



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISCELLANEOUS CRIMINAL APPLICATION NO. 56 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 19, 20 (1) (2) (3) & (4) , 21, 22, 23, 29(a), 48, 49 h) 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.

-AND-

IN THE MATTER OF: APPLICATION BY SHAKEEL AHMED KHAN AND NAZIR AHMED MATABKHAN FOR ANTICIPATORY BAIL/BOND PENDING ARREST AND/OR CHARGES.

-AND-

IN THE MATTER OF: CRIMINAL PROCEDURE CODE CHAPTER 75 LAWS OF KENYA, THE INHERENT JURISDICTION OF THE HONOURABLE COURT, THE GENERAL PRINCIPLES OF NATURAL JUSTICE AND THE RULE OF LAW.

-BETWEEN-

- 1. SHAKEEL AHMED KHAN**
- 2. NAZIR AHMED MATABKHAN.....APPLICANTS**

VERSUS

- 1. REPUBLIC**
- 2. OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**
- 3. DIRECTORATE OF CRIMINAL INVESTIGATIONS**
- 4. ETHICS AND ANTI-CORRUPTION COMMISSION**
- 5. THE ATTORNEY GENERAL.....RESPONDENTS**

RULING

1. The genesis of the matter before me is the compulsory acquisition Land Reference MN/VI/3801 (the property), Mombasa belonging to Tornado Carriers Limited (TCL) by the National Land Commission (NLC) upon the request of the Kenya National Highways Authority (KeNHA) for the construction of Mombasa Southern Bypass and Kipevu New Highway Container Terminal link road. On 16.4.19, Noordin Haji, CBS, OGW, the Director of Public Prosecutions (DPP) issued a press statement regarding irregular compensation by the NLC to TCL in respect of the property. The DPP stated that the Ethics and Anti-Corruption Commission conducted investigations upon receiving an

anonymous report that irregular payments had been received by NLC officials, private persons and entities. He went on to state that in 2015, the statutory valuation done indicated that the value of the portion of the property to be acquired was Kshs. 34,501,110/= and an award to that effect made to TCL. Following an alleged rejection of the award, the Chairman of the NLC directed that another valuation be done in 2017 which returned a staggering figure of Kshs. 109,769,363.00 for the same parcel of land. The NLC proceeded to pay Kshs. 55,269,363/= to TCL and Kshs. 54,000,000/= to C. W. Chege & Co. Advocates. Upon perusal and consideration of the inquiry file submitted to him by the Ethics and Anti-Corruption Commission, the DPP found that there was sufficient evidence to warrant the prosecution of 24 suspects including the Applicants, both directors of TCL.

2. It is common ground that on 18.4.19 all 24 suspects were charged in Nairobi Anti-Corruption Criminal Case No. 6 of 2019, Republic v. Mohammad Abdalla Swazuri & Others. Those not present in Court were ordered to avail themselves on 23.4.19. The Applicants however failed to avail themselves as ordered and warrants of arrest were issued against them on 23.4.19. It is this turn of events that provoked the Application before me dated 24.4.19 in which Shakeel Ahmed Khan and Nazir Ahmed Matabkhan (the Applicants) seeking anticipatory bail/bond pending arrest and/or charges in relation to any allegations concerning the acquisition and /or compensation in respect of part of Plot MN/VI/3801, Portreitz, Mombasa. The Applicants also seek that the Respondents be restrained from arresting, detaining, harassing, intimidating the Applicants in relation to any allegations concerning the acquisition and /or compensation in respect of part of Plot MN/VI/3801, Portreitz, Mombasa, pending further orders of the Court.

3. The grounds upon which the Application is premised as contained in the Application and the Affidavit of the 1st Applicant sworn on 24.4.19 are that in 2015, the award given by NLC for the portion of the property to be acquired was Kshs. 34,501,110/=. This was rejected by TCL as being too low given the developments thereon. The NLC ordered another valuation and an award of Kshs. 75,268, 253/= was given to TCL. Partial payment of Kshs. 55,269,363/= was paid to TCL in November 2017 leaving a balance of 19,998,890/= which remains unpaid to date. The bank accounts containing the part payment have been frozen by the Court following an application by the Ethics and Anti-Corruption Commission, the 4th Respondent.

