



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

MISCELLANEOUS APPLICATION NO. 3 OF 2019

FORMERLY JUDICIAL REVIEW NO 510 OF 2018

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE CRIMINAL PROCEDURE CODE, CAP 75 LAWS OF KENYA

AND

IN THE MATTER OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2013, LAWS OF KENYA

AND

IN THE MATTER OF THE ANTI-CORRUPTION CASE NO. 48 OF 2018 IN THE CHIEF MAGISTRATES COURT AT MILIMANI

BETWEEN

REPUBLIC OF KENYA.....APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

CHIEF MAGISTRATES COURT MILIMANI LAW COURTS.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

EXPARTE: 1. DANSON MUCHEMI NJUNJI

2. ROBERT MURIITHI MUNA

3. M/S WEBTRIBE LIMITED.

RULING

1 By a chamber summons dated 27th December 2018 and filed in court the same day, the exparte applicants **Danson Muchemi Njunji, Robert Muriithi Muna and M/s Webtribe Limited** seek from this court leave to institute Judicial Review proceedings for the following

orders:-

i An order of Certiorari to remove into the Honourable Court and quash the decision of the 1st and 2nd Respondents to charge and prosecute the Ex parte Applicants in respect to the subject in the Milimani Chief Magistrate's Court, Anti-Corruption Case No. 48 of 2018.

ii An order of Prohibition directed to the Respondents prohibiting further proceedings in the Milimani Chief Magistrate's Court, Anti-Corruption Case No. 48 of 2018 and further prohibiting the 1st and 2nd Respondents from instituting any future charges against the Ex Parte Applicants in respect to the subject.

iii That the grant of leave herein do operate as a stay of the proceedings in the Milimani Chief Magistrate's Court, Anti-Corruption Case No 48 of 2018 pending the hearing and determination of this matter.

iv. Costs of this Application to be in the cause.

2 The chamber summons is predicated on the grounds on the face of the application, the statutory statement and verifying affidavit on 29th November, 2018.

3 The *Ex-parte-Applicants* have termed the decision of the 1st Respondent to charge them with fraudulent acquisition of public property while knowing very well that the purported fraudulent acquisition of public property is fictitious an abuse of power.

4. The *Ex parte* Applicants were jointly charged vide Nairobi ACC No. 48 of 2018 with the offence of fraudulent acquisition of public property. The particulars of the offence being that between 15th August 2014 and 31st October 2018 in Nairobi County within the Republic of Kenya the 1st and 2nd *Ex parte* Applicants being the Directors of Web Tribe Limited a Limited Liability Company respectively fraudulently acquired public property to wit Kshs. 1,103,060.853.89) from the National Hospital Insurance Fund.

5 They pleaded not guilty and each was released on a cash bail of Kshs.2,000,000 with a mention slated for 29th January 2019.

6. On 11th December 2018, the Prosecution applied for and obtained Orders from the Court compelling them to continue rendering services under the same contract for provision of an Integrated Revenue Management System.

7 That prior to being charged in court, the 1st and 2nd Respondents through their officers conducted a search in their offices where the 1st *Ex-parte* Applicant was asked detailed questions relating to the contract for provision of an Integrated Revenue Collection Services system.

9 He explained that the history of the contractual relationship between the Company and National Hospital Insurance Fund is traceable to the Tender Request for Proposal by the National Hospital Insurance Fund (hereinafter the contract) Tender No. NHIF/018/2013-2014). Subsequently, the company submitted it's bid and attended the bid opening with other bidders who had successfully dropped their tenders on time.

8 Following the competitive process, he received a Notification of Award vide a letter (DMN-7) dated 13th June 2014 indicating that the company had been awarded the contract for Provision of Integrated Revenue Collection Services. Afterwards, he signed the contract of Provision of Integrated Revenue Collection Services (Tender No. NHIF /018/2013-2014) dated 15th August, 2014 between the company and National Hospital Insurance Fund.

9 He gave a detailed analysis on how much the company received as initial implementation fee from NHIF, the commissions paid to the company through Jambo Pay Services and that upon expiry of the contract on 30th June, 2017 the contract was extended vide a letter (DMN-10 and DMN-11) dated 24th July 2017 for six months till 31st December 2017.

10 However, towards the completion of the contract, NHIF issued a tender notice, Request for Proposals for System Purchase for Provision of an Integrated Revenue Management System(RFP/SSSM No. NHIF/001/2017-2018). The company put in a bid and vide a letter dated 25th May 2018. Afterwards, the company was informed that it had been successful in the tender for purchase of Integrated Revenue Collection Management System(RFP/SSSM No. NHIF/001/2017-2018) on 4th June 2018 at a contract price of Kshs. 495,205,588.74. That so far, the total fees earned by the company trading as Jambo Pay for the two contracts has been Kshs. 1,123,984,975.52.

11 Thus it was the *Ex-parte* Applicants case that the decision of the 1st Respondent to charge them with fraudulent acquisition of public property while knowing very well that the purported fraudulent acquisition of public property is in fact, cumulative payments for services rendered under the contract for provision of Integrated Revenue Collection and on going contract for System Purchase for Provision of an Integrated Revenue Management System is utter abuse of power and the court process.

