



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

CRIMINAL REVISION NO. 4 OF 2019

REPUBLIC.....RESPONDENT

VERSUS

PROF. MUHAMMAD ABDALLA SWAZURI..... APPLICANT/1ST ACCUSED

DR. SALOME LUDENYI MUNUBI.....2ND ACCUSED

TOM AZIZ CHAVANGI 3RD ACCUSED

FRANCIS KARIMI MUGO 4TH ACCUSED

ATANAS KARIUKI MAINA 5TH ACCUSED

VICTOR WAHOME KARIUKI 6TH ACCUSED

ELIJAH MWENDA NYAMU 7TH ACCUSED

JOHN MWANGI MWANIKI 8TH ACCUSED

CAROLINE NABALAYO KITUYI 9TH ACCUSED

PETER NGANGA MBURU 10TH ACCUSED

GLADYS MWIKALI MUYANGA 11TH ACCUSED

OBADIAH MBUGUA WAINAINA 12TH ACCUSED

DAVID BARNO SOME 13TH ACCUSED

ESTHER FURA SOME 14TH ACCUSED

DASAHE INVESTMENT LIMITED 15TH ACCUSED

KEIBUKWO INVESTMENT LIMITED 16TH ACCUSED

OLOMOTIT ESTATE LIMITED 17TH ACCUSED

RULING

Brief Background

1. Through a Notice of Motion dated 15th February 2019 filed the same day under certificate of urgency, Professor Muhammed Abdalla

Swazuri (herein referred to as “the applicant”) sought orders as follows:

- (1) That this application be certified as extremely urgent and one deserving to be heard ex parte in the first instance.**
- (2) That this honourable court be pleased to call for and examine the record of the proceedings in Anti-Corruption Case No. 33 of 2018 for the purpose of satisfying itself as to the correctness, legality or propriety of the proceedings since 12th February 2019, the reasons/order of recusal of Hon. Mugambi; the ex parte orders issued on 12th February 2019; the orders issued on 14th February 2019; and subsequent orders issued in respect of the application dated 12th February 2019.**
- (3) That the honourable court be pleased to set aside the order of recusal of Hon. Mugambi; the ex parte orders issued on 12th February 2019; the orders issued on 14th February 2019; and any other orders issued subsequent to the order of 14th February 2019 in respect of the application dated 12th February 2019.**
- (4) That any other relief that this honourable court shall deem fit to grant in lieu of the above.**
- (5) That costs of this application be provided for.**

2. The application which is brought pursuant to Sections 123, 123A and 362 of the CPC, Section 10 of the National Land Commission Act, Section 62(6) of Anti-Corruption and Economics Crimes Act, Articles 49 (1) (h) 67, 165 (6) (7) 248 (2) (b), 249 (2), 250 (6) (5) and 252 4(a) of the Constitution, is premised upon the grounds set out on the face of it and an affidavit sworn by the applicant in person on 15th February 2019. It was certified urgent on 15th February 2019 and directions made for its service upon the respondent. Upon being served, the respondent (Republic) filed five grounds of opposition on 27th February 2019. On that day, the matter proceeded with the hearing and both counsel submitted orally.

3. Brief circumstances and facts surrounding this application are that on 13th August 2018, vide ACC no. 33/18, the applicant herein and 16 others were jointly charged of various corruption related charges and arraigned before Nairobi Anti-Corruption Chief Magistrate’s Court on 18th August 2018. Upon entering a plea of not guilty, the presiding Magistrate Hon. Mugambi granted and released them on bail pending trial.

4. Their release on bail was however subject to some conditions among them; the applicant was prohibited from accessing his office unless accompanied by a police officer and that; he was not supposed to interfere with witnesses. Aggrieved by this directive, the applicant moved to the high court vide H.C. Revision case no. 13/18 seeking revision of the condition barring and or limiting him access to his office. His application was based on the argument that, as a constitutional office holder being the Chairman (Commissioner) of the National Land Commission could not be barred from holding and or accessing his office by dint of Section 62 (6) of the Anti Corruption and Economic Crimes Act.

5. Upon delivering her ruling in Criminal revision No. 13/18, Hon. Lady Justice Ong’udi revised the order of the lower court regarding the applicant’s access to his office pending trial. The Judge upheld the application and allowed the applicant to access his office as a constitutional office holder as long as he did not interfere with witnesses. Subsequent attempts by the state seeking to stay the orders of the high court through their application dated 21st January 2019 did not bear any fruit as the same was dismissed on 12th February 2019.

6. However, on 12th February 2019, the state filed an application before the trial court seeking to bar the applicant from accessing his office. When the file was placed before the trial court presided by Hon. Mugambi, the learned Magistrate disqualified himself from hearing the application on the basis that; he had previously and extensively expressed his legal mind on the same subject and that, the high court had already made orders on the same. He referred the file back to Hon. Ogoti being the head of the Anti-Corruption court for further directions.

7. On the same day, Hon. Ogoti took charge of the matter and issued ex parte orders barring the applicant from accessing the office on grounds that he was interfering with witnesses. Interpartes hearing was then fixed for 15th February, 2019.

8. However, on 13th February 2019, the applicant herein filed a notice of motion under certificate of urgency seeking the court to set aside its ex parte orders issued in favour of the state the previous day. The court directed service of the said application upon the state who were to file their response by 4.30pm and hearing at 5.00pm same day. After canvassing the application, a ruling was fixed for 14th February 2019 on which day the application by the applicant was dismissed as being incompetent. Interpartes hearing of the application by the state dated 12th February 2019 and slated for 15th February 2019 was however to proceed as scheduled.

