfere with any witnesses or documents at the NLC. He was to make an undertaking before the trial court to this effect which he did (MS2). This was therefore binding on him.

16. I have considered the Application, supporting and replying affidavits, grounds of opposition, submissions and cited authorities. The issue I find falling for determination is whether the Applicant has met the threshold for variation of the bail conditions set by this court on 1st November 2018.

17. The application before me is premised on Article 49(1)(h) of the Constitution which provides that:

(1) An arrested person has the right—

“ to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

The other cited provision is Article 169(3) of the Constitution which is non-existent.

18. The Fourth schedule of the NLC Act is about meetings and procedure of Commission. Section 1 of the 4th schedule provides;

The Commission shall decide when and where it meets and the meetings shall be convened by the chairperson.

Section 7 provides:

The Commission may invite any person to attend any of its meetings and to participate in its deliberations, but such person shall not have a vote in any decision of the Commission.

19. It is on the basis of these provisions that the Applicant wants this court to vary its order prohibiting him from interfering/interacting with witnesses at his work place or any other witness in the case before the Magistrate's Anti-Corruption court. His main ground is that he has been working so well but is unable to call for a meeting of the Commissioners who are witnesses in the pending criminal case.

20. He adds that since his term and that of the other commissioners ends on 19th February 2019 the intended meeting/meetings is/are very crucial for purposes of making the handing over report.

21. The application has been strongly opposed by the Respondent and Interested Party who are wondering what the urgency of the meeting is as there are no new commissioners in sight. They are opposed to the Applicant's interference and interacting with the witnesses since the said witnesses have yet to testify.

22. I have critically considered the scenario the Applicant has presented to this court, and make the following observations:

(i) The orders made by this court on 1st November 2018 were as a result of a Revision application filed by the Applicant against the bond terms issued by the trial court in the criminal case. In fact from the point of issuance of that order, the matter went back to the Magistrate's court for implementation. It became part of that court's record. The court now seized with the matter is the trial court. The Applicant herein wants to put this court in what would turn out to be parallel proceedings before this court and the trial court. I will not allow that.

(ii) There is no new material that has been presented before this court. The issue of the Applicant and others vacating office on 19th February 2019 or there about is not anything new. They knew about it even before being charged before the Anti-corruption court.

(iii) Holding of meetings e.t.c is a purely internal matter and personal to NLC. This court would not want to turn itself into a supervisor of the National Land Commission's internal affairs:

(iv) For the above reasons I decline to grant the orders sought. The application lacks merit and is dismissed.

Orders accordingly.

Delivered, signed and dated this 12th day of February 2019 in open court at Nairobi.

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HEDWIG I. ONG'UDI

JUDGE