12 The application was opposed by the 1st and 2nd Respondents in a replying affidavit dated 23rd January 2019 sworn by CI Nephath Marubu the lead investigating officer in this matter. He averred that in September 2018, the Directorate of Criminal Investigations received a report concerning allegations of financial misappropriation at NHIF arising out of unlawful award and extension of contract for Tender No. NHIF/018/2013-2014 for provision of Integrated Revenue Collection Services to the company.

13 Upon investigations, they established that a requisition for Multi-payment plat form was raised by Gilbert Gathuo Kamau to the General Manager, ICT on 6th January 2014 and was then received and approved by the General Manager ICT Mr. Karingo Njoka on the same day.

Thereafter, the authority to source for an integrated Revenue Collection System accompanied by a Purchase Requisition Note S/No.001372 by NHIF was made and approved by the Chief Executive Officer then, Mr. Simeon Ole Kirgotty on 31st January 2014.

14 Since the procurement records for tender No. NHIF/018/2013-2014; were not captured in the procurement plan for the financial year 2013-2014, the then Senior Assistant Manager Procurement and Supplies one Maurice J. Ouma prepared a procurement plan (NM-3) for the item on 4th February 2014 whose estimated cost provided by the user department was Kshs. 30,000,000. Subsequently, on 10th February 2014, an advertisement for the said Tender was placed in the local daily newspapers among them in the Daily Nation Newspaper (NM-4(9a) & NM4(b).

15 The following companies responded to the Tender advertised by the date of opening:-

i) Eclectics International

ii) Craft Silicon Ltd.

iii) Essel Enterprises Ltd.

iv) Webtribe Ltd

v) Fintech Kenya Ltd

vi) Akkad Systems Ltd

vii) Gestait Gild Ltd.

16 That a perusal of the tender documents indicated that while all the other bidders conformed to the advertisement that sought for “provision of integrated revenue collection system, the *Ex-parte* Applicants submitted tender (NM-5) that were for the provision of integrated revenue collection services which did not meet the specification for what NHIF had tendered through tender no. NHIF 2018/2013-2014.

17 That notwithstanding, on 29th May 2014, the Tender Evaluation Committee recommended award of Tender No. NHIF/018/2013-2014 to the lowest bidder that is the company at Kshs. 49,513,440.00. As a result, a contract for provision of Integrated Revenue Collection Services was awarded instead of contract for provision of Integrated Revenue Collection System.

18 Thereafter, on the 15th August 2014, NHIF Board of Management and the company entered into a contract agreement for provision of Integrated Revenue Collection Services vide Tender No.NHIF 018/2013-2014 for a period of three years which was to expire on 30th June, 2017.

19 According to the 2nd Respondent, this was peculiar since despite the fact that the *Ex-parte* Applicants had not met the major specification to provide a system, they unlawfully entered into an agreement for provision of services with NHIF officials who are their co-accused in ACC 48 of 2018. The service for which the contract was entered into cost over Kshs. 500M surpassing the provision of Kshs.30 million in accordance with the procurement plan.

20 In addition to this, he averred that even after the expiry of the said illegal contract which had occasioned a loss of over Kshs. 500 million, the *Ex-parte* Applicants in collusion with senior officials of NHIF entered into a further illegal extension contract leading to a payment of over Kshs. 253 which was over and above the estimated budget.

21 The deponent further averred that there was a further attempt to defraud NHIF through single sourcing of the 3rd *Ex parte* Applicant to provide similar services to the NHIF. This he said was orchestrated by senior officers at NHIF, for purposes of siphoning of colossal public funds from the said institution.

SUBMISSIONS

22 Mr. Ogolla submitted that the *Ex- parte* Applicants who are directors of a limited liability company, are not employees of NHIF and that their application relates to the legality of the decision to charge them. He submitted that the said decision to charge them was full of malice and ill will.

23 Counsel further submitted that the *Ex-parte* Applicants complied with the conditions, provided the services and there was no conspiracy between the decision makers and workers of NHIF in this matter.

24 Mr. Ogolla stated that the DPP sought enforcement of the provision of the services by NHIF, and wondered whether the Respondents had the evidence to show that the *Ex-Parte* Applicants sabotaged anything in relation to this.

25 M/s Kimuri for the 1st and 2nd Respondents in opposing the application submitted that the DPP exercised his powers within the law as the decision to charge the *Ex-Parte* Applicants was reached upon evaluation of the evidence tendered. She further submitted that in as much as

the *Ex-parte* Applicants were not the only bidders, the tender (NM-4) was specific but what Applicants bid for was something different.

26 Counsel further submitted that the system was not installed at NHIF, but at a different premise. She added that NHIF was paying for services and not a system which ought to have been installed. After the contract expired in 2017, two illegal extensions were done and as a result, Kshs. 253M was lost.

27 M/s. Kimuri further submitted that the decision by the 3rd Respondent to have the company continue providing services was based on public interest as this system assists all Kenyans to efficiently access health services since 2014. She further submitted that meetings are on going to find a solution on this issue of the integrated system and urged the court to dismiss the *Ex-Parte* Applicants application as it lacks merit.