9. Unfortunately, due to pressure of time, the interpartes hearing of the application dated 12th February 2019 was rescheduled to 21st March 2019 hence pending hearing and determination.

Applicant’s Case

10. The applicant’s case is anchored on two grounds. Firstly, that the trial court exceeded its mandate by ordering the applicant not to access his office during the pendency of the trial court’s proceedings on account that he was interfering with witnesses thus illegally reviewing the high court decision which had allowed the applicant as a constitutional office holder to access his office. Secondly, it is the applicant’s contention that, the recusal of honourable Mugambi from hearing this matter should be set aside as he is the only one who is versed with full particulars of the case having taken part of the evidence. The applicant therefore prayed that the court do direct that the matter does proceed before Hon. Mugambi. In his submission, Mr. Okubasu counsel appearing for the applicant reiterated contents contained in the affidavit in support. He submitted that, his client was apprehensive that he will not get justice before Hon. Ogoti who had a predetermined mind in

cancelling his client's bond. Learned counsel however conceded that his client's term having expired sometime last week, access to his office is not very relevant save for collection of his personal items.

Respondent's Case

11. In response to the applicant's case, the respondent filed five grounds of opposition stating that; the application herein is incompetent and lacks merit; application herein is calculated at engaging the court in a speculative and academic exercise; that the application is overtaken by events; that the applicant is seeking orders the court cannot grant and; that the court cannot grant orders in vain.

12. In her oral submissions during the hearing, M/s Mwamburi appearing for the state stated that, the applicant's term of office having expired, the issue of access to the office is overtaken by events. Regarding Hon. Mugambi's recusal, M/s Mwamburi submitted that, Mr. Ogoti is properly seized of the matter being the in charge hence has powers to re-allocate the file.

Analysis and Determination

13. I have considered the application herein, supporting affidavit and grounds of opposition plus rival submissions. Issues that render for determination are; firstly, whether the orders by Hon. Ogoti issued on 12th February 2019 barring the applicant being a constitutional office holder from accessing his office was legal or proper. Secondly, whether this court can set aside the recusal order by Mr. Mugambi disqualifying himself from hearing the matter.

14. Authority to exercise supervisory powers of revision over subordinate courts or person, body or authority exercising a judicial or quasi judicial function under Article 165 (6)& (7) of the Constitution is vested in the high court. Under Article 165 (7) of the Constitution, this court can call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6) and may make any order or give any direction it considers appropriate to ensure fair administration of justice. The said mandate is further solidified under Section 362 of the CPC which empowers the high court to call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or raised and as to the regularity of any proceedings of any such subordinate court.

15. Although clothed with these immense powers, the high court is also subject to observance of certain legal parameters which guide the process of revision. In other words, before discharging such function, the high court must be satisfied that the subordinate court must have acted on a wrong principle in arriving at an incorrect, illegal or improper decision or order **(See Samuel Njuguna Githinji vs R (1992) eKLR and Joseph Waweru vs R (2014) eKLR)**.

16. In the instant case, the court is being asked to set aside orders barring the applicant from accessing his office. The facts and circumstances culminating to the making of the impugned orders is not in dispute. However, it is common ground that the applicant's term of office has since expired and he is no longer a constitutional office holder. The issue of accessing the office or not is spent. I need not belabour on this point as the same is overtaken by events. It will not be of any consequence to make a determination on the same.

17. Regarding the disqualification of Mr. Mugambi from hearing the matter in question, the same was aptly put in writing. Before a judge or magistrate disqualifies himself or herself from hearing a case, he /she must state reasons which Mr. Mugambi has done. In his wisdom, he had dealt with the issue before him extensively and the high court having reviewed his orders, he had no business hearing the same again. Although the learned Magistrate would still have heard the application and made a decision on merit his previous order notwithstanding, he had a choice for the sake of justice to be seen to have been done by an independent mind who had not handled similar application to hear the same.

18. The issue of recusal is quite fragile though a personal decision. Unless a recusal is likely to occasion either party substantial injustice or lead to a miscarriage of justice, a superior court cannot force a judicial officer to hear a matter. I do not see anything irregular, illegal, improper or incorrect in Mr. Mugambi recusing himself. Recusal of a judicial officer from hearing a case before him or her is a daily occurrence in our judicial process hence nothing unusual or prejudicial to justice.

19. Regarding the applicant's and Mr. Okubasu's application that they will not get justice before Hon. Ogoti, there was no basis held out to justify that argument. The claim is merely speculative based on alleged unfavourable orders made before against the applicant by Hon. Ogoti. That cannot be the basis of revision orders. If that were to be condoned, courts will be held captive by litigants who will then forum shop for favourable or friendly courts thus jeopardizing the entire judicial process.

20. For the above reasons stated, it is my holding that the application before me does not meet the threshold for grant of revisionary orders as envisaged under Articles 165(6) and (7) as well as Sections 362 and 364 of the CPC. Accordingly, the application herein is hereby dismissed and the original file be returned to the in charge Anti-Corruption Chief Magistrate's Court for further directions on who is to hear the case.

Order accordingly.

DATED, DELIVERED AND SIGNED AT N AIROBI ON THIS 13TH DAY OF MARCH, 2019.

J.N. ONYIEGO

JUDGE