4. The Applicants deny that an award of Kshs. 109,769,363/= was ever given to TCL. To the best of their knowledge, no copy of such award has been included in any proceedings in any Court by the 4th Respondent. They do not know the firm of C. W. Chege & Company Advocates and have never had any dealings with the said firm. They have recorded statements to that effect. The Applicants further claim that they and their families have been subjected to immense harassment and intimidation by the Respondents including arbitrary raids and searches of their premises without warrants. The 2nd Applicant is elderly and unwell having suffered 2 strokes 10 and 15 years ago. His health and life will be threatened if he is incarcerated. The Applicants further claim that Catherine Ngare an investigator with the 4th Respondent swore an affidavit the contents of which have exonerated the Applicants from all wrongdoing.

5. The Director of Public Prosecutions, the 2nd Respondent has opposed the Application by Grounds of Opposition dated 26.4.19. Similarly the Directorate of Criminal Investigations and the Attorney General, the 3rd and 5th Respondents respectively filed their Grounds of Opposition dated 26.4.19. The Ethics and Anti-Corruption Commission, the 4th Respondent filed grounds opposition of dated 24.4.19 and affidavits sworn by Salat Abdi on 24.4.19 and 3.5.19 and. The Respondents contend that the Applicants have not demonstrated any breach or violation of their constitutional rights. The Applicants' interpretation of the Constitution is self-serving. The issues raised by the Applicants are issues of fact which can only be determined by the trial Court. The Applicants will have an opportunity to raise any issues at the trial Court. To the Respondents therefore, the Applicants by their Application seek to circumvent and impede the administration of criminal justice system.

6. At the hearing, extensive submissions were made by the Applicants. However, the bulk of the submissions related to material that should be placed before the trial Court. The Court is mindful not to trespass into the jurisdiction of the trial Court and hence will restrict itself to the matter before it.

7. The Applicants contend that NLC gave TLC an award of Kshs. 34,501,110/= for acquisition of 0.0752 ha of the property. Following TLC's rejection in 2015, NLC commissioned another valuation. In 2017 an award of Kshs. 75,268,253/= was given to TLC. The Court was further told that on 3.11.17, NLC paid TLC Kshs. 55 million leaving a balance of over Kshs. 20 million. Given that TLC had a loan with SBM Bank on which it had defaulted, the 1st Applicant transferred the money to his mother's and sister in law's accounts in NIC Bank in December 2017. It was submitted that the Applicants have cooperated and appeared before the 4th Respondent on 4th and 5th March 2019 and recorded statements and even told the 4th Respondent where the money was.

8. The Applicants contend that the 4th Respondent having exonerated TCL, the 2nd Respondent should not be pursuing them. It was further submitted that the predictable procedure of the Anti-Corruption Court is that nobody gets bail the same day they apply for it. The Court was urged to allow the Application and various bail terms were suggested. The Respondents denied that the Applicants were exonerated by the affidavit of Catherine Ngare and argued that the Applicants have misapprehended the import of the contents of her affidavit.

9. In an application for bail pending arrest, the Court must consider whether circumstances exist that would occasion a serious breach of a citizen's fundamental right by a state organ. This was the holding of Rawal, J. (as she then was) and Kimaru, J. in Samuel Muciri W'Njuguna v Republic [2004] eKLR:

We are further of the humble opinion that the right to anticipatory bail has to be called out when there are circumstances of serious breaches by an organ of the state of a citizen's fundamental right...The right to anticipatory bail will not give a person a right not to appear before the police or any authority who would wish to question a person in connection with the commission of an offence. In the circumstances therefore anticipatory bail can only be granted upon terms that are appropriate under the circumstances of each case. In granting anticipatory bail, the High Court would be exercising its supervisory powers to prevent the abuse of the powers granted to the executive to the detriment of the individual.

10. Article 165(3) of the Constitution clothes this Court with jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. An applicant must however demonstrate to the Court existence of

circumstances that give rise to serious breaches of, or threat to, his fundamental rights. Only then will this Court exercise its supervisory powers to prevent the abuse of the powers granted to the executive to the detriment of the individual. While considering this application for anticipatory bail, the Court must ask itself whether the Respondents have abused their powers to the detriment of the Applicants and whether the intervention of this Court in exercise of its supervisory powers is necessary to prevent the abuse. In the present case, no cogent evidence has been placed before this Court demonstrating that in the carrying out of their constitutional and statutory mandate, the Respondents have abused their powers to the detriment of the Applicants or at all.