28 Mr. Ogolla for the *Ex-parte* Applicants in a rejoinder submitted that there was no evidence that the 3rd *Ex-parte* Applicant has not complied with the contract. He accused the 2nd Respondent of being unfair as apart from public interest there was no evidence of commercial interest. He urged the court to grant leave and the same leave to operate as stay.

DETERMINATION

29 I have considered the application dated 27th December, 2018, the statutory statement and verifying affidavit, replying affidavit by the 1st and 2nd Respondents and oral submissions in court. I find the following issue to fall for determination:

I) whether the *Ex-parte* Applicants have met the threshold for the grant of leave to file for Judicial Review and whether such leave if granted should operate as stay.

30 Commencing with the prayer for leave to apply for Judicial Review orders of certiorari and prohibition, the *Ex-parte* applicants allege that the decision to charge them with the criminal offence in Nairobi CM'S ACC NO. 48 OF 2018 is an abuse of power and an act of pure malice.

31 It is the 1st and 2nd Respondents' contention that the charges against the *Ex-parte* Applicants are based on evidence which establishes that they fraudulently acquired monies under the disguise of implementation of the contractual agreement between them and NHIF.

32 The yardstick for grant of leave to institute Judicial Review proceedings was set and is now settled vide several judicial decisions including **Republic vs County Council of Kwale & Another Exparte Kondo & 57 Others HCC Miscellaneous Application No. 384 of 1996 and Polycarp Wathuta Kanyugo & 2 others vs The County Government of Kirinyaga [2014] e KLR** where it was held inter alia that leave to institute Judicial Review proceedings is not granted as a matter of course or as a mere formality. Further, that although at the leave stage the Applicant is not expected to go into the depths of the intended application for Judicial Review, he/she must nonetheless satisfy the court that they have an arguable prima facie case which merits further investigation by the court.

33 In addition an application for leave is supposed to exclude frivolous and vexatious assertions which prima facie appear to be abuse of the process of the court or are statute barred.

34 In this case, it is alleged that the decision by the 1st and 2nd Respondents to charge the *Ex-parte* Applicants with fraudulent acquisition of public property while at the same time obtaining orders compelling the *Ex-Parte* Applicants to continue rendering services under the same contractual agreement is a farce, unconstitutional and utter abuse of power and the court process.

35 Without delving into the merits of the decision to charge the *Ex-parte* Applicants, I have no doubt in my mind that prima facie, the *Ex-Parte* Applicants claim is not frivolous or vexatious and warrants a further in-depth investigation at a later stage. I will not say more than that.

36 For that reason, I find the application for leave merited. I grant them leave to institute the Judicial Review proceedings as sought in the chamber summons dated 27th December 2018 in terms of prayers (i) and (ii) thereof. The substantive motion to be filed and served within 21 days.

37. On the prayer (no. iii) for an order that the leave so granted do operate as stay of the criminal proceedings, I dare say that the same is not automatic. The *Ex-parte* Applicants must show that unless stay of the impugned proceedings is granted the intended application, if successful, will be rendered nugatory and therefore the Applicant will be rendered a pious explorer in the judicial process.

38 In this case, it is the *Ex-parte* Applicants claim that the decision of the 1st Respondent to charge them with fraudulent acquisition of public property while knowing very well that the purported fraudulent acquisition of public property is fictitious and malicious and is an abuse of power, the court process and a total lack of good faith.

39 The 1st and 2nd Respondents in their replying affidavit averred that the charges against the *Ex-parte* Applicants are based on evidence which established that they fraudulently acquired monies under the disguise of implementation of the contractual agreement between them and NHIF.

40 Furthermore, in my view, the issues of evidence in this case are contentious and therefore the accuracy and correctness of the evidence can only be assessed and tested by the trial court which is best equipped to deal with the quality of the evidence adduced in support of the charges.

41 In any case, the law does not bar a criminal process to continue side by side with civil proceedings see **section 193A of the Criminal Procedure Code**. Each of the processes is intended to achieve justice for all the parties. Where there is prima facie evidence of a criminal offence having been committed the police have the power to investigate and charge the suspect for prosecution by the DPP.

42 In my humble view, the *Ex- parte* Applicants have not demonstrated to this court that the pending criminal proceedings which they have been allowed to challenge have absolutely no foundation as the decision to prefer charges against them was well assessed by the 1st and 2nd Respondents. That cannot be dismissed at face value. It has also been confirmed that the mention on 29th January 2019 was for a pre-trial conference by the trial court. The hearing is yet to take off: The *Ex-parte* Applicants are therefore unlikely to suffer any prejudice if stay is not granted.

43 Furthermore, nothing has been placed before this court to establish any ill will or outright malice by the 1st and 2nd Respondents against the *Ex-parte* Applicants. I would in the premises decline to interfere with the **Cr. Case ACC No. 48 of 2018**. The application for leave to operate as stay is declined. Costs in the cause.

Orders Accordingly.

Delivered dated and signed this 1st day of February 2019 in open court at Nairobi.

HEDWIG I. ONG'UDI

JUDGE