11. The Applicants have stated that their right to freedom is threatened given that warrants of arrest have been issued. It is to be noted that the said warrants were issued when the Applicants failed to attend Court as ordered, to take plea on charges that have been preferred against them. In the W’Njuguna case (supra), the Court did state that the right to anticipatory bail will not give a person a right not to appear before the police or any authority who would wish to question a person in connection with the commission of an offence. It is common ground that the Applicants were charged alongside others but when they have failed to present themselves before the trial Court. This in my view undermines the criminal justice system and the rule of law. Mumbi Ngugi, J. in Kipoki Oreu Tasur v Inspector General Of Police & 5 others [2014] eKLR held:

The criminal justice system is a critical pillar of our society. It is underpinned by the Constitution, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated.

12. I fully associate with the holding of the learned Judge that a proper functioning criminal justice system is a bastion of the rule of law. A malfunctioning criminal justice system that is subject to interference from any person or authority should concern all patriotic Kenyans. Even as they seek protection of their rights, the Applicants are enjoined by Article 10 of the Constitution of Kenya, 2010 to uphold the national values of patriotism and the rule of law set out in Article 10(2)(of the Constitution of Kenya 2010. Article 10(1) provides:

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law;... (emphasis added)

13. This Court must also caution itself to strike a balance between protecting the rights of the Applicants as guaranteed by the Constitution and interfering with the mandate of state agencies set out in the very same Constitution and statute. The law cuts both ways. Even as the Applicants seek protection of their constitutional rights, they must appreciate that the Respondents have a duty to carry out their respective constitutional and statutory mandate.

14. The Court has been urged to grant bail the terms of which shall be applicable in the trial Court, so that the trial Court will have no reason to deny the Applicants bail. The Applicants are apprehensive that once they present themselves to the trial Court, they will not be granted bond on the same date. They premise their argument on the fact that although their co-accused were granted bond, the same was not granted on the same day and they all had to spend some nights in custody.

15. In the Republic v Director of Public Prosecution & another Ex Parte Chamanlal Vrajlal Kamani & 2 others [2015] eKLR, Odunga, J observed:

The Court in determining judicial review proceedings ought not to usurp the Constitutional and statutory mandate of the Respondent and Interested Party to investigate and undertake prosecution in the exercise of the discretion conferred upon them.

16. By analogy, this Court must exercise great restraint so as not to usurp the powers of the trial Court to hear and determine an application for bond pending trial. Eventually the Applicants who have been charged, will have to submit to the criminal trial process as laid out by statute. To ask this Court to grant to the Applicants bail terms which will be applicable throughout the trial would in my view be stepping into the shoes of the trial Court and usurping its powers. In this regard I am guided by the holding of Court of Appeal in Uwe Meixner & another v Attorney General [2005] eKLR:

The criminal trial process is regulated by statutes, particularly, the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge...It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.

17. An application for bond pending trial is best handled by the trial Court which will consider all circumstances of the case. Further, unlike in this Court, the Applicants will be present before the Court. It would indeed, be a subversion of the law regulating criminal trials if this Court were to usurp the function of a trial Court in granting bond or dictating bond terms. The Applicants just like their co-accused are under Article 27 of the Constitution equal before the law and have the right to equal protection and equal benefit of the law. They will have opportunity to be heard on application for bond in the trial Court after taking plea just like their co-accused. Article 49(1)(h) of the Constitution guarantees the right to an arrested person to bond pending trial. My view remains that it is the trial Court and not this Court that should determine, based on the evidence produced before it and considering all circumstances, whether to grant bond to the Applicants or whether there are compelling reasons not to. Anticipatory bail as constitutionally provided for is available to the Applicants. It must be noted however that it just a temporary reprieve.

18. In the result and in view of the foregoing, I make the following orders:

i) The prayer that the Respondents be restrained from arresting, detaining, harassing, intimidating the Applicants in relation to any allegations concerning the acquisition and /or compensation in respect of part of Plot MN/VI/3801, Portreitz, Mombasa is hereby declined.

ii) The Applicants are hereby admitted to bail pending arrest on terms that:

a) Each of the Applicants shall execute a personal recognisance in the sum of Shs. 50,000/=.

b) The Applicants shall present themselves before the Anti-Corruption Court in Nairobi on Monday 13.5.19 not later than 12 noon to take plea in Nairobi Anti-Corruption Criminal Case No. 6 of 2019, Republic v. Mohammad Abdalla Swazuri & Others.

c) In default the 4th Respondent shall be at liberty to execute the warrants of arrest issued against the Applicants.

iii) There shall be no order as to costs.

It is so ordered.

DATED, SIGNED and DELIVERED in MOMBASA this 10th day of May 2